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The Judgment of the International Court of Justice on the Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)

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Abstract

In recent decades, indiscriminate whaling in the oceans as well as marine pollution have caused harmful damage to the sea environment and the marine ecosystem of the oceans. Therefore, creating an international legal system and imposing legal restrictions on whaling have become necessary. Moreover, the approval of the International Convention for the Regulation of Whaling (ICRW) and the formation of an international commission to monitor whaling in international law were considered essential. In this article, using the analytical descriptive method, The Judgment of the International Court of Justice on Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening) has been studied.The findings of this researcher indicate that since Japan did not comply with the international regulations of whaling in the Antarctic, the government of Australia instituted a proceeding against the government of Japan in the International Court of Justice (ICJ) and New Zealand intervened. Considering the importance of the issue and the consequences of the ICJ's judgment on whaling and the legal implications and position of whaling in international environmental law. This article hypothesizes that the international whaling regulations and the environmental approach of states towards the concept of the common heritage of mankind and erga omnes resulting from it can

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become the basis for the development of international environmental rights and international judicial procedures. Moreover, this paper hypothesizes that these international rights and judicial procedures are influenced by the decisions issued by the ICJ.

Keywords: International Court of Justice, Whaling, the Antarctic, the Common Heritage of Mankind, the International Responsibility

1.Introduction

Whales are among the marine mammals of the marine ecosystems in the ocean. They are unofficially categorized as a sub-group of marine mammals. They are taken for the products obtained from them, and their survival is at risk as a result of indiscriminate whaling (worldwildlife.org, 2022, p. 1). Many species were whaled in the 19th and 20th centuries to a dangerous extent. Therefore, protecting whales and managing their sustainable hunt have been emphasized.

The first action taken to protect whales was the formulation and approval of regulations related to the limitation and organization of whaling, such as the ICRW, Geneva, July 24, 1931, the International Agreement for the Regulation of Whaling, London, June 8, 1937, and the protocols approved on June 24, 1938, and November 26, 1945, for the Proper Conservation of Whaling Stocks and the Orderly Development of the Whaling Industry (history.state.gov, 2022, p. 3). Commercial whaling was also prohibited after the approval of the ICRW in December 1946 in Washington, DC[1], as well as the restrictions imposed in 1986.

[1] The ICRW was signed on December 2, 1946, in Washington, DC, USA, and its protocols were also signed on November 19, 1956. Moreover, it has an annex that is an integral part of it. It is subject to regular revision by the International Whaling Commission (IWC). It is currently considered the international legal regime of whaling. The protection of whales requires the formulation of regulations and the imposition of restrictions on whaling to prevent the extinction of endangered species of whales. This requirement led to the formation and emergence of the ICRW, which was signed on December 2, 1946, in Washington DC, USA. Then some protocols were added to the ICRW. Since whales protect great natural resources and the nations of the world are trying to protect these resources for future generations, it is necessary to protect whales. Due to increasing and harmful whaling in the past, the

Despite the establishment of whaling regulations and rules and the resulting legal and international restrictions that led to the increase and recovery of some whale species, whales face many human threats (worldwildlife.org, 2022, p 3). Despite the increase in the number of some endangered species of whales, which is considered an international achievement of whale preservation, some whale species are still critically endangered. Humans, collisions with ships, ocean noise pollution, and habitat destruction are the main threats that the beluga whale encounters (iwc. int, 2022, p. 2). The International Union for Conservation of Nature (IUCN) has listed the blue whale, fin whale, and right whale of the North Pacific as critically endangered (iucn.org, 2022, p. 7).

Considering the increasing commercial and industrial whaling using modern marine and whaling technologies, as well as frequent warnings about the extinction of many rare species of whales, it is necessary to formulate regulations to protect whales and systematize the annual whaling. Moreover, the necessity to protect marine animals, including whales, for economic benefits and the fundamental role and importance of

common purposes of the contracting governments are: to establish expert, technical, and legal restrictions on whaling and to provide the conditions for the natural increase of their species, to achieve an optimal level of whale stocks as quickly as possible without imposing extensive economic pressure and the pressure of feeding the whales, to limit the exploitation of whales as endangered species, to provide grounds for breeding and increasing the number of whales in a certain period and to form an international regulation system for whaling to ensure proper and effective preservation and development of whale stocks. These goals have been achieved based on the principles of the International Agreement for the Regulation of Whaling, London, 1937, and its protocols which were approved in 1945. The protection of the natural and marine habitats of whales and the possibility of regular development of the whaling industry are also considered the basis and purpose of approving the ICRW. Therefore, the IWC, established in 1946, is one of the achievements of the ICRW and includes the contracting states of the ICRW. The purpose of the ICRW is to protect and support the whale population, to properly develop the whaling industry, and to ensure its sustainable exploitation as a global reference. The protocols of the ICRW were also signed in the same city on November 19, 1956. The program planned under Article 1 of the ICRW is considered an integral part of the ICRW and is regularly modified and updated by that Commission in the order mentioned (IWC.int, 2022, p. 1).

these animals in preserving the ocean ecosystem caused international regulations to be formulated and approved from the 20th century onwards to limit and organize whaling. The approval of international regulations related to whaling led to the proper and continuous protection of whale stocks, resulted in regular development of the whaling industry, and facilitated their sustainable exploitation. Despite legal and international restrictions, the government of Australia instituted a proceeding against the government of Japan, and New Zealand intervened. Then the ICJ delivered a judgment for this case. Furthermore, the International Whaling Commission (IWC) is currently emphasizing the harms and dangers that threaten the survival of whales and intends to take measures in this regard and approve some regulations.

The main questions of this article are: How do the international regulations of whaling, which are integral parts of international law, guarantee the survival of whales? What is the international responsibility of governments in case of violation of international regulations? What is the legal and international basis of Australia's Application against Japan in the ICJ? What is the role of international whaling regulations in the international judicial procedure of the mentioned application? How effective is the Court's decision in the development of the regulations of international law, the common heritage of mankind, and the international responsibility of the states? This article hypothesizes that the international whaling regulations and the environmental approach of states towards the concept of the common heritage of mankind and erga omnes resulting from it can become the basis for the development of international environmental rights and international judicial procedures. Moreover, this paper hypothesizes that these international rights and judicial procedures are influenced by the decisions issued by the ICJ. This article uses descriptive and analytical methods to investigate this case.

2. Australia v. Japan in the ICJ (whaling in the Antarctic):

Protecting endangered marine mammals, including whales, is of particular importance due to their economic benefits and their fundamental role in maintaining the ocean ecosystem. The ICRW plays the most important role in this regard. The ICRW was signed by some countries engaged in whaling in 1946 to preserve the generation of whales and ensure their sustainable exploitation. Although one of the purposes of the ICRW is a complete prohibition of commercial whaling, economic interests have caused contracting states to hunt whales in different ways, of which the "Japanese Whaling Research Program with a Special Permit in the Antarctic" known as "JARPA II" is a good example.[1]

Australia detected this plan as commercial whaling in disguise and instituted a proceeding against Japan in 2010 in the ICJ. The government of Australia claimed that Japan violated the ICRW and international obligations and other relevant wildlife conventions. New Zealand intervened, as well. The ICJ decided that JARPA II did not conform to the ICRW. The delivery of this judgment on March 31, 2014, made clear what scientific whaling means, and was a development in the international environmental law system, resulted in more serious protection of wildlife species, clarified the legal and international position of whaling, and showed that the ICJ emphasizes the ICRW (Khabazi, 2015, p. 2).

1.2. Australia's Application against Japan in the ICJ

After disputes arose between the government of Australia and the government of Japan regarding indiscriminate whaling in the Antarctic and the two states failed to negotiate the case, the government of Australia

[1] JARPA II started under paragraph 1 of Article VIII of the ICRW. See "the Plan for the Second Phase of the Japanese Whale Research Programme under Special Permit in the Antarctic (JARPA II)-Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources; STRICTLY CONFIDENTIAL UNTIL THE OPENING PLENARY OF IWC/57:JARPA II-Environmental Law Australiaenvlaw.com.au›wp-content ›uploads ›whale18"

instituted a proceeding against Japan in the ICJ on May 31, 2010. The government of Australia claimed that JARPA II, which was under progress under a Special Permit in the Antarctic, continued to violate the ICRW and other international obligations approved by the ICJ to protect marine mammals and the marine environment. The aforementioned Application was filed in the Registry of the ICJ under the title "Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)" (Australia v. Japan: New Zealand intervening, 2010).

The government of Australia instituted a proceeding against the government of Japan under Article 36[1] (paragraph 1, and paragraph 2), and Article 38[2] of the statute of the ICJ, and submitted its Application to the ICJ. In this Application, the government of Australia claimed that the government of Japan was violating its obligations and the ICRW, and was executing extensive commercial whaling in the second phase of its scientific whaling research program. The government of Australia also claimed that the government of Japan was breaching other international obligations on the protection of marine mammals and the marine environment (Australia v. Japan: New Zealand intervening, 2010).

The proceeding was in respect of "Japan's continued pursuit of a long-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II'), in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ('ICRW'), as well as its other international obligations for the preservation of marine mammals and the marine environment" (Australia v. Japan: New Zealand intervening, 2010).

The government of Australia believed that the government of Japan was violating its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and Biodiversity,

[1] See Article 36 of the statute of the ICJ: https://www.icj-cij.org/en/statute
[2] See the order of the institution of the Application in the ICJ: https://www.icj-cij.org/en/rules

and at the end of the Application, the government of Australia requested the ICJ to judge the case and to declare that Japan is breaching its international obligations through the implementation of JARPA II in the Antarctic, and to decide that Japan shall not continue the implementation of this program and shall revoke all permits, authorizations, or licenses for conduction of any activity that breaches the rights of endangered species of wild fauna and flora. Additionally, it shall be guaranteed that Japan will not conduct any other action of the kind or any other similar program that violates international law (Australia v. Japan: New Zealand intervening, 2010).

The government of Australia did not consider JARPA II a scientific program conforming to Article VIII of the ICRW. Moreover, the government of Australia claimed that the government of Japan not only breached Article VIII of the ICRW but also conducted some actions contrary to the purposes of scientific research. Since the government of Australia believed that the government of Japan was violating the fundamental obligations of the ICRW and did not comply with the procedural obligations under paragraph 30 by granting a Special Permit to JARPA II, the government of Australia instituted a proceeding in the ICJ, and arguments were presented orally and in writing in the ICJ (Australia v. Japan: New Zealand intervening, 2010).

The government of Australia and the government of Japan made declarations under paragraph 2 of Article 36 on March 22, 2002, and July 9, 2007, respectively to recognize the jurisdiction of the ICJ as compulsory. The jurisdiction of the ICJ was recognized as compulsory on March 31, 2014 (Australia v. Japan: New Zealand intervening, 2014). The Minister for Foreign Affairs of Australia appointed and introduced William Campbell as the judge of this proceeding under paragraph 2 of

Article 31 of the Statute of the ICJ[1] (Australia v. Japan: New Zealand intervening, 2014).

However, the government of Japan rejected the claims of the government of Australia in the ICJ, and initially argued that taking a specific species of whale is not part of the restrictions mentioned in Article VIII of the ICRW, and maintained that it is necessary to separately evaluate and interpret the provisions of paragraph 1 of Article VIII. Subsequently, the government of Japan insisted on the necessity to interpret Article VIII of the ICRW and to conform it with the other provisions of the ICRW and emphasized that careful study of paragraph 1 of Article VIII of the ICRW clarifies that such restrictions are not mentioned in the ICRW (Australia v. Japan: New Zealand intervening, 2014). As a result, the government of Japan rejected the claims of the government of Australia and maintained that JARPA II complies with Article VIII of the ICRW as it is a plan with scientific objectives, which is not subject to the restrictions of paragraph 1 of Article VIII of the ICRW, and no obligation has been violated (Australia v. Japan: New Zealand intervening, 2014).

Under paragraph 1 of article VIII of the ICRW (1946), contracting governments could grant any of their nationals a special permit if the killing, taking, and treating of whales are conducted for purposes of scientific research. The ICJ believed that even if a whaling plan is considered scientific, killing, taking, and treating of whales during such a plan does not conform with Article VIII of the ICRW unless these activities are considered scientific and are conducted for scientific purposes (Australia v. Japan: New Zealand intervening, 2014).

The ICJ examined and interpreted Article VIII of the ICRW and the purpose stated in its preamble, and concluded that whaling should be restricted so that these natural stocks will not be at risk, common interests are observed, governments have a favorable share of whales, and economic

[1] See paragraph 2 of Article 31 of the Statute of the ICJ: https://www.icj-cij.org/en/statute.

and nutritional failure will not occur. In addition, the ICJ stated that the purpose of the whaling restriction is to protect whale species. The ICJ also declared that proper preservation of whale stocks and orderly development of the whaling industry are among the purposes mentioned in the preamble of the ICRW, and these provisions must be interpreted and applied in the light of each other, and the obligations of the government of Japan shall be reviewed under customary international law (Australia v. Japan: New Zealand intervening, 2014).

Accordingly, the ICJ considered Article VIII of the ICRW an integral part of the whaling regulatory system established by the Convention, and it shall not be considered as an exemption and a cause for whaling, to weaken the purpose and object of the Convention. Therefore, under Article VIII, whaling is allowed only for purposes of scientific research, and a special permit shall only be granted by a government to its nationals when they only conduct whaling for "scientific purposes and scientific research" following the standards of the Convention. Moreover, it is to be ensured that the least number of whales considered necessary for scientific research shall be caught and killed under this permit. Furthermore, whaling shall be proportionate to scientific purposes, and the collective objectives outlined in the Convention shall be taken into account (Australia v. Japan: New Zealand intervening, 2014).

Thus, the ICJ maintains that contracting governments may allow their nationals to catch whales for scientific research if the number limit is taken into account. Furthermore, the contracting government shall make sure that the killing, taking, and treating of whales comply with the provisions of this article and is subject to exemption from restrictions. In addition, the ICJ stated in the interpretation of paragraph 1 of the mentioned article that JARPA II can be generally described as "scientific research". However, the evidence does not prove that this program and its implementation are

scientific and for scientific research. Accordingly, the ICJ concluded that the Special Permit granted by the government of Japan to kill, take, and treat whales during the said program did not conform to the purposes of paragraph 1 of Article VIII of the ICRW (1946) because the program was not scientific research (Australia v. Japan: New Zealand intervening, 2014).

Therefore, despite the defense delivered by the government of Japan, the ICJ decided that considering that the Commission prohibited commercial whaling in 1982 and amended the Schedule to the ICRW and annexed paragraph 10 (e) to it and approved that catch limits for commercial whaling shall be zero in each season during 1985-1986 and thereafter, and since the Commission prohibited commercial whaling whether through marine operations or through land stations in the Southern Ocean Sanctuary in 1994 under paragraph 7 (b) of the Schedule to the whaling program, the government of Japan violated its obligation to refrain from commercial whaling in the Southern Ocean Sanctuary under paragraph 10 (e) and (b) and paragraph 7 (b) and breached its obligation to observe international obligations in good faith under Article 26 of the Vienna Convention on the Law of Treaties (1969), and confirmed the claims of the government of Australia and the intervention of New Zealand, and condemned the government of Japan (Australia v. Japan: New Zealand intervening, 2014).

2.2. Intervention of New Zealand into Whaling in the Antarctic (Australia v. Japan)

Almost two years after the government of Australia instituted a proceeding against the government of Japan in the ICJ regarding whaling in the Antarctic, the government of New Zealand intervened under Article 63 of the Statute of the ICJ as a third party in this proceeding instituted in the ICJ by the government of Australia as a plaintiff stating that Japan's

conductions violated the provisions of the ICRW (Australia v. Japan: New Zealand intervening, 2012).

As a contracting government, New Zealand claimed to have direct interests in the interpretation of this Convention. Accordingly, New Zealand yearned for interpreting Article VIII of the Convention as a third party that is an active contracting government of the IWC. The ICJ made a declaration and decided that New Zealand has the right to intervene as a third party and intends to avail itself of this right and the interpretation provided by the ICJ shall be binding on New Zealand as well as the two other governments (icj-cij.org, presscom, 2012). Accordingly, New Zealand filed a statement of intervention in the case as a third party in the Registry of the ICJ on November 20, 2012. Under paragraph 2 of Article 63 of the Statute of the ICJ, New Zealand claimed that as a contracting government, it has a direct interest in this case to which the ICJ may refer and by which the ICJ may be affected when making its decision (Australia v. Japan: New Zealand intervening, 2012).

3.2. The decision of the ICJ on accepting the intervention of New Zealand in Whaling in the Antarctic (Australia v. Japan)

On November 22, 2012, New Zealand made a declaration under Article 63 of the Statute of the ICJ and requested to intervene in the case. Under Article 63 of the Statute of the ICJ, any contracting government in any convention that will be interpreted in the ICJ during a case is allowed to intervene in the proceedings, and the interpretation of the ICJ is binding on that government, as well. New Zealand claimed that it has a direct interest in the interpretation that the ICJ may deliver of the ICRW, and especially of Article VIII of the ICRW, as a contracting government in the ICRW (Australia v. Japan: New Zealand intervening, 2012). New Zealand

argued that because it had a long-standing engagement in the IWC and had views on the interpretation and implementation of the Convention, it was necessary to intervene in the proceedings to bring its interpretation of the provisions of the Convention to the ICJ. New Zealand stated that it does not intend to intervene in the case as a "party to the dispute" and confirmed that it intended to avail itself of its right of intervention under Article 63 of the Statute of the ICJ; therefore, the interpretation provided by the ICJ of the provisions of the Convention will be binding on this government, as well (Australia v. Japan: New Zealand intervening, 2012).

After New Zealand made a declaration, the ICJ declared that New Zealand has this right under Article 63 of the Statute. The ICJ also stated that this right does not qualify New Zealand to intervene in the case as a third party ipso facto, but the conditions stipulated in the said article must be met. Although the government of Japan did not object to the intervention declaration of New Zealand, it claimed that the presence of a judge who is the national of this government and a special judge from Australia is not compatible with the principle of equality of the parties contained in paragraph 1 of Article 31 of the Statute and paragraph 5 of Article 36 of the Court's procedure. Finally, the ICJ concluded on February 6, 2013, that the declaration New Zealand made to intervene in the case of Whaling in the Antarctic (Australia v. Japan) is acceptable under paragraph 2 of Article 63 of the Statute (Australia v. Japan: New Zealand intervening, 2013).

4.2. The decision delivered by the ICJ on Whaling in the Antarctic (Southern Ocean Sanctuary)

The ICJ delivered its judgment on March 31, 2014, four years after the government of Australia instituted a proceeding against the government of Japan regarding whaling in the Antarctic. The judgment of the ICJ stated that under paragraph 1 of Article VIII of the ICRW, which allows contracting governments to grant a special permit authorizing their

nationals to conduct whaling for scientific research (in Antarctica), whaling with a Special Permit granted by the government of Japan is scientific and for scientific research and sheds light on many issues of ecological nature and marine ecosystem.

The ICJ decided by twelve votes to 4 votes that the Special Permit granted by the government of Japan to JARPA II does not comply with the provisions of the ICRW and the approvals of the IWC. The ICJ concluded that although when a Special Permit is granted, whaling for scientific research will be exempt from restrictions, it should be conducted based on the provisions and general principles of the Convention and the authority that contracting governments of the IWC have in this regard should comply with an objective standard (paragraph 62 of the judgment). The ICJ also emphasized that under paragraph 1 of Article VIII of the Convention, JARPA II was not implemented for scientific research and the government of Japan violated paragraphs 7 (b), 10 (d), and (e) of the program and pointed out that the government of Japan was unwilling to cooperate with the IWC through using non-lethal scientific methods that have been available for many years. Therefore, the ICJ revoked any license and permit that the government of Japan had granted to JARPA II to kill, take, or treat whales for scientific research, and emphasized that under Article VIII of the Convention, the government of Japan is prohibited to issue any other license or permit (Australia v. Japan: New Zealand intervening, 2014).

3. Legal and international aspects of the decision of the ICJ:

The decision issued by the ICJ caused the government of Japan to withdraw from the ICRW. Japan continued commercial whaling of this endangered species after withdrawal from the ICRW. As a result, the

government of Japan received severe and widespread criticism from environmental protection activists and other governments (Environment, 2015). On November 18, 2015, the government of Japan stated its intention to take 333 minke whales in the Antarctic and provided a Secretary for its new scientific research program in the Antarctic to the Scientific Committee of the International Whaling Commission and its Secretariat (icrwhale.org, 2015).

The government of Japan terminated its whaling program in the Antarctic during 2014-2015 after the delivery of the judgment of the ICJ and resumed it in 2016. Since the government of Japan withdrew from the Convention, it failed to obtain a legal license for whaling from the Committee of the IWC (legal.un.org/avl, 2015), and this government changed the optional declaration of the compulsory jurisdiction of the ICJ, except for disputes related to living marine stocks, in October 2015, so that no other proceedings will be instituted against this government in the ICJ regarding Japanese whaling (Fitzmaurice, 2022).

1.3. Extensive interpretation of international obligations towards the Convention by the ICJ

Before delivery of the judgment, the ICJ tried to find the answer to this question: Did the Special Permit that was granted to JARPA II by the government of Japan conform to the purposes for the scientific research listed in paragraph 1 of Article VIII of the Convention? The ICJ did not believe that the said program complied with the provisions of paragraph 1 of the said article, and the government of Japan had violated its international obligations and its obligations towards the IWC by implementing JARPA II; especially the commitment to paragraph 10 (e) to reduce the commercial whaling to zero and the commitment to paragraph 7 (b) to refrain from the commercial whaling of humpback whales and fin whales in the Southern Ocean Sanctuary. Moreover, the ICJ found that JARPA II conducted extensive whaling, and since it did not take

into account the protection of whales and the existing risks that whale species and stocks face and did not manage to do whaling, it did not comply with Article VIII of the Convention (icj-org/public/files/case-related/148, 2022).

The ICJ concluded that the government of Japan violated its international obligations towards the CITES by whaling humpback whales. This government had also breached the Convention on Biological Diversity. Therefore, this government needed to commit that the activities conducted under its jurisdiction or surveillance do not cause damage to the environment of other countries or regions beyond its jurisdiction (.icj-cij.org/public/files/case-related/148, 2022). In addition, the ICJ decided that the government of Japan shall revoke the existing permits, including permits or licenses to kill, take, or treat whales, and shall refrain from granting other licenses to JARPA II under paragraph 1 of Article VIII of the Convention (icj-cij.org/public/files/case-related/148, 2022).

Nevertheless, the ICJ refrained from providing any definition regarding scientific whaling and delivering a specific criterion for it. Although the ICJ had delivered the aforementioned decision and extensive interpretation of Article VIII of the Convention, the fundamental disputes were not removed between the parties. Moreover, the ICJ refrained to address the general issues related to this proceeding. While the government of Japan justified its actions under the textual interpretation of the ICRW, which conforms to the Vienna Convention on the Law of Treaties (1969) and stated that contracting governments have the right to grant special permits for scientific whaling, the judgment delivered by the ICJ indicated that this action of the government of Japan was contrary to the mentioned provisions and it seemed that this judgment condemned the government of Japan, initially.

Although none of the restrictive interpretations of Article VIII will be justified under the preamble and other provisions of the ICRW, the judgment delivered by the ICJ was based on this interpretation and indicated that judicial heresy is placed in the interpretation of international treaty rights in international judicial procedure. Therefore, Japan seemingly agreed to comply with the court's decision, but theoretically, it distorted the main purpose stipulated in the decision of the ICJ by withdrawing from the Convention, and, like the government of Iceland, has reserved its future accession to the Convention (Rubaiyat Rahman, 2014, p. 6).

2.3. The structural and functional weakness of the IWC regarding the judgment of the ICJ

The judgment delivered by the ICJ concerning this case will not affect whaling for scientific research and the hunting of other whales in the future. Furthermore, the personal and opposing opinions of some judges of the ICJ, including Judge Owvad (Owvad, 2014, p. 6) and Judge Abraham (Abraham, 2014, p. 9) who stated that the ICJ does not have the expertise to judge this case, revealed other aspects of the judgment of the ICJ. However, the decision of the ICJ manifested weaknesses in the overviews conducted by the IWC and its scientific committee. Moreover, this judgment discloses that it is not guaranteed that international law and regulations are truly observed during scientific whaling which is conducted under a Special Permit granted by a contracting government. This judgment also reveals that the Commission has failed to effectively monitor whaling. Whaling by Japan for scientific research which forced the government of Australia to institute a proceeding and the government of New Zealand to intervene is proof of this weakness.

4.3. Common heritage of mankind and erga omnes in Whaling in the Antarctic (Southern Ocean Sanctuary)

The right to have a healthy environment is one of the rights stipulated in the third generation of human environment rights and in many advanced documents of international law and international environmental law, such as the United Nations Conference on the Human Environment (Stockholm, June 5-16, 1972) and Rio Declaration on Environment and Development (Rio de Janeiro, June 3-14, 1992). This right is recognized as a right beyond civil and social rights. The mentioned right is based on international solidarity as well as collective and global concepts and is beyond individual and social rights.

The third generation of human environment rights considers the strong true relationship between environmental destruction, human rights violations, and the manner of breaching human rights, and recognizes the right to enjoy a safe and healthy environment that is ecologically balanced as an independent human right (Ruppel, 2019). Accordingly, threatening and destructing environment are considered threats to human rights. In addition, the destruction of ecosystems, air and land pollution, and the destruction of natural stocks and resources will prevent the continuous and effective realization of human rights, and the approach of international environmental law, such as the United Nations Conference on the Environment and Development (Rio Declaration) also oversees this important matter (A. Downs, 2020). Therefore, the destruction of the planet as a common heritage of mankind is considered a violation of human rights, and the preservation of the planet is regarded as erga omnes that interests all governments or a group of them as a global and common interest.

In this regard, whaling in the Antarctic is an example of the current ecosystem approach and the concept of the common heritage of mankind. It is based on erga omnes and addresses the violation of specific

international obligations that protect the collective interests of a group of governments or the interests of the entire international community. Those governments that have not been harmed themselves can invoke responsibility, and the non-harmed government has the right to invoke responsibility as one of the contracting governments from a group of governments benefiting from that obligation or as a whole as a contracting government of the international community (Hadadi, Mehdi, 2019, p. 89). Fitzmaurice (Fitzmaurice, legal.un.org, 2015) emphasized that Article 48 of the Secretary plan of international responsibility of a government approved by the International Law Commission in 2001 regarding compensation and the common right of states and their interest in a proceeding revealed the international obligations of the states (International Law Commission, 2001).

4. Protecting the animal (whale) rights in international law

Protecting the rights of marine animals and creatures, including whales, is of particular importance due to their economic benefits and their fundamental role in maintaining the ocean ecosystem, as well as their being endangered. The ICRW (1946), is considered the most important international document in this regard, which was signed by some countries engaged in whaling in 1946 to preserve the generation of whales and ensure their sustainable exploitation. Subsequently, commercial whaling was prohibited in the Antarctic in general. Nevertheless, the contracting governments continued whaling due to economic interests, for instance, JARPA II (JARPA II, 2013) which led the government of Australia to institute a proceeding against the government of Japan in the ICJ (Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), 2010).

The ICJ delivered judgment on March 31, 2014, and decided that Japan's scientific research program in the Antarctic does not comply with the provisions of the Annex Schedule to the Convention. This judgment is important because it not only clarifies the standards for protecting animal

rights, including whales and marine creatures but also prohibits the interpretation of international conventions without jurisdiction (Pourmand, 2013). Australia's Application against Japan in the ICJ caused the ICJ and the International Tribunal for the Law of the Sea to develop a stable practice regarding international environmental law and the protection of animal rights and whale rights in international law (Zarei, Poorhashmi, & Pournouri, 2016).

Accordingly, the ICJ and other international judicial and arbitration authorities play an important role in the development of general international law, including international environmental law, through the delivery of judgments and international judicial procedures. These judgments and procedures as well as some cases of the ICJ contain new legal principles and rules that can greatly help the development of international environmental law. However, in addition to these legal capacities, some limitations and obstacles have hindered the development and positive changes. Judgments and decisions delivered by international courts indicate that the sovereignty of governments has always been an obstacle to the development of international environmental law. However, when these authorities did not take the traditional approach of the supremacy of governments into account in their judgments, this challenge turned into an opportunity for international environmental law.[1] Therefore, considering the importance of judicial decisions and procedures in the

[1] Environmental protection was raised for the first time in cases such as the "Trail Smelter Case" and was gradually developed and established in judgments and judicial procedures (Case Concerning Aerial Herbicide Spraying (Ecuador v. Colombia)). The most important result of the Trail Smelter arbitration and judgment should be summarized in the principle of "non-harmful use of land". For more information about this see: Vosoughi Fard, B. (2012). Case Concerning Aerial Herbicide Spraying (Ecuador v. Colombia), the 21st Century Trail Smelter? *International Law Review: An Academic Journal (Quarterly)*, *Center for International Legal Affairs of the Presidency*, Volume: 29, Issue: 47, 139-158: https://www.icj-cij.org/en/case/138

development of international environmental law, it is possible to see how these decisions and judgments influence the development of international environmental law and also to see the existing legal gaps and provide solutions to solve these shortcomings by examining the decisions, judgments, and commands of the ICJ (Zarei, Poorhashmi, & Pournouri, 2016).

5. The international responsibility of the government regarding the violation of international whaling obligations

The international responsibility of the government of Japan is to identify the illegal actions of government bodies that are considered violations of the international obligations of the ICRW and the provisions approved by its Commission based on the control criteria. Also, under international rules, this state is responsible for the aforementioned Convention, CITES, humpback whales, and Convention on Biological Diversity. Moreover, under draft articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)[1], a government should not violate the rights of international treaties, pacta sunt servanda, the right to enjoy the environment, the survival right of endangered species, and whales, as well as erga omnes.

Under Article 1 of the draft articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) every internationally wrongful act of the government causes the international responsibility of that government. This article oversees the principle of "personality of responsibility" in the system of international government responsibility (Zamani, & Mirzadeh, 2013). Accordingly, the violation of international law by a government will cause international responsibility for that government. The government of Japan violated its international obligations, which it was required to comply with according to the ICRW

[1] https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

and the aforementioned conventions. Also, this government violated the environmental right through whaling and committed a wrongful action contrary to the legal and international rules, and in this way, it violated its international obligation and harmed the common heritage of mankind and the environment. Therefore, New Zealand intervened in the case as an interested government, and the government of Japan was obliged to revoke the Special Permit granted to JARPA II and other licenses granted to this program and terminate any similar actions under its international responsibility and according to the judgment of the ICJ. The ICJ declared that the government of Japan violated its international obligations and the ICRW, and concluded that contrary to Japan's claim, JARPA II does not pursue scientific purposes and is not considered scientific research according to the Convention, and clarified that this government violated its international obligations (Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), 2014).

It is worth noting that in case of violation of certain international obligations that support the collective interests of a group of states or the interests of the entire international community (erga omnes), only those states that are not harmed themselves can invoke the responsibility. A government that has not been harmed by the violation of erga omnes is allowed to invoke responsibility based on articles 42, 43, 44, 45, and 48 of the international draft articles of international responsibility, and thus has the right to institute a proceeding in the ICJ (Mehdi, 2010). Under paragraph 1 of Article VIII, any government other than the harmed government has the right to invoke the international responsibility of another government under paragraph 2 of this article. Accordingly, the unharmed government legally benefits from complying with "erga omnes" and can invoke responsibility and ask for termination and guarantee of non-repetition of that act. This was the basis for New Zealand's subsequent

intervention into Australia's Application against Japan in the ICJ, and the ICJ accepted New Zealand's declaration of intervention as a "third party" under Article 63 of the Statute of the ICJ (Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), 2014).

Therefore, the judgment of the ICJ delivered in 2014 regarding the whaling in the Antarctic (Australia v. Japan: New Zealand intervening) in which the government of Australia and New Zealand supported a collective benefit (violation of erga omnes of the common heritage of mankind and international environmental rights) as the plaintiff and an intervening third party, respectively indicated that under Article 48 of the plan of international responsibility of governments, Japan violated its international responsibility. The government of Australia instituted a proceeding as an unharmed government to protect the collective interest of the international community (Ramazani Ghavamabadi, Mohammadi, & Hosseini, 2016).

Therefore, the government of Japan violated its international responsibility, its international obligations, the ICRW, the CITES, as well as its obligations towards humpback whales and the Convention on Biological Diversity because it failed to identify the illegal acts of a Japanese government body based on the control criteria, granted licenses contrary to paragraph 1 of Article VIII of the Convention, and did not continuously and effectively monitor the process of whaling in the Antarctic. Moreover, this government did not pursue the purposes it had claimed, and the companies and the ships belonging to that government acted against the approved rules and provisions of that Convention and the plans of the IWC. As a result, the government of Japan was condemned to violate the legal requirements contained in the aforementioned international conventions that defined the responsibility of that government under the rules of international law (that is, it was condemned to violate the obligations of international treaties, the principle of pacta sunt servanda, environmental destruction, the right to enjoy the environment, and the survival right of endangered species, and whales).

Moreover, under draft articles of international responsibility of the government (2001) and the ruling delivered by the ICJ, this government was ordered to revoke the legal authorizations that it had granted to JARPA II and similar programs.

Conclusion

Despite the approval of international rules for organizing and limiting whaling to properly maintain whale stocks and make the regular development of the whaling industry possible, the approval of the ICRW in 1946, the imposition of restrictions and "legal deadlines" for commercial whaling in 1986, and the relative recovery of some endangered species, whales are still being hunted due to the economic interests. Moreover, many dangers threaten their health and survival, including collisions with ships, noise pollution of seas and oceans, and other forms of habitat destruction. Also, some contracting governments as well as many other countries continue whaling. Australia's Application against Japan in the ICJ and the subsequent intervention of the government of New Zealand is clear and documented legal and international evidence in this regard.

The judgment delivered by the ICJ is important because it not only clarified the international regulations for the protection of whale rights and the preservation of international environmental rights but also prohibited the interpretation of the standards of the conventions without jurisdiction. Moreover, this judgment laid the foundation for the expansion of the principles of sustainable development in the procedure of the ICJ and international environmental rights. It also emphasized that one of the international responsibilities of governments is to respect environmental rights as an international right recognized in the third generation of human

rights. In addition, the judgment the ICJ delivered for this case (i.e., Australia v. Japan) influenced the development of international environmental law and emphasized the expansion of the principles of sustainable development in the judicial procedure of the ICJ when hearing violation of international environmental law and the protection of the rights of animals and whales.

Even though the judgment of the ICJ revealed the structural and legal inefficiency of the aforementioned Convention and the approvals of the Commission and the scientific and preservation, and scientific committees and manifested that there is no legal and international guarantee necessary for scientific whaling by the contracting governments, it also indicated that the ICJ has adopted an environmental approach regarding international environmental law and the concept of the common heritage of mankind and erga omnes resulting from it. Moreover, Article 48 of the draft articles identifies the international responsibility of governments, as well as the common right of the governments, their interests in instituting a proceeding, and their international responsibilities and obligations, and in the future, it will serve as a legal and international warning for the governments which violate their international obligations and international environmental and animal rights.

However, it is necessary to adopt an approach similar to the approach of the government of Australia, which is based on the "environment" and "the environmental right and the common heritage of mankind". It is also necessary to use the conventional capacities of international law, such as the legal and international requirements contained in the law of treaties, Chapter of the United Nations, UNEP approvals, and Article 48 of draft articles of the international responsibility of governments to maintain and develop international environmental law and expand the principles of global sustainable development for the preservation of the marine environment and species of whales. In addition, it is necessary to use the legal and international mechanisms of the institutions and bodies of the United Nations and other international and interstate organizations that are

responsible for the preservation of the environment and animal rights. Furthermore, international environmental rights should be expanded in the light of the international judgments and judicial procedures to achieve the purpose of creating a safe global sea and a free and calm ocean for whales and other beautiful and valuable species that live in the marine ecosystem of the oceans and pass it as a "common heritage of mankind and future" to future generations.

In this way, the survival of whales can be gradually guaranteed in light of international whaling laws and regulations and the achievements resulting from international judicial procedures. Furthermore, governments can contribute to the development of international environmental rights in the light of international judgments and judicial procedures and by refraining from breaching desired international regulations and adopting an environmental approach towards the concept of the common heritage of mankind and erga omnes resulting from it.

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