

Cessation of Whaling in Antarctic Waters



A Case for Regulation under the Antarctic Treaty?



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Abstract

The group's investigations were to determine if the Cessation of whaling in Antarctic waters is a case for regulation under the Antarctic treaty. It was found that the treaty is an apolitical document with no exclusive title or duress under national or international regulation. That is, an area owned by no one but managed by everyone. The Japanese Whaling Research Program states that sustainable use and management of all marine resources should be based on proper scientific findings however, Japan's research can be difficult to access and to translate. Japan states they need to kill whales to find out their age, diets and sex. But Australian and New Zealand scientists are using non-lethal methods to do similar research without having to kill the whales. Their methods include obtaining faeces and skin samples for diet and age respectively. The Australian branch of the Humane Society International took the Japanese whalers to court due to a breach in the Australia's Environmental Protection Act. Following four years of deliberation the Federal Court awarded the Australians victory and issued an injunction against Japanese whalers who were hunting in Australia's claimed area. This injunction however, has been largely ignored by Japan. The court case and its results placed strain on the tenuous relationships under the Antarctic Treaty System. Adding further strain is Greenpeace who consider themselves to be 'leading' the struggle against whaling. Greenpeace and other anti-whaling organisations believe that the Japanese Scientific whaling program was invented to disguise the fact that whales are being hunted for their meat. Prolonged deaths of whales are considered deeply unethical by anti-whaling nations. According to the Japanese culture, whaling is considered a vital part of national identity with historical importance dating back until at least the 12th Century. Furthermore there are factions between different environmental groups, with organisations such as Sea Shepherd believing more extreme action against whaling is necessary. Due to the issues of protests over sovereignty, it would prove more beneficial to keep the Antarctic Treaty System intact. The Treaty has protected Antarctica for the past 50 years, by managing national rivalry and territorial disputes. An environmental stance would be more appropriate to protect resources from excessive exploitation. International Whaling Commission Meetings goals are to maintain peaceful purposes in Antarctica, protecting the Antarctic environment, ensure scientific freedom for research and exchanges of information, and to finally create economic benefits for all. These goals could be achieved by reaching out to the youth of Japan to take an anti-whaling stance to potentially unite opposing beliefs of whale conservation and sovereignty.

Introduction

Once populated with hundreds of thousands of great whales, Antarctica waters have had their whale population almost entirely wiped out by excessive commercial hunting. Though commercial whaling is now illegal, lethal scientific whale hunting is still taking place in Antarctica. There have been significant efforts, particularly by the Australians and the New Zealanders, to put an end to any lethal whaling, including scientific whaling. Through court cases and launching their own non-lethal scientific program, the Australasians have fought back. Some, however, question whether they have any right to assert their own value system on another country. And the question remains of exactly *who* should be allowed control of the Southern Ocean. In the following essay, we will attempt to answer the 'Ultimate Question'- Who benefits from whaling? Who benefits from whale conservation?

SECTION I

The International Whaling Commission



Formation of the Whale Sanctuary in the South

In 1994, the International Whaling Commission (IWC) established a whale sanctuary in the Southern Ocean. This sanctuary covers much of the ocean south of the 40°S. It is designed to protect whales. According to the International Whaling Commission, the purpose of the Convention is to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry (ASOC, 2010). Thus it is pro-conservation, but not entirely anti-whaling.

The sanctuary is not the first of its type. Prior to the establishment of the current sanctuary in the southern oceans, the IWC had designated other areas as sanctuaries to protect whales from hunting which placed enormous pressure on their numbers and drove many species to near extinction (ASOC, 2010).

Commercial whaling is banned within the sanctuary. However, the Whale Sanctuary allows an exemption for whaling for the purposes of scientific research. Iceland and Japan in particular have done a great deal of scientific whaling. The science involved is somewhat questionable, as whale meat obtained is usually sold for human consumption.

Scientific whaling has often targeted minke whales, which are relatively abundant. With other whale populations, such as fin and blue whales, depleted minkes became more attractive to whalers (ASOC, 2010). Countries such as Iceland and Japan that seek scientific exemptions have used minke whales' relatively large population size to argue that there is no reason to prohibit small-scale, sustainable harvesting. Nevertheless, there are many non-lethal methods widely employed by researchers to study cetaceans. Many whale conservationists therefore believe that the "scientific" exemption is being used to provide official cover for the resumption of commercial whaling (ASOC, 2010).

However, the Antarctic Treaty states that “Antarctica shall be used for peaceful purposes only”, and more specifically Article 4 says that “treaty states shall meet periodically to exchange information and take measures to further the treaty objectives, including the preservation and conservation of living resources. These consultative meetings shall be open to contracting parties that conduct substantial scientific research in the area. All land and ice shelves below 60° South latitude are included, but high seas are covered under international law.” The mention of the high seas being covered by international law is deeply problematic for those countries who would try to claim them as their sovereign territory. Many treaty claimants believe the Antarctic seas are part of their territory and this is the basis for Australia trying to impose its laws

There are some serious issues with using the Antarctic Treaty as a tool to stop whaling in the Southern Ocean. The Antarctic Treaty is a consensus based system. Japan is a member country which defends whaling as a critical part of its heritage, and finds calls from other nations to stop whaling disrespectful to Japanese culture. Every member has to agree when proposals are passed through, and the Japanese are usually known to veto proposals attempting to ban whaling.

ASOC have recommended that ICW consider additional steps that will help protect the Sanctuary’s integrity. For instance, they suggest that non-lethal and long-term programmes of research should be applied to study and monitor the changes in the Southern Ocean ecosystem and to track the expected recovery of whale populations. ASOC also suggests that the International Whaling Commission should urge its members not to issue further Special Permits for the taking of whales under the scientific exemption.

The Antarctic Treaty and the History of the Living Resources Convention

In the Convention on Antarctic Living Resources and the Antarctic Treaty Environmental Protocol, additional provisions were included that preserved the rights of parties to both the Seals Convention and the International Whaling Commission (Templeton, 2002).

There was a comprehensive renegotiation of the Law of the Sea from 1972-1982, as a conflict of interests had to be reconciled. There were well-known repercussions for Antarctica. However, the Antarctic issue was viewed as an additional complication within other negotiations, and by inferred consent these issues were ignored and not acknowledged at the Law of the Sea Conference. (Templeton, 2002). Australia’s attitude in mid 1977 was that the mineral regime proposed was not appropriate during the short term. Priority needed to be given to a regime for living ocean resources. Australia’s perspective on the sea’s resources was a total contrast to NZ who were worried about the price of oil and petrol shortages (Templeton, 2002).

CCAMLR distinguished that the prime responsibility of the Consultative Parties for the preservation of the Antarctic environment was their obligations under Article 9 of the Antarctic Treaty. This article was about the conservation of living resources in Antarctica (Templeton, 2002).

The Convention specifically designated an area for living resources that extends beyond the northern boundary of the Antarctic Treaty area (60° South) to an approximation of the Antarctic Convergence (Templeton, 2002). The convention is intended to “protect the entire marine ecosystem in Antarctic waters to conserve the stocks species and the effect of harvesting for human use” (Templeton, 2002).

The area the Convention covered could arguably be classed as part of the high seas. Not for the first or the last time, those wishing to conserve whales were forced to confront

international politics and the ever-present issue of Antarctic sovereignty. It may have been ICW's intention to create a sanctuary, but the debate about who has the right to control Antarctic waters is still unresolved.

Stokke (1993) assessed the effectiveness of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and noted that 85% of the population of demersal fish is endemic to the Southern Ocean. This ecosystem is the largest in the world. The Southern Ocean is considered quite susceptible to resource exploitation. Whale harvesting cannot take place sustainably there unless a huge degree of supervision is put in place.

Stokke (1993) emphasises that the conservation and preservation of Antarctic living resources is the only item which is not evidently understood within the distinct objectives and principles of the treaty. CCAMLR was established in 1980 to congregate over the principle of conservation and put forth that resource management should be guided by ecosystem concerns.

Negotiations over living resources may have harboured hidden agendas that is not expressed in agreements themselves, but are nevertheless well known among observers of that given policy arena (Stokke, 1993). Stokke (1993) establishes that if rules are not clear, or based on poor understanding of the issue, trying to accommodate to them can result in devastating outcomes. Such distortion, misunderstanding and subversion of treaties is why science and facts are desperately needed for submitting proposals and making agreements with Consultative Parties.

The International Whaling Commission's Outlook into the Future of Whaling

Chair's Report of the Intercessional Meeting of the Commission on the Future of IWC (2009) has highlighted the following changes. SWG Chair reported that it has proven complicated to identify a single way forward regarding the issue of Japanese small-type coastal whaling. It will not be possible to reach agreement on coastal whaling without agreement on research whaling under special permit. This is evident by the attitude Japan has towards whaling as they regard it of cultural significance. The chair also stated that "long-term solutions relating to the governance and future functioning of the IWC are to be developed to be put in place at the end of the interim period, when the second stage begins."

Other consultative parties, such as Australia, welcomed the constructive spirit of discussions on IWC's future and hoped for progress. However, many consider that such measures do nothing to resolve the fundamental difference in views about the legitimacy of such activities under the banner of Article VIII of the Convention. For Australia to join any package, it stressed that such a package would need to contain hard commitments for unilateral special permit whaling programmes to be brought to an end.

Brazil indicated ways must be found to phase-out pelagic whaling in international waters, or at the very least in the Southern Ocean. The continuation of large-scale whaling by countries far detached from its region sends the wrong message of whale resources' sustainably, Brazil claimed. It therefore looked forward to working with Japan and others to find a way to end whaling in the Southern Hemisphere and to bring all other remaining whaling under the control of IWC. Brazil's attitude indicates that generally there is a brighter future in regards to consultative parties working with Japan. However, whether these initiatives proposed in the meeting are going to be met is all very dependent on Japan's attitude.

New Zealand indicated that these meetings have a better tone than those of previous years. They also emphasised that issues around whaling, sovereignty and cultural pride are difficult

and that they may require years of negotiation to resolve. These suggestions would require removal of Article VIII from the Convention.

Interestingly, the media is essentially shut out of these negotiations and talks. Documents from ATCMs are not available to the public until after each meeting, and documents from CCAMLR are never made public. That makes it very difficult for the media and the public to understand the complex issues around the Antarctic Treaty and the Whale Sanctuary. Even ASOC, an accredited NGO, cannot access the CCAMLR document archive for past meetings (maintained by the Secretariat). The public is not getting access to crucial scientific research, in particular Japan's alleged scientific work on whales.

The question remains: Who benefits from the Whale Sanctuary? The obvious answer is the whales themselves. But the treaties and debates over sovereignty The International Whaling Commission's treaties cause have caused so much disturbance politically and so much strain to international relations, that their benefit may well be outweighed by the damage done.

SECTION II

The So-Called Whale Wars



Sea Shepherd

Since 1946, commercial whaling has been illegal throughout the world. However, whaling still continues in several countries, such as Japan and Norway, as 'Scientific research'. Environmentalists seeking to protect this vulnerable species are upset that whaling is allowed to continue in any form. The hunting of whales is condemned by many countries and organisations in the modern world.

Greenpeace describes itself as 'leading' the struggle against whaling (Greenpeace). Most anti-whaling protesters use peaceful, non-violent methods, such as petitions, writing to ambassadors and producing art and cartoons to influence the public. Greenpeace has also taken the step of peacefully boarding whaling vessels to confront whalers.

However, there is one particular group which takes its opposition to whaling much further. This group deals with 'direct action', not simply influencing public opinion. Furthermore, this group openly uses violence in its campaign to protect the great whales. This organisation is of course Sea Shepherd.

Sea Shepherd is a non-profit organisation, which was started in 1977. Sea Shepherd was founded by the radical environmentalist and former Greenpeace member Paul Watson. He showed contempt for the organisation that he had formerly belonged to, dismissing Greenpeace as "Avon Ladies" and remarking that their methods of protest have so far not saved "a single whale (Heller, p42)". Watson's own organisation has no room for compromise. He has told interviewers he seeks out crew members who are prepared to "die for a whale (in interview with *The Listener*)".

To Die For a Whale

Members of Sea Shepherd usually cite the whale's intelligence and beauty as why they are prepared to risk their lives for a single member the species. Biologist Roger Payne compared killing a whale for its meat to using Shakespeare's plays to light a fire (Heller, 179). Paul Watson claimed in an interview that he believes that whales are more intelligent than people, and jokingly hinted that he also believes cockroaches to be more intelligent (Sea Shepherd's website).

Such a startlingly misanthropic comment is perhaps revealing. The contempt for the human race common to extreme secular-environmentalists, for whom semi-nature worship has become a substitute for religious belief, is not to be underestimated. In his book about the Sea Shepherd, Peter Heller recalls speaking to members of the organisation, and states they believed having children was a "sin" and "blasphemous (Heller, p79)" because of the damage humans were doing to the environment. Many are vegetarians or vegans and had total contempt for those who ate meat.

One member of Sea Shepherd, when asked if she would exterminate every member of the human race to protect the natural world, replied "without hesitation (Heller, p79)" that she would. Paul Watson himself was deliberately vague when asked the same question, but replied that a dolphin would probably press the button (Heller, p69). In further extreme behaviour in defence of sea life, a UK artist allowed herself to be suspended from hooks to protest shark fishing and donated the funds to Sea Shepherd (BBC).

Despite their extremist views, Sea Shepherd has received support from people as diverse as Mick Jagger and the Dalai Lama.

Terrorists?

None of Sea Shepherd's members has so far died for a whale, and no whalers have been killed by their actions. However, Paul Watson claims that he was shot by Japanese whalers in 2003 and only a bullet-proof vest saved his life. This claim is somewhat dubious, but suggests that the 'Whale Wars' may well escalate into true violence. Sea Shepherd uses a modified pirate flag as its logo and has rammed several whaling vessels with a modified blade attached to the ship, called the 'can-opener'. Laser pointers and acid have also been used in what is called "non-lethal warfare (Wired)". Sea Shepherd stated they would not hesitate to injure Japanese sailors if they attempted to board a vessel. "Anything short of killing them, that's alright" remarked a Sea Shepherd member, who also used the racial epithet "Japs (Heller, p186)".

Sea Shepherd has been condemned by both the Japanese and Canadian government as eco-terrorists. Two members of the organisation were arrested in Canada for their anti-sealing activities (CTV). The FBI has also investigated their activities against "commercial fishing (FBI website)". Keiichi Nakajima, the President of the Japanese Whaling Organisation, accused Sea Shepherd of being "dangerous vegans (National Geographic)". Even Greenpeace has condemned the group as being terrorist-like in their actions, and complained that Sea Shepherd could actually damage anti-whaling efforts by angering the Japanese (Greenpeace).

In an essay on his website called 'The League of Extraordinarily Gentle Terrorists', Paul Watson dealt with the claims of eco-terrorism. Watson stated that if the Dalai Lama and Barack Obama have been accused of being terrorists, the accusation is in some way a badge of pride, and that he is "upholding truth, justice, and the humanitarian way (Paul Watson via Sea Shepherd website)."

In answer to the ultimate question of "who benefits" Sea Shepherd looks beyond the human race and its desires and believes that the planet as a whole would benefit from the cessation of whaling. Its members are uninterested in debates about Sovereignty over the oceans, viewing sovereignty as a human construct and unimportant compared to the lives of whales. Such views, combined with the genocide-supporting beliefs of several members of Sea Shepherd, are unlikely to become widespread or influence government policy. Government policy is usually influenced with the needs, squabbles and interests of humans rather than animals.

'Scientific' Whaling

Japan's claim to be whaling for scientific purposes is popularly dismissed as a flagrant lie put forth to disguise the fact whales are being hunted for their meat. Greenpeace states that the Japanese Scientific whaling program is simply a sham that was "invented (Greenpeace)". Chris Carter, New Zealand's Minister for Conservation, said that Japanese Whaling is "not about science (Heller, p291)". In fact, Japan has released several papers detailing the findings of their scientific whaling, which have largely been ignored by the media. They detail the methods and necessity of scientific whaling, including the analysis of the contents of whales' stomachs.

Such lethal scientific research is still performed on animals such as apes, mice and dogs, and has produced medical breakthroughs for diseases like diabetes, cancer and cystic fibrosis. In fact, the benefits of lethal research on animals throughout history have been huge. The fact that the by-products of Japanese scientific research on whales are usually eaten can in fact be seen as a form of waste-prevention or even recycling.

The incredible cruelty of modern methods of killing whales is often mentioned when criticising the Japanese whaling program. Exploding harpoons, electrocution and drowning are often used. Whales can take nearly an hour to die. In *Whale Warriors*, the slaughter of a pregnant female humpback whale is described in stomach-churning detail. The whale is harpooned twice, electrocuted and eventually her breathing hole is forced underwater. "She drowns after fifteen more minutes in a sea of her own blood," the author notes. "I want to vomit (Heller, p272)". Scientific research involving animals is usually meant to involve as little cruelty as possible. Such prolonged deaths are considered deeply unethical and contribute towards the perception that whaling is slaughter and has nothing to do with science.

Several Australasian researchers are taking a more constructive route to help prevent whaling. A huge non-lethal whaling program has been launched in Antarctic waters, with the combined efforts of Australian and New Zealand researchers. This program is called the Southern Ocean Research Partnership (environment.govt.au). It is governmentally supported and aims to prove that lethal whaling is entirely unnecessary. Whether the efforts of the partnership will have any effect on Japanese whalers remains to be seen.

Japanese Culture

However, the Southern Ocean Research Partnership has taken the important step in noting that it is important to persuade Japanese Whalers to stop without causing them to lose face. In Japanese culture, the concept of honour has historically had huge importance. Being seen to cave in to another country's sovereignty would be seen as humiliating to the Japanese Government, as would accepting that other cultures "know better" about whaling. A campaign that encourages the Japanese to stop whaling for purely scientific reasons, while not accepting the superiority of another culture, is perhaps more likely to work than Sea Shepherd's use of violence.

The Japanese have been whaling since at least the 12th Century. However, the mass eating of whale flesh only truly became a part of Japanese culture in the 20th Century. Ironically, the American government after World War Two encouraged the Japanese to eat whale meat after mass food shortages. The starving people adapted quickly to this new food source, and the American President MacArthur benefited with "millions of dollars worth of oil. (The Age)" Therefore whaling is intrinsically tied in the Japanese imagination with Japan's humiliating loss in World War Two. This is particularly true of the generation that lived through the war.

Sea Shepherd refuses to accept that Japanese culture has anything to do with their continuing whaling. In his book about Sea Shepherd, Peter Heller points out that only "isolated coastal communities (Heller, p111)" have traditionally hunted whales. This misses the point somewhat, as the important fact is that Japan does not want to accept another culture's dominance. Greenpeace has recruited Japanese activists to hand out chocolate whales emblazoned with "I love Japan, but whaling breaks my heart (Common Dreams)". This campaign was actively aimed at Japanese youth, who will eventually decide policy in the future.

Ultimately, convincing the youth of Japan to turn culturally against whaling may be the factor that unites the apparently opposing beliefs of whale conservation and sovereignty, and provides a solution that 'benefits' all relevant parties. .

SECTION III

Scientific Whaling



Whale Populations

It's difficult to determine the population of whales pre-exploitation. Both the current and historical estimates should be considered poor, because the methodology and data used in the study are known to be flawed. (IWC). However the best estimates are as follows:

Minke Whales

The IWC estimate of minke whales in the Southern Ocean is now at 665,074 (Okamura and Kitakado). The minke whale is not classified as endangered but it is considered data deficient by the IUCN Red List. (IUCN)

Blue Whales

During the whale hunting era approximately 330,000 whales were killed in the Antarctic alone. A survey in 1998 suggested there are now 2280 blue whales left in the Antarctic. This is less than 1% of the original population. (Branch, T. 2007)

Fin Whales

The IWC estimates that the Southern Hemisphere pre-whaling population of fin whales was 400,000, and that after the cessation of Antarctic large-scale whaling the population in 1979 was 85,200.

Other estimates cite late 1980's/1990's population levels of no more than 5,000 whales and possibly as low as 2,000 to 3,000. (National Marine Fisheries Service, 2006). There is no agreed upon estimate within the scientific community.

Humpback Whales

Due to over-hunting, its population fell by an estimated 90% before a whaling moratorium was introduced in 1966. Stocks have since partially recovered; however, entanglement in fishing gear, collisions with ships, and noise pollution also remain concerns. There are approximately 42,000 in the Southern Hemisphere. (IWC)

JARPA - Japanese Whale Research Program

The Japanese Whaling Research Program states that sustainable use and management of all marine resources should be based on proper scientific findings. However the results of Japan's scientific whaling research are difficult to locate, possibly due to the language barrier. They don't get much publicity from western media and anti whaling groups.

However, the research is there. JARPA, the Japanese Whaling Research Program, has published 48 papers over the period from 2000-2008. Of this, 27 were focused on reproductive science and genetics; there were 12 papers on population dynamics and biology of whales, and even two papers on methodology of killing whales. These are being published in both Japanese journals (Japanese Journal of Zoological Wildlife Medicine; Fisheries Science) and American journals (Polar Biology; Marine Mammal Science; Zygote).

Japan has scientific permits to take 850 (+/- 10%) minke whales and 10 fin whales, with the plan of including humpback whales in the near future. (ASOC)

From an unbiased scientific perspective, Japan is getting data that is useful for understanding whale populations, fish stocks and the role of whales in the ecosystem. Japan has recovered good information estimating that whales consume 3-5 times as much fish as humans take out of the oceans. If fish stocks are to be managed correctly it is important to understand the role whales play in them.

But Japan states they need to kill the whales to find out their age, diets and sex.

Japan's data is very accurate because it is easy to examine a dead animal. For example, it is easy to find out what a dead whale has been eating by cutting it open and looking in its stomach. And it is easy to measure the inner ear bone to find out the whales age by cutting open the skull- when the whale is dead.

But in a new initiative, Australia and New Zealand scientists are using non-lethal methods to do the same research without having to kill the whales. Albeit the research may not be accurate, but the results are a good estimate and it has the added benefit of allowing the whale to live. The non lethal methods include collecting faeces samples to determine diet, and collecting a skin sample, which can be used for DNA analysis to determine sex and give an estimate of age.

It's definitely possible to do a lot of this research without killing whales. If legislation can't be changed, maybe national programs like these will help show the world that non lethal research is a more humane option. The benefits of non-lethal whale

research are clear- allowing 'Whale Science' to continue while pleasing conservationists. (JARPA website)

Humane Society International

Killing whales with explosive harpoons is not always an immediate and pain-free death. It can sometimes take hours for the whale to die. (The Exploding Whale website)

The Australian branch of the Humane Society International took advantage of a loophole in Australia's Environmental Protection Act (1999) and took the Japanese whalers to court (Humane Society International).

This case was complicated, especially regarding sovereignty of the area where the whaling occurred. In this case Japan had taken approximately 400 whales from waters around Antarctica. This particular area of Antarctica has been claimed by Australia, but the claim has been put on hold under the Antarctic Treaty System. Only New Zealand, the United Kingdom, Norway and France recognise Australia's claim, and it is debatable whether Australia can apply its domestic law to this area. Nevertheless, Australia pushed forward with the court case and after four years of debating the Federal Court awarded them victory and issued an injunction against Japanese whalers hunting in Australia's claimed area.

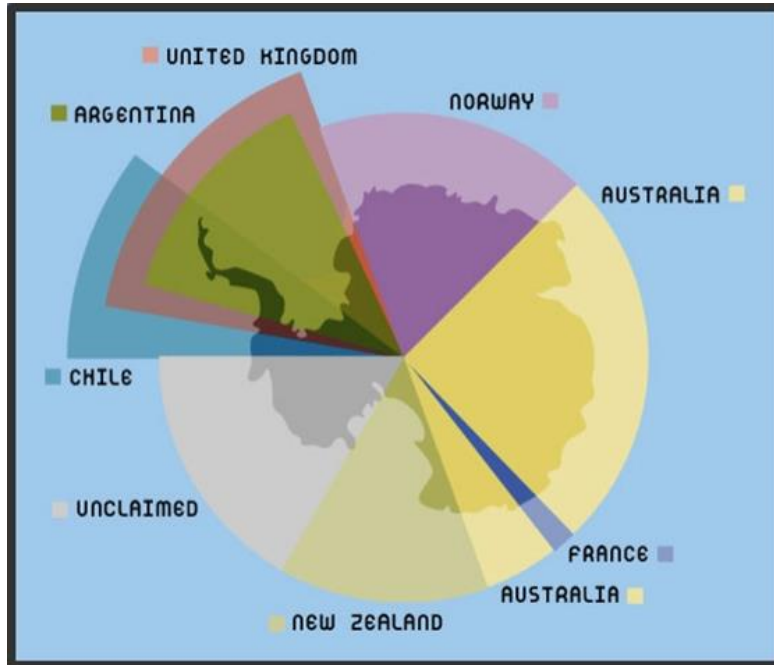
But, as anticipated, Japan has ignored the injunction and has continued whaling in the Australian whale sanctuary in contempt of the federal court.

This decision is historic- it is the first time the Japanese whalers have been taken to court in any country. Although the Australian Government initially said they would enforce the injunction, due to political pressures they have since back-tracked on this promise. Instead of sending a Government vessel to stop whalers they sent the Oceanic Viking, a mere patrol vessel, to the Australian whale sanctuary area in Antarctica to 'monitor' the hunt and gather evidence for a separate international court case.

So while the Australian people clearly want to save the whales, this case has put Australian lawmakers into the spotlight for enforcing their claim to an area which most of the world doesn't recognise as theirs, and straining the tenuous relationships under the Antarctic Treaty System. Who benefited from the court case? It would appear that no-one did.

SECTION IV

Sovereignty in Antarctica



Antarctica is a very special continent. Of the seven continents it is the only one that has very little human intervention or habitation on a permanent. Antarctica is a major influence on the world's weather patterns in terms of ocean temperature and movement around the globe. Stratospheric ozone readings effect radiation levels on earth. It offers a rare opportunity for scientists from around the world to work in a pristine environment to study both the history and the future of our earth. It is understandable therefore that scientific studies conducted on, above, underneath and around the continent consume a considerable amount of human time and energy spent in the Antarctic.

The Antarctic Treaty specifically refers to science in Article II (freedom of scientific investigation in Antarctica and cooperation towards that end....) and Article III (In order to promote international cooperation in scientific investigation in Antarctica.....).

Discovery of this fabled 'missing' southern continent began in the 1800's with claims and counter claims of different islands and pieces of the continent being reported from various nations. Whalers and sealers were the next inhabitants of the Southern Oceans and sub- Antarctic islands. Exploration of the continent proper was the next phase and various sovereign states sent their nationals to build huts, discover routes, collect specimens and conduct scientific experiments and to winter over in some instances. By 1907 seven nations had claimed territory within the 'Antarctica Pie'- claims that remain to this day, though unrecognised by other nations and they are effectively 'shelved' under Antarctic Treaty terms. Article IV of the Antarctic

Treaty (1959), states specifically that Contracting Party Member States 'shall renounce previously asserted rights of or claims to territorial sovereignty in Antarctica'.

Legitimacy of Antarctic Claims

Before the eighteenth century, discovery of a new land meant the acquisition of title to that new territory. For example Tasman discovered New Zealand, but Captain James Cook landed on New Zealand and claimed possession for the British Crown by planting the British flag.

International Law requires for discovery to convey title more than physical possession must be taken of the territory. That is, continual and obvious habitation is required in order to demonstrate lawful ownership of the territory. Furthermore some form of authoritative control over the territory and the inhabitants should be clearly demonstrated.

"Actual control over a territory remained necessary for sovereign ownership," (Joyner, 1998).

Due to isolation and climate, continuous, effective occupation in Antarctica is difficult to achieve and fulfilling these international law requirements on possession and occupation is arguable at best.

Territorial claims are also based on discovery documentation. Great Britain had the claims and the documentation from nationals who explored Antarctica. Captain James Cook and Sir James Clark Ross both claimed parts of Antarctica for the British Crown and documented the discoveries. At the beginning of 1907, the British Government, using these documents, became the first Government to declare national sovereignty in the Antarctic under 'Discovery Rights' and claimed them in a King's Letters Patent in 1908.

In 1923, an Order -in-Council from the Government of Great Britain formally claimed a sector encompassing the Ross Dependency and placed it under the administration of New Zealand, (triangular sector 150 degrees West, 160 degrees East, out to 160 degrees South with an apex at the South Pole). New Zealand gained a territorial sovereignty claim in Antarctica and as an independent state today, retains the claim to this area (in domestic legislation, whilst reserving the right to this claim when the present Treaty becomes invalid).

Global Commons

Global Commons have been described as those areas that are for the benefit of all people and are not part of a National Territory of any state. They are regarded as apolitical with no exclusive title or duress under national or international regulation that is, an area of land / sea that is owned by no one but managed by everyone.

- Global Commons are areas that are physically and legally beyond the limits of National jurisdiction
- There are no recognised or valid sovereignty claims to the area

- Regulation is by a group of concerned States rather than by one Government
- Universal access is assured due to the absence of individual ownership or sovereignty by a nation
- Degradation and over exploitation would incur costs but management protection and conservation would incur benefits for all.
- The risk to the common areas increases when individual nations conduct intensive activities.

In order to protect the resources and environment from excessive exploitation and development from a few, a decision- making body with the authority to administer the resource is needed.

Antarctica is an example of a Global Commons and in fact is called the Frozen Commons. Other examples are the Arctic, the atmosphere above the Earth and Outer Space. (A further example of an Information Commons is the Internet!).

International Law Considerations:

Modern International Law, pertaining to status and ownership of International Spaces involves four principle approaches.

- Res nullius – the property of no one, the land has no owner. While claims of national sovereignty to portions of Antarctica have been made no legal creditability has been admitted thus far to those claims.
- Res communis – implies that property may be available for use by everyone as they elude sovereign possession or national enclosure, for example the oceans and the atmosphere. However, states with available technology and resources can exploit the res communis commons area, for example Japanese whaling in the Antarctic, thereby limiting the availability of use and resources by everyone.
- The Common Heritage of Mankind (CHM) – this shifts focus from the State or Sovereign to human kind as a whole, as all people become the legal entity to manage and benefit from activities in the commons area, for example in 1982 the United Nations Law of the Sea Convention (UNCLOS) passes an International Sea Bed Authority proclaiming that the seabed is for the benefit of all mankind.
- Res publica – Public heritage of human kind. A commons area essentially becomes a public trust regulated by an International Institution. These areas are policed and maintained by the state. For example, internal rivers, waterways and lakes etc. Essentially the commons areas become a public trust.

The Antarctic region is part of the global commons with some shared characteristics from each of the above four principle approaches under international law. However, it does not fit squarely into any one category; such are the disputes among sovereign states with regard to territory and among international lawyers with regard to interpreting the law. Antarctica then remains unique as a 'common space area', (Joyner 1998).

Antarctic Treaty

Article IV of the Antarctic Treaty 1959, states:

- Sovereignty claims set aside
- Prevents sovereignty claims from being prejudiced, diminished, enlarged, reinforced or perfected or bolstered by States' activities

Therefore states' claims to sovereign titles remain shelved whilst the Treaty is current. However, only the states who have signed the treaty are bound by these provisions meaning that the Treaty does not generate international legal obligations for other states whose nationals may visit Antarctica.

Since the Treaty was written in 1959 there have been many political, environmental, economic and legal changes throughout the world that have led to a range of Supplementary Agreements. As a result the Antarctic Treaty is now referred to as the Antarctic Treaty System (ATS). This system provides a structure that enables the signatories to be managed and administered in their activities on the Antarctic Continent by collaborative agreements amongst Party signatories. The Treaty allows for expansion and additions by including supplemental agreements over the last fifty years. This action further implies an absence of valid territorial sovereignty over the continent by individual states. However, each national in Antarctica is bound by the laws and protocols from his / her own signatory nation.

All decisions made at Antarctic Treaty Consultative Party annual meetings are done by consensus. Members are all working for the common good to meet the following the principles:

- Maintain peaceful purposes in Antarctica only
- Protecting the Antarctic environment
- Ensuring scientific freedom for research and exchanges of information
- Creating economic benefits and participation for all

Under the Treaty provisions, "the Antarctic can be viewed legally as lying beyond the limits of recognised national jurisdiction, absent any lawfully recognised national sovereignty claims", (Joyner 1998).

(New Zealand has three pieces of legislation that specifically refer to Antarctica and the Ross Dependency. 1923 saw two sets of regulations asserting control over whaling activities within three miles from the Ross Dependency and bases established on land – giving the Government the right to collect taxes from the whalers. In 1977 a claim for a territorial sea and EEZ application in the Ross Dependency was passed, but never formally commenced, although New Zealand has reserved the right to do so should the Treaty collapse at any time. Finally, in 2006 New Zealand did not submit to the Commission on the Limits of the Continental Shelf, coordinates for the continental shelf in the Ross Dependency, instead reserved the right to do so in the future).

Continental Shelf

The 1954 Geneva Conference on the Law of the Sea based the legal concept of the Continental Shelf on the geographic phenomenon of identity of the off-shore areas with the non-submerged continuous landmass. Subsequently this was confirmed by the United Nations Convention on the Law of the Sea (UNCLOS), 1982. This legal concept of the Continental shelf is also valid to areas 60 degrees South Latitude, however, the existence of an Antarctic Continental Shelf does not tell us whose exclusive jurisdiction this area is subject to.

Under the Antarctic Treaty conditions, no State has domain over any Antarctic land that would give them the rights to have domain over part of the adjoining continental shelf and subsequent 200 miles Exclusive Economic Zone (EEZ). Therefore no State can claim the rights that would normally be accorded to them through international law. So in order for there to be territorial seas there must be territorial sovereignty over the land. As there is no territorial sovereignty over the land there is no territorial sovereignty over the adjoining continental shelf or sea.

“At present the legality of proclaiming EEZs in the Antarctic Region can be regarded as dubious at best “[as]” ... the prerequisites in the UNCLOS III Draft Convention for the legal establishment of EEZs – presence of a coastal state, recognised coastal baselines, effective occupation, and purposeful management of natural resources – are not found in Antarctica”. (Joyner, 1998)

High Seas

Article VI of the Antarctic Treaty acknowledges the freedom of the high seas within international law. It confirms that the high seas adjacent to the Antarctic Continent remain high seas and any assertion of authority or territory over these waters has been consistently met with objections within Antarctic Treaty Consultative Members (ATCM) meetings, as per Article IV of the same Treaty. (An example would be the 1994 Australian EEZ declaration for mainland and offshore territorial sovereignty claims in Antarctica. Several ATCM party members objected to the addition of Antarctica territorial claims).

The 1958 Law of the Sea Conference (UNCLOS I), states “Oceans, seas, and waters outside of national jurisdiction are also referred to as the high seas” and “Ships sailing the high seas are generally under the jurisdiction of the flag state”.

Whaling Implications

There has been no attempt to bring whaling under the mantle of The Convention for Conservation of Antarctic Marine Living Resources (CCAMLR). The agenda had been set in 1946 with the foundation of the International Convention for the Regulation of Whaling (now the International Whaling Commission, IWC), and Article VI from CCAMLR affirms this. It was agreed by the Treaty Parties that the CCAMLR regime would apply to the Antarctic ecosystem in preference to individual species.

The Environmental Protocol, whilst not directly addressing the whaling issue, in Article 2, ‘commits to the comprehensive protection of the Antarctic environment and

dependent and associated ecosystems and designates Antarctica as a natural reserve, devoted to peace and science.” Annex II addresses the conservation of Antarctica fauna and flora, which include those native mammals which occur in the Antarctic Treaty area through seasonal natural migrations. This definition, although not stated, would presumably include whales.

The IWC sanctions the capture and killing of whales under Article VIII of the 1946 Convention, “...a contracting party may grant to any of its nationals a special permit authorising that national to kill, take and treat whales for the purposes of scientific research.” Therefore a country like Japan which is sailing on the high seas and has a permit from the International Whaling Commission to kill whales, is not breaking any international laws.

In Summary

The Antarctic Treaty is a document that has woven together a growing group of diverse nations over a rapidly evolving fifty year time span. Claims of sovereignty and territory within the Antarctic region have been made, but are suppressed at present for the purpose of supporting shared access to the special continent that is Antarctica. Matters of national rivalry and territorial dispute have been constrained by the collective management of the Antarctic Treaty Consultative Parties and the Antarctic Treaty System. Whilst the Treaty is in force, sovereign states cannot claim territory within Antarctica, however tenuous those claims may be under international law guidelines, and the common goals of shared use and benefit within the Antarctic area remain for all mankind.

The situation is therefore mutually beneficial for all parties in many ways. However, the fragile state of sovereignty claims in Antarctica makes for an awkward situation when one country tries to assert its laws and value system over another. Australia’s attempts to ban whaling are therefore easily seen as the assertion of its own sovereignty over Antarctica and over another country’s right to fish in the high seas.

Conclusion

The clash between the issues of sovereignty and conservation still remains the issue that seems to prevent any progress being made on the whaling debate. Regulation of whaling in the southern ocean around Antarctica relies on effective monitoring, which presumes ownership of the areas to be policed. The debate over territorial issues returns the sovereignty problem back into the Treaty forum. A fragile agreement under Article IV threatens to be broken by the arguments over whaling.

The Antarctic Treaty System specifically excludes whaling from its legislation and agenda because it had already been legislated for under the 1946 International Convention for the Regulation of Whaling.

The Antarctic Treaty System is an extremely useful diplomatic tool for managing the Antarctic Territory, however, whaling is such a divisive issue that any case for regulation under the Antarctic Treaty will either fail or even break the Treaty. Therefore we suggest that if the whale problem is to be solved, re-education of the young, positive NGO support, recognition of public opinion in debates and regular information from the media will be much more productive in moving towards the cessation of whaling in Antarctic waters in the future.

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