

Revisiting Japan: Whaling after the Withdrawal from the ICRW

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Abstract Deutsch

In dieser Abhandlung geht es um die Bedeutung des Begriffs „Minderheit“ in einem allgemeineren Sinne, nämlich als die kleinere Anzahl von Staaten, die weniger als die Hälfte der Staaten in der Welt ausmacht. Sicherlich nehmen viele Staaten in verschiedenen Bereichen des internationalen Rechts eine Minderheitenposition ein, und als ich den Begriff „Minderheit“ auf diese Weise umformulierte, dachte ich natürlich an mein Heimatland Japan und seine rechtliche und politische Position innerhalb der globalisierten Welt. Die internationale Gesellschaft hat sich immer besser organisiert, und die durch das internationale Recht geregelten Bereiche haben sich erweitert. Natürlich ist es durchaus möglich, dass ein bestimmter Staat in einem Fall die Mehrheitsposition und in einem anderen Fall eine Minderheitsposition einnimmt. Im Falle Japans gibt es, wenn wir die internationale Gesellschaft als Ganzes betrachten, sicherlich einige Bereiche, in denen Japan als Minderheit in der internationalen Gesellschaft anerkannt werden könnte, obwohl das Land in den meisten Fällen sicherlich zur Mehrheit gehört. Ein Bereich, in dem Japan eine eindeutige Minderheitenposition innerhalb der internationalen Gesellschaft einnehmen könnte, wäre der Walfang. Die genaue Frage, mit der ich mich in diesem Artikel auseinandersetzen möchte, ist die folgende: Da die internationale Gesellschaft um universelle Regeln wie das ICRW (International Convention for the Regulation of Whaling/Internationales Übereinkommen zur Regelung des Walfangs) und internationale/regionale Organisationen wie die IWC (International Whaling Commission/Internationale Walfangkommission) herum organisiert und durch diese strukturiert ist, obliegt es den Staaten, sich an die immer größer werdenden Systeme von Regeln und Vorschriften zu halten. Folgt daraus, dass jeder Staat allmählich etwas von seinem individuellen Charakter verlieren muss, wenn sein Verhalten mehr und mehr von einem einheitlichen, monoartigen Wertesystem bestimmt wird?

Um dieser Frage nachzugehen, erfolgt zunächst ein kurzer Überblick über den internationalen Rechtsrahmen für den Schutz der lebenden Meeresressourcen, einschließlich der Wale. Zweitens werden Japans innerstaatliche Gesetze zum Walfang erklärt, um zu verdeutlichen, wie Japan die einschlägigen internationalen Vorschriften umsetzt. Auf der Grundlage dieser rechtlichen Rahmenbedingungen wird dann die Realität des Walfangs in Japan nach dem Austritt des Landes aus dem ICRW erörtert und untersucht, welches Licht dies auf das oben dargelegte Problem werfen kann.

Abstract English

This paper is about the meaning of the term “minority” in a more general sense, namely as the smaller number of states that make up less than half of the states in the world. Certainly, many states occupy a minority position in various matters of international law, and indeed when I reframed “minority” in this way, I naturally thought of my home country of Japan and its legal and political position within the globalized world. International society has become increasingly well organized, and the areas regulated by international law have expanded. Of course, it is entirely possible for a given state

to occupy the majority ground in one instance and a minority position in another. In the case of Japan, if we observe international society as a whole, there are certainly some areas in which Japan might be recognized as constituting a minority in international society, although in most cases the country certainly belongs to the majority. One area in which Japan might be recognized as adopting a distinct minority position within international society would be whaling. The precise question I seek to wrestle with in this article is the following: given that international society is organized around, and structured by, universal rules, such as the ICRW (International Convention for the Regulation of Whaling), and international/regional organizations, such as the IWC (International Whaling Commission), it is incumbent upon states to obey every-expanding systems of rules and regulations. Does it therefore follow that any given state must gradually lose something of its individual character, as more and more of its behavior is governed by a uniform, mono set of values?

To address this question, first a brief overview of the international legal framework for the protection of living marine resources, including whales, is provided. Secondly, Japan's domestic laws on whaling are explained to illustrate how Japan implements the relevant international regulations. Based on this legal framework, it then discusses the reality of whaling in Japan after the country's withdrawal from the ICRW and examines what light this may shed on the problem outlined above.

1. Introduction

It is a great pleasure and an honor for me to contribute to the Festschrift for Prof. Dr. Dr. h. c. mult. Gilbert Gornig. For me, Prof. Gornig has always been a "Vorbild" as a scholar, an educator, and a kind person who has welcomed students from all over the world. Writing my doctoral dissertation under his guidance in Marburg was one of the best experiences in my life. The title of my dissertation was "Immunität Internationalen Organisationen", which was in fact one of the topics suggested by Prof. Gornig when he accepted me as a "Doktorandin" in April 2000. Needless to say, at that time international organizations were already recognized as playing major roles in addressing pressing issues, such as poverty, the loss of biodiversity, and protection of the environment. Similarly, today it seems beyond question that there are many global issues that call for a cooperative approach from international society, orchestrated by international organizations. Clearly the importance of international organizations has not changed since then, even though some have notably confronted difficulty functioning, as the WTO has shown us in recent years, for instance.

When the editors of this Festschrift told me that the overarching keyword for the work would be "minority", a topic to which Prof. Gornig has devoted much time, I decided to consider a topic that touched on both a minority and the Law of the Sea, which is the area of study in which I have been primarily engaged after concluding my doctoral studies. If we wish to define "minority", immediately we run into the problem that there is "no generally accepted definition";¹ however, as

1 K. Henrard, Minorities, in: Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. VII, Oxford University Press: Oxford 2008, p. 254.

Article 27 of the International Covenant on Civil and Political Rights² indicates, a “minority” is usually connected with human rights issues in terms of public international law. Now in the field of the Law of the Sea there are certainly several issues relating to human rights that would make fine topics, but instead I decided to take this opportunity to reconsider the meaning of the term “minority” in a more general sense, as namely, the smaller number of states that represent less than half of the states in the world. Certainly many states occupy a minority position in various matters of international law, and indeed when I reframed “minority” in this way, I naturally thought of my home country of Japan and its legal and political position within the globalized world. I have been considering this idea since its gestation during my old time as a Doktorandin. Having remembered Prof. Gornig’s suggestions for my dissertation, I thought that now would represent the perfect opportunity to take up an issue related to Japan from this perspective.

International society has become increasingly well organized, and the areas regulated by international law have expanded. There is not only general international law, such as the Charter of the United Nations, but also specialized international law, which includes, for instance, international human rights law, environmental law, economic law, financial law and so on. Of course, it is entirely possible for a given state to occupy the majority ground in one instance and a minority position in another. In the case of Japan, if we observe international society as a whole, there are certainly some areas in which Japan might be recognized as constituting a minority in international society, although in most cases the country certainly belongs to the majority. One area in which Japan might be recognized as adopting a distinct minority position within international society would be whaling.

First of all, it is necessary to clarify how Japan can, in fact, be treated as a minority in terms of its position on whaling. According to a letter to the editor of the *Washington Post* by Takeshi Osuga, Press Secretary for the Ministry of Foreign Affairs,³ “Japan is working closely with roughly half of the commission’s [here he means the International Whaling Commission, hereinafter IWC] members, who share its commitment to sustainable whaling”, meaning that Japan is not necessarily a “minority” within the IWC; however, if we consider the number of states involved in whale fishing worldwide, it is clear that that number is far less than half of the total number of states.⁴ According to IWC data, there are only four IWC member states that undertake aboriginal subsistence whaling based on the IWC rules, and two states that undertake commercial whaling, namely Norway and Japan.⁵ The

2 International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, UNTS 999, p. 171.

3 The Washington Post, Letter to the editor, Opinion Japan’s whaling is sustainable and responsible, Takeshi Osuga, April 22, 2019 at 5:27 p.m. EDT (available in website of the Washington Post).

4 There are 196 states and the United Nations has 193 Member States. See the United Nations, Growth in United Nations membership, <https://www.un.org/en/about-us/growth-in-un-membership#2000-Present>.

5 See the IWC Homepage, <https://iwc.int/total-catches>.

IWC data records whaling undertaken by its member states, including its former member state Japan, but outside of this scope there are also other states that undertake whaling, such as Canada and Indonesia. Consequently, if we tally these, there are less than ten states around the world that undertake whaling in some form. Therefore, if we consider simply the number, those states no doubt constitute a minority.

As the Chief Cabinet Secretary announced on 26 December 2018, Japan decided to withdraw from the International Convention for the Regulation of Whaling (hereinafter ICRW)⁶ based on Article XI (1) of the convention, whereupon the country resumed undertaking commercial whaling in July 2019 after a 30-year hiatus. Since its withdrawal, Japan has undertaken commercial whale fishery both in its territorial waters and Exclusive Economic Zones (EEZ). Both marine areas lay within Japan's jurisdiction based on the United Nations Convention on the Law of the Sea (hereinafter UNCLOS)⁷. Personally, when I first heard the news of Japan's withdrawal from the ICRW, I was shocked; I thought that Japan should insist on its position on whaling within the appropriate international framework. I wondered if there were young Japanese students studying abroad who faced criticism from their classmates because of Japan's attitude to whaling. Fortunately, I myself had no such experience, but even as a young student I already felt that whaling was an immensely complicated and somehow emotional issue that I was reluctant to touch. Not being a specialist in the topic, I knew little about Japan's whale fishery, whaling industry, or the relevant historical, cultural and political background. Now, almost twenty years after my doctoral student days, I have decided to revisit my own country and analyze this sensitive and timely issue from a legal and institutional perspective. Through my analysis I consider the meaning of diversity amidst unified values and systems in a globalized era when many areas, such as the environment, finance, climate change, and so forth, are regulated by international law.

The precise question I seek to wrestle with in this article is the following: given that international society is organized around, and structured by, universal rules, such as the ICRW, and international/regional organizations, such as the IWC, it is incumbent upon states to obey every-expanding systems of rules and regulations. Does it therefore follow that any given state must gradually lose something of its individual character, as more and more of its behavior is governed by a uniform, mono set of values?

To pursue this line of inquiry, firstly, I briefly summarize the international legal framework for protection of marine living resources including whales. Secondly, I explain Japan's domestic laws on whaling in order to clarify how Japan implements relevant international rules. Based on these legal frameworks, I then discuss the reality of whaling in Japan after the country's withdrawal from the ICRW and see what light this can shed on the problem I articulated above.

6 The International Convention for the Regulation of Whaling, UNTS 161, p. 72.

7 The United Nations Convention on the Law of the Sea, UNTS 1833, p. 3.

2. Protection of Marine Living Resources under International Law

There are two international treaties that are relevant to matters involving whales and whale fishery. One of them is UNCLOS, and the other is the ICRW. Japan has been a contracting party of UNCLOS since 1996. As for the ICRW, Japan concluded it in 1951 and remained a party until its aforementioned withdrawal in December 2018, whereupon, accordingly, it left the IWC on 30th June 2019. I will now briefly explain how these treaties regulate whale fishery, and attempt to ascertain thereby its legal status within an international context.

2.1. UNCLOS

UNCLOS was adopted in 1982, which was more than 30 years after the adoption of the ICRW. As a “constitution of the oceans”, UNCLOS stipulates conservation and management of marine living resources, for instance, in Article 56(1)(a) and Articles 61 to 64. However, Article 65 of UNCLOS specifically stipulates “marine mammals” separately from those articles that regulate marine natural resources, including living resources. In other words, it considers “marine mammals” as constituting a special category of species.⁸ Article 65, moreover, stipulates that states have an obligation to “cooperate with a view to the conservation of marine mammals”. In terms of cetaceans, states are to “work through the appropriate international organizations for their *conservation, management and study*” (emphasis mine). If we compare Article 65 with the other Articles regulating marine living resources, Article 65 notably lacks the word “utilization”⁹, which is used in Article 62 regulating “utilization of the living resources” and also used in Article 64(1) regulating highly migratory species. Moreover, Article 65 recognizes “the right of a coastal State or the competence of international organizations [...] to prohibit, limit or regulate the exploitation of marine mammals *more strictly* than provided for” (emphasis mine). This wording is significant because while on the one hand Article 65 seems to indicate that, when it comes to marine mammals, UNCLOS aims to conserve and protect targeted species, this same Article also stipulates the obligation of states to cooperate through international organizations not only for conservation, but also for management and study. A holistic assessment of Article 65, then, shows that in principle UNCLOS does not prohibit the utilization of marine mammals, and under some conditions whale fishery could be undertaken.

8 E. Morgera/J. Harrison, Article 65, in: A. Proelss (ed.), United Nations Convention on the Law of the Sea, C. H. Beck: München 2017, p. 520.

9 E. Morgera/J. Harrison, Article 65, in: A. Proelss (ed.), United Nations Convention on the Law of the Sea, C. H. Beck: München 2017, p. 523; A. Proelss/K. Houghton, Protecting Marine Species, in: R. Rayfuse (ed.), Research Handbook on International Marine Environmental Law, E. Elgar: Cheltenham 2016, p. 237; S. N. Nandan/S. Rosenne (eds.), United Nations Convention on the Law of the Sea 1982 vol. II, Martinus Nijhoff: Dordrecht/Boston/London 2002, pp. 663–664.

So long as Article 65 mentions international organizations, in the plural – the IWC had already been established and was functioning as an international organization for managing whales when UNCLOS was adopted – UNCLOS does not exclude any other international organizations being engaged in the conservation, management and study of marine mammals.¹⁰ However, as an international organization with member states from all over the world, the IWC is certainly the main organization established “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”¹¹ in 1946, and which currently has 88 contracting parties.¹² Therefore, I will now briefly discuss the ICRW and the IWC from a legal perspective.

2.2. IWC

After the end of the Second World War, the ICRW, “includ[ing] the Schedule attached thereto which forms an integral part thereof” (Article I[1] of the ICRW), was signed in Washington, D.C. on 2 December, 1946. It entered into force on 10 November 1948, and based on Article III(1), the IWC was established. As the last part of the ICRW’s preamble stipulates, the purposes of the ICRW are to “provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”. This means that the ICRW has essentially two purposes: to take the proper conservation measures for whales, and to develop the whaling industry.¹³ We should note that the ICRW applies “to *all waters* in which whaling is prosecuted” (Article I[2], emphasis mine), meaning that as long as states are contracting parties of the ICRW their policies on whales should be

10 For instance, the Convention on the Conservation of Migratory Species of Wild Animals (CMS) works tightly with IWC. See on this point, A. Proelss/K. Houghton, Protecting Marine Species, in: R. Rayfuse (ed.), *Research Handbook on International Marine Environmental Law*, E. Elgar: Cheltenham 2016, p. 251. In the Twelfth Meeting of the Conference of the Parties to the CMS (CMS COP12) held in October 2017, the CMS COP 12 adopted the Resolution on Conservation and Management of Whales and their Habitats in the South Atlantic Region which requested the CMS Secretariat and the CMS Scientific Council to work with the Scientific and Conservation Committees of the International Whaling Commission. See the Report of the CMS COP12, para. 670, https://www.cms.int/sites/default/files/document/cms_cop12_report_e.pdf. See also Y. Tanaka, *The International Law of the Sea*, Third Edition, Cambridge University Press: Cambridge 2019, p. 292; E. Morgera/J. Harrison, Article 65, in A. Proelss (ed.), *United Nations Convention on the Law of the Sea*, C. H. Beck: München 2017, p. 525; A. Proelss/K. Houghton, Protecting Marine Species, in: R. Rayfuse (ed.), *Research Handbook on International Marine Environmental Law*, E. Elgar: Cheltenham 2016, p. 238.

11 See the last paragraph of the Preamble of the ICRW.

12 As of 12 September 2021, <https://iwc.int/members>.

13 Y. Tanaka, *The International Law of the Sea*, Third Edition, Cambridge University Press: Cambridge 2019, p. 294; J. Harrison, *Saving the Oceans through Law*, Oxford University Press: Oxford 2017, p. 199. See also A. Proelss/K. Houghton, Protecting Marine Species, in: R. Rayfuse (ed.), *Research Handbook on International Marine Environmental Law*, E. Elgar: Cheltenham 2016, p. 243.

undertaken in compliance with the ICRW. Participating states are thus to take measures adopted by the IWC irrespective of in which maritime zones the whale fishery in question is undertaken. The ICRW neglects to stipulate the definition of “whale”, which has resulted in discussion on whether the Convention can possibly be applied to dolphins.¹⁴ Nowadays, the IWC has exercised competence to regulate on the so-called “Great Whale” species, for which various conservation measures are designated. The targeted species among these “Great Whales” are listed in Tables 1, 2 and 3 of the Schedule.¹⁵ Accordingly, the IWC has regulated catch limits for eleven species. In terms of the other, smaller whale species, contracting member states of the ICRW are able to catch these in line with their own policies if desired. The Articles and Schedule of the ICRW make it clear that the Convention does not prohibit whale fishery or the development of the whaling industry. This, too is in line with understanding Article 65 of UNCLOS as not prohibiting whale fishery.¹⁶

Indeed, in practice there are some forms of whaling that can be undertaken within the framework of the ICRW, notably aboriginal subsistence whaling (ASW),¹⁷ Special Permit Whaling (also known as scientific whaling), based on Article VIII of the ICRW, and commercial whaling, regarding which the IWC decided upon “a pause in commercial whaling on all whale species and populations from the 1985/1986 season onwards” (Moratorium)¹⁸ at the 34th Annual Meeting, held in July 1982 in Brighton.¹⁹ The upshot of this decision was that one of the purposes of the ICRW, namely, “orderly development of the whaling industry”, was pushed aside, with the ICRW turning from a means of managing whaling to an instrument to prohibit commercial whaling altogether.²⁰

Although the ICRW has turned away from commercial whaling, what of the other two forms of whaling permitted under the framework? The first, aboriginal subsistence whaling, is not subject to the Moratorium and can be undertaken legally within the ICRW framework based on paragraph 13 of the Schedule, with the resulting catches being published on the IWC homepage.²¹ The IWC annual

14 The IWC doesn’t regulate on hunting of small cetaceans but initiate to scientific research on the species and to establish fund for them. See “Scientific Research and Conservation, The Small Cetacean Voluntary Fund” on the IWC homepage, <https://iwc.int/smallcetacean>.

15 See ICRW, Schedule As amended by the Commission at the 67th Meeting Florianópolis, Brazil, September 2018, pp. 6–7.

16 See for instance, Y. Tanaka, *The International Law of the Sea*, Third Edition, Cambridge University Press: Cambridge 2019, p. 292; J. Harrison, *Saving the Oceans through Law*, Oxford University Press: Oxford 2017, p. 199.

17 *Ibid.*, para. 13, pp. 8–9.

18 See the explanation of the IWC, <https://iwc.int/commercial>.

19 Chairman’s Report of the Thirty-Fourth Annual Meeting, p. 9; P. Birnie, *Countdown to zero, 34th meeting of the international whaling commission*: Brighton, UK, 19–24 July 1982, in: 7 *Marine Policy* 1983, pp. 64–68.

20 See, for instance, P. Sands/J. Peel, *Principles of International Environmental Law*, Fourth Edition, Cambridge University Press: Cambridge 2018, p. 535.

21 For statistics, see the IWC homepage, https://iwc.int/table_aboriginal.

meeting, held in 1981, articulates three purposes for the IWC to regulate aboriginal subsistence whaling.²² The first and third purposes pertain to the conservation of whales, as per the stipulation in the last part of the ICRW preamble. Specifically, the first objective is “to ensure that the risks of extinction to individual stocks are not seriously increased by subsistence whaling”, while the third is “to maintain the status of whale stocks at or above the level giving the highest net recruitment and to ensure that stocks below that level are moved towards it so far as the environment permits”.²³ The second objective, however, is a little different, in that it reveals a special necessity for this form of whaling. It stipulates that subsistence whaling should contribute “to enabl[ing] aboriginal people to harvest whales in perpetuity at levels appropriate to their cultural and nutritional requirements”. Whether this type of whale fishery constitutes a “whaling industry” as stipulated in the last part of the ICRW preamble is questionable, as it does not “seek to maximize catches or profit”.²⁴ Additionally, aboriginal subsistence whaling is required to be carried out under strict conditions which are stipulated in the Schedule. For indigenous peoples, aboriginal subsistence whaling is recognized as a part of their traditional culture, and the IWC was aware of the significant effect its whaling regulations would have on these whaling traditions.²⁵ Accordingly, the IWC decided to allow aboriginal subsistence whaling within its framework. Currently, there are four ICRW member states in which aboriginal subsistence whaling is conducted, namely, Denmark, Russia, St Vincent and the Grenadines, and the United States; outside of the ICRW, such whaling is also conducted in both Canada²⁶ and Indonesia.²⁷ For this type of whale fishery, the IWC sets a maximum sustainable yield (MSY), comparable to that which is often set for sustainable fishery in many regional fisheries management organizations. The MSY for aboriginal subsistence whaling is revised every six years, to ensure that the status of hunted species would not dramatically decrease.²⁸

22 IWC, Aboriginal Subsistence Whaling, <https://iwc.int/aboriginal>. For the precise procedure to regulate aboriginal subsistence whaling in the IWC, see, N. C. Doubleday, *Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law*, in: 17 *Denver Journal of International Law & Policy* 1989, pp. 386–387.

23 IWC meeting report is published in IWC official homepage (<https://iwc.int/commission>), under Meeting & Events, Commission Meeting Archive.

24 See the explanation of the IWC about the Aboriginal Subsistence Whaling, <https://iwc.int/aboriginal> and more precisely R. R. Reeves, “The Origins and Character of ‘Aboriginal Subsistence’ whaling: a global review”, in: 32 *Mammal Review* 2002, p. 82.

25 IWC, *Aboriginal Subsistence Whaling*, <https://iwc.int/aboriginal>; see also J. Harrison, *Saving the Oceans through Law*, Oxford University Press: Oxford 2017, pp. 199–200.

26 N. C. Doubleday, *Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law*, in: 17 *Denver Journal of International Law & Policy* 1989, pp. 373–376.

27 A. Sahri/P. Liza Kusuma Mustika/H. Yoga Dewanto/A. J. Murk, *A Critical Review of Marine Mammal Governance and Protection in Indonesia*, in: 117 *Marine Policy* 2020, p. 14.

28 ICRW, para. 13(b) of the Schedule As amended by the Commission at the 67th Meeting Florianópolis, Brazil, September 2018, pp. 6–7.

The second category of whale fishery permitted under the ICRW framework, Special Permit Whaling or “scientific whaling” is undertaken on the basis of Article VIII (1) of the ICRW. This article stipulates that “any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research”. States that undertake Special Permit Whaling are responsible for regulating such whaling through their respective domestic laws and regulations, and therefore in principle the IWC does not regulate Special Permit Whaling. However, as an international organization for conservation and management, the IWC is involved in the study of whales and therefore from this perspective as well as conservation the organization is not entirely divorced from Special Permit Whaling. More specifically, if states decide to conduct such whaling, those states bear an obligation to report to the IWC each time that they grant such authorizations (Article VIII [1]), as well as to transmit scientific information gained through such whaling to the IWC on at least an annual basis (Article VIII [3]). In addition to the Secretary of the IWC, the organization has a Scientific Committee which is also engaged in issues pertaining to Special Permit Whaling. The Scientific Committee is required to review and comment on such permits, in line with Paragraph 30 of the Schedule. Since the Moratorium came into effect in 1986, various states, including Japan (except in 1986), have undertaken this type of whaling.²⁹ Japan ceased this type of whaling when it left the IWC.

Irrespective of the type of whaling in question, there are some elements that need to be consistently taken into consideration under the ICRW framework, such as sustainability. These elements are common denominators and are taken into consideration not only in whale fishery, but also in the conservation of marine living resources including fish stocks. One such element is the reference to the “best scientific advice”³⁰ for whale policy. The IWC established the aforementioned Scientific Committee in 1950, based on Article IV (1) of the ICRW, and it plays an important role in assessing whale populations and “provid[ing] scientific findings on which amendments to the Schedule shall be based” (Article V of the ICRW). In addition to those tasks, the Scientific Committee is to “receive, review and comment on Special Permits issued for scientific research” (Article VIII[3] of the ICRW and paragraph 30 of the Schedule). Consequently, Japanese Special Permit Whaling was also the subject of the Scientific Committee’s review and recommendation. The Committee developed the “Revised Management Procedure (RMP)” to estimate sustainable catch limits for commercial whaling, and indeed this is used to calculate catch limits for whales, in Japan for instance, which brings us to the issue of the Japanese framework for whaling.

29 See IWC Statistics on “Special Permit Catches since 1985”, https://iwc.int/table_permit.

30 For instance, in terms of aboriginal subsistence whaling, see para. 13 of the Schedule As amended by the Commission at the 67th Meeting Florianópolis, Brazil, September 2018, pp. 6–7.

3. Legislation on Whaling in Japan

Japanese domestic laws and regulations governing fishery are complicated because of longstanding fishery practices coordinated by different layers of governance, from the national down to the local level, and because of a variety of different kinds of fishery rights. In this section, I will explain relevant domestic laws and regulations on whaling in line with the hierarchy of domestic laws and regulations ([1] ~ [3]). In addition to these, I will also cover the newest law introduced by members of the Diet which articulates characteristics of whaling in Japan (4).

3.1. Fishery Act

The main domestic law on fishery in Japan is the Fishery Act (Act No. 267 of December 15, 1949), which has been revised several times in the past.³¹ The purpose of this Act is “to establish a basic fisheries production system” (Article 1). Chapter III of the Act regulates “Permitted Fishery”, which is sub-divided into two categories, namely, fishery under permission granted by the governmental minister responsible (i.e., the Agriculture, Forestry and Fisheries Minister), and fishery under permission granted by local governors. The first article of that Chapter is Article 36, which stipulates the power of the Agriculture, Forestry and Fisheries Minister (hereinafter the Minister) to permit “fishery using a ship specified by an Order of the Ministry of Agriculture, Forestry and Fisheries”. Persons who have obtained such permission bear an obligation to “report the status of resource control in the fishery, the result of fishery production and other matters specified by an Order of the Ministry of Agriculture, Forestry and Fisheries” to the Minister (Article 52[2]). Moreover, if conducting fishery for which a person should “obtain a permission of the Governor” (Article 57[1]), the fisherman in question bears substantially the same obligation as that of the fisherman undertaking fishery under permission of the Minister (Article 58).

3.2. Cabinet Order (政令, *Seirei*)

In terms of permitted whale fishery, persons (or organizations) who have engaged in whale fishery bear some additional obligations stipulated under a domestic regulation titled the Cabinet Order Specifying the Designated Sectors of the Fishing Industry under Paragraph (1) of Article 52 of the Fishery Act (Cabinet Order No. 6 of January 22, 1963, hereinafter Order No. 6).³² Based on Order No. 6, persons (or organizations) managing a whale fishery, irrespective of its scale and type, must report the status of resource control in the fishery, the results of fishery activities, and other matters, as specified in an Order of the Ministry of Agriculture, Forestry and Fisheries (Order No. 5, see the next part [3]) to the Minister, as regulated by Article 52 of the Fishery Act. Accordingly, even after Japan had withdrawn from

31 Unofficial translation, <https://www.japaneselawtranslation.go.jp/en/laws/view/1871>.

32 This order was last amended in 2015.

the ICRW, the catch of each whale is recorded, reported to the Minister, and then submitted to the IWC just as was the case when Japan was a member state of the ICRW. Essentially, the only difference in the situation for Japanese whaling before and after its withdrawal from the ICRW is that Japan now undertakes whale fishery within its national jurisdiction based on UNCLOS and has ceased to conduct Special Permit Whaling.

3.3. Ministerial Order (省令, *Sho-rei*)

In terms of fishery permitted by the Minister, the details of relevant issues such as species concerned are prescribed in an order, based on the Fishery Act, from the Ministry of Agriculture, Forestry and Fisheries, namely, the Ministerial Order on the Permission, Regulation, Etc. of Designated Fisheries (「漁業の許可及び取締等に関する省令」, Order of the Ministry of Agriculture and Forestry No. 5 of January 22, 1963, hereinafter Order No. 5) which was enforced in 1963 and most recently revised in 2020.³³ Order No. 5 stipulates all of the types of whale fishery permitted by the Minister, namely factory-ship-type whaling (previously called mothership-type whale fishery, and covered in Article 2[9] and Section 10)³⁴ and coastal whaling (previously called small-scale whale fishery, and covered in Article 2[8] and Section 9)³⁵. The Order No. 5 prohibits the capture of “Suckling calves or female whales accompanied by calves (including suckling calves)” (Article 44 for coastal whaling, and Article 48 for factory-ship-type whaling), which serves to ensure the sustainability of the whales. It is noteworthy that the Schedule of the IWC stipulates the same restrictions in, for instance, paragraphs 13(a)(4) and 14. Additionally, whale fishery managers are required to report where and when whales are captured, as well as the whale species, and the identification number that is marked on the tail of each captured whale (Article 46[2] and Article 49[2]). Here too, the obligation is identical to that set out in the ICRW’s Schedule (para. 24). Keeping precise reports on captured whales enables Japan to record and control all whaling activities while ensuring the sustainability of whale stocks in accordance with the ICRW. To facilitate this governmental control scheme, Order No. 5 also requires managers engaged in coastal whaling to obtain permission from the Minister for whale processing stations “that he/she uses for each boat pertaining to permission to engage in such Whale Fisheries” (Article 45),

33 Unofficial English Translation, <https://www.japaneselawtranslation.go.jp/ja/laws/view/3938>.

34 For this type there is one vessel (*Nisshinmaru*) permitted by the Minister and the vessel is based in Shimonoseki, Yamaguchi prefecture. See Ministry of Foreign Affairs of Japan, “Japan and the Management of Whales” (2) Operating Areas, <https://www.mofa.go.jp/policy/economy/fishery/whales/japan.html>.

35 For this type of whale fishery, 5 vessels are permitted by the Minister and they are based in Kushiro (Hokkaido), Hachinohe (Aomori), Ishinomaki (Miyagi), Minamiboso (Chiba), and Taiji (Wakayama). See Ministry of Foreign Affairs of Japan, “Japan and the Management of Whales” (2) Operating Areas, <https://www.mofa.go.jp/policy/economy/fishery/whales/japan.html>.

which is an element of domestic law comparable to paragraph 20 of the ICRW's Schedule. So long as captured whales can only be processed in designated places permitted by the Minister, the governmental control governs not only the immediate fishery practices themselves, but also the subsequent process occurring afterwards.

To sum up, it is clear that whale fishery in Japan is well-regulated by the government, in a manner comparable to or exceeding the framework of the ICRW's Schedule, and that this may reflect the special meaning accorded whaling in Japanese culture (which I will return to in part four).

3.4. Act for Ensuring the Sustainable Use of Whales (鯨類の持続的な利用の確保に関する法律, *Geirui no Jizokukanou na Riyō no Kakuho ni kannsuru Houritsu*)

The legal framework for Japanese whale fishery had been kept almost unchanged since the 1960's, and it had worked well while Japan was undertaking whale fishery in cooperation with the IWC and its Scientific Committee. After the ICJ's Judgement on Whaling in March 2014³⁶, the Japanese Diet (both the upper and lower houses) adopted a resolution which required action to be taken on the part of the government, for instance, carefully considering the grounds for the outcome of the judgement and the importance of research whaling and whale fishery for Japan.³⁷ Following these resolutions, in 2017, new impetus was given to the longstanding domestic legislation on whaling by the Diet. In 2017, some members of the Diet launched an initiative to introduce a new law on whaling that stresses, among various issues, the sustainability and importance of whale fishery for Japanese culture, namely, "Act for Ensuring the Sustainable Use of Whales" (Act No. 76 of June 23, 2017, last amended in December 2019, hereinafter, Act No. 76).

As Act No.76 was initiated by members of the Diet, who were elected from various areas across Japan, it reflects various interests pertaining to whale fishery, which are also reflected in the wording of the stated intent of said act. Act No. 76 aims to achieve several purposes relating to whale fishery, the first of which is "to ensure the development of the fishery sector and its related industries" through sustainable use of marine living resources. The second purpose is to "clarify the responsibilities of state, for ensuring the sustainable use of whales", which moreover requires the government to provide "for the development of the basic policies and scientific whale research programs" (Article 1).³⁸ These purposes reveal how, rather than pursuing a radically different policy from the past, or attempting

36 Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgement of 31 March 2014, <https://www.icj-cij.org/en/case/148/judgments>.

37 Resolution of the Agriculture Fishery Committee of the Lower House on 16 April 2014 (only in Japanese); Resolution the Agriculture Fishery Committee of the Upper House on 17 April 2014 (only in Japanese).

38 Unofficial translation, <https://www.japaneselawtranslation.go.jp/ja/laws/view/3915>.

to overturn the principles of sustainable whaling that had informed its involvement in the ICRW, Japan continues to strive to realize sustainable whaling assisted by scientific data as it had always advocated as a contracting state of the ICRW.³⁹ In addition to occupying a more or less consistent perspective, Japan's domestic framework on whaling is also quite similar to the international legal framework adopted for the protection of marine living resources.

However, at the same time Act No. 76 also recognizes whale fishery as something special that is distinct from other forms of fishing, and in this regard it offers insight into why Japan has continued whaling. Article 1 recognizes whales not only as "an important food resource which should be used in a sustainable manner based on scientific evidence", but also as something possessing great "importance in Japan in the succession of *traditional cuisine*" which is, moreover, "related to *culture and dietary practices* involving whales, and of ensuring the diversity in the use of whales" (emphasis mine). In other words, we see two distinct reasons articulated for the significance of whaling in Japan. The first, emphasizing the importance of whales as a food resource, is obvious, and there is nothing about this that is particularly distinct from other forms of fishing, or particular to Japan. The second, however, emphasizing the importance of whaling within traditional Japanese culture and dietary practices, is harder to clearly define, and suggests that, unlike with the first reason, within Japan whales are distinct from other forms of marine food resource and occupy a role, moreover, that is particular to Japan. This makes whales distinct from other marine living resources, such as tuna or pacific saury, regarding which Japan cooperates with other states within the relevant Regional Fisheries Management Organizations, because whales are understood as more than just a resource. These issues will be considered more thoroughly in the following section.

Article 3 of Act No. 76 stipulates the basic principles for whale fishery, namely that it should be conducted based on scientific research (Article 3[i]) and in accordance with relevant international treaties which Japan has concluded, "as well as in accordance with established international law" (Article 3[ii][b]). These two sentences clearly state, in other words, that Japan is to obey responsibilities based on UNCLOS and other international treaties which regulate fisheries. Accordingly, even though Japan is no longer a contracting member state of the ICRW,⁴⁰ the Japanese domestic whale fishery framework continues to respect what the ICRW and Schedule stipulate, and whaling continues to be undertaken in accordance with those, including the RMP established by the Scientific Committee of the IWC.

39 After the withdrawal from the IWC, Japan has conducted scientific research with the IWC referred to as IWC-POWER (International Whaling Commission/Pacific Ocean Whale and Ecosystem Research) in the Summer 2021. See, Institute of Cetacean Research, Completion of the 2021 "IWC/Japan Joint Cetacean Sighting Survey Cruise in the North Pacific – IWC-POWER", <http://www.icrwhale.org/210930ReleaseENG.html>.

40 After withdrawal from the ICRW, Japan attends to the ICW as an observer.

4. The Reality of Whaling and Its Meaning in a Japanese Context

The system for controlling whale fishery based on Japanese domestic law and regulations has not substantially changed since Japan withdrew from the ICRW; however, how many whales are caught in Japan now that it is no longer bound by the ICRW? Is Japan a state that now enjoys the freedom to exercise “sovereignty” over its whaling policy without any limitations? This section will attempt to answer these questions.

Japan had cooperated with the IWC for many years, despite its view on sustainable whaling becoming increasingly less mainstream, putting Japan in a difficult position as a minority in the Commission. However, Japan’s disagreement with the majority position did not mean that it did not respect the IWC and its framework. Even after its withdrawal from the ICRW, Japan set catch limits for whales calculated in line with the method adopted by the IWC,⁴¹ the Revised Management Procedure (RMP), mentioned earlier. Regarding the RMP, we should keep in mind that the IWC’s Scientific Committee has continued to assess new calculation methods over many years. It is not clear whether and when a new method to calculate catch limits will be introduced in the IWC.⁴² However, if the IWC introduces a new calculation method, in all likelihood Japan, insofar as it continues to conduct whaling in the future, will continue to closely cooperate with the IWC⁴³ and adopt the new calculation method. Far from pursuing an entirely independent whaling policy, Japan continues to strive to strictly manage whale fishery based on science-based evidence⁴⁴, a value it shares with the IWC Scientific Committee.

What about the real situation of whaling in Japan at present? There are now one fleet and five vessels in Japan engaged in whale fishery.⁴⁵ All of them are required to obtain permission from the Minister based on Japanese law, explained in the previous section. The domestic product of whale meat was 154,000 tons in 1960⁴⁶, and since then the volume of whale meat has constantly decreased. Since end of

41 For the Year 2022, see Ministry of Foreign Affairs of Japan, “Japan and the Management of Whales 1. Whaling in Japan (1) Catch Quota”, <https://www.mofa.go.jp/policy/economy/fishery/whales/japan.html>.

42 See for instance, E. J. Goodwin, *Threatened Species and Vulnerable Marine Ecosystems*, in: D. R. Rothwell/A. G. Oude Elferink/K. Scott/T. Stephens (eds.) *The Oxford Handbook of the Law of the Sea*, Oxford University Press: Oxford 2015, pp. 817–818.

43 Ministry of Foreign Affairs of Japan, “Japan and the Management of Whales 2. Japan’s Basic Position on Whaling, (2) Japan’s Position after Withdrawing from the IWC”, <https://www.mofa.go.jp/policy/economy/fishery/whales/japan.html>.

44 For the position of the science in development of the international environmental law, see, for example, S. Johnston, *The Role of Science*, in: L. Rajamani/J. Peel (eds.), *The Oxford Handbook of International Environmental Law* 2nd ed., Oxford University Press: Oxford 2021, pp. 250–252.

45 See Ministry of Foreign Affairs of Japan, “Japan and the Management of Whales” (2) Operating Areas, <https://www.mofa.go.jp/policy/economy/fishery/whales/japan.html>.

46 Statistics of Japanese Food Supply “Meat/Whales” (only in Japanese) is published every year by the Ministry of the Agriculture, Forestry and Fisheries.

the 1980s, the number has been between 1,000 and 3,000 tons annually. In 2018, for instance, it was 3,000 tons. Japan also imports whale meat from foreign countries on an annual basis, but the volume of this imported whale meat has likewise been decreasing. The turning point in whale meat imports was the year 1986: in the previous year, Japan had imported 17,000 tons of whale meat, but in 1986, it imported only 4,000 tons, and recently the number has dropped to between 0 to 3,000 tons. The newest statistics, for 2018, record no imported whale meat. The statistics also show us how much whale meat each Japanese person consumes, constituting a simple tool to know if the food production is sufficient to meet demand. This calculation, however, does not reflect real consumption in a particularly meaningful way, because it is calculated by simply dividing total whale meat production by the Japanese population, revealing an overall downward trend. In 1960, each Japanese ate an average of 1.6 kg of whale meat, but by 2018 this number was essentially zero, a number that had not changed since 1987. The withdrawal from the IWC has had no apparent impact on this situation.

I state that this is not particularly meaningful because although the population calculation reveals a strong downward trend, so that the majority of Japanese eat no whale meat at all, this ignores the minority who do, although it may occupy great significance for them. Clearly, whale meat no longer occupies a position as a prominent nutrition resource like other types of meat in Japan. It is beyond the scope of this piece to investigate whether this is primarily due to changing culinary culture, or whether the “Moratorium” on commercial whale fishery did in fact play a role. It is undeniable that nowadays there are many Japanese who have not eaten whale meat at all,⁴⁷ and that whale meat is not usually available for daily consumption. For instance, many kinds of fish in various form are sold in every Japanese supermarket for daily use, but it is no easy feat to find a shop where one can purchase whale meat. Some real detective work may be required, and there is no guarantee that one will be successful. In other words, while there is clearly a Japanese culinary culture of consuming whale meat,⁴⁸ as Act No. 76 in 2017 states, this aspect of whales in Japan is only significant for a minority of the population, and if nothing is done to preserve it, it is likely that this aspect of whales in Japanese culture will eventually disappear.

In addition to the culinary aspect of whale meat, however, there are also other cultural aspects of whales in Japan. The most significant of these is traditional craft work utilizing whale bones and teeth. For example, in Ishinomaki (in Miyagi Prefecture, where one of the five whaling vessels is based), there are traditional forms of craftwork making Japanese seals (*hanko*) from whalebone and accessories from whale teeth. Craftspeople practicing these traditional arts have suffered from the shortage of whales caught by Japan, and continuing their craft as well as passing on their knowledge to successors is now becoming an increasingly difficult prospect.

47 For instance, NHK World-Japan, Y. Sekiguchi, Backstories Why Japan Withdrew from the IWC, 11 Feb. 2019, <https://www3.nhk.or.jp/nhkworld/en/news/backstories/367/>.

48 In terms of Japanese Whaling Culture, see, for instance, A. Kalland/B. Moeran, *Japanese Whaling?: End of an Era*, Routledge: London 1992.

In light of these cultural and traditional aspects of whale fishery in Japan, it is understandable that Act No. 76 emphasizes characteristics of Japanese whaling as part of Japanese tradition. While preserving cultural heritage and traditions is a key value for a sovereign state, this can sometimes represent a problem if said traditions are confronted by contrary values widely supported by the majority in international society. It is in this position that Japan finds itself, as seen by the discussions on the “Moratorium” in the IWC. Had Japan pursued whale fishery as an instance of aboriginal subsistence whaling,⁴⁹ based on para. 13 of the ICRW Schedule, then it would not have needed to withdraw from the IWC, but at the same time it is clear that Japan’s whaling practices could not meet the required criteria for aboriginal subsistence whaling. Japanese whaling is in something of a conundrum because it possesses some aspects of Japanese traditional cuisine and craftsmanship⁵⁰, and reflects special characteristics pertaining to the cultural significance of whales in Japan, but as a “Japanese” industry lacks the special status accorded “aboriginal” whaling, which can only be undertaken by indigenous peoples.

5. Further Considerations

As I described in the previous part, even after Japan’s withdrawal from the ICRW its whale fishery capacity is limited and the situation surrounding the whale industry is highly unlikely to change in the near future. It is also, of course, questionable if the trend in the Japanese whale industry would dramatically reverse course even if Japan were to catch more whales. Putting aside this issue of the real situation facing the Japanese whale industry, in this last part I will turn to the broader issues at play here and consider the possible problems that an increasingly regulated international society will face.

One of these problems might be the “value” recognized in a given society, and how this impacts on how the same set of circumstances are understood. Although there exists scientific data on whales gathered by scientists, and the Scientific Committee of the IWC is constituted by scientists who provide advice on the management of whale stocks, the interpretation of scientific data describing trends in the whale population differs from state to state because of their respective policies on whale fishery. States or groups that are strongly against whale fishery insist on the crucial status of whales based on the data gathered by scientific research, and argue that any and all catching of whales stands to threaten whale populations with collapse. Accordingly, they tend to insist on absolute prohibition of whaling. On the other hand, states or groups engaged in whale fishery, like Japan, tend to treat the same scientific data as evidence proving the recovery of whale popula-

49 See on this point, for instance, J. Harrison, *Saving the Oceans through Law*, Oxford University Press: Oxford 2017, pp. 199–200.

50 Additionally, in *Taiji* (Wakayama prefecture, where one of whaling vessels is based) people have used some traditional methods by whaling which is strongly criticized by international society.

tions. Accordingly, they are of the opinion that the data shows whaling can be carried out in sustainable fashion.⁵¹ Indeed, a similar phenomenon was at work when different evaluations of the scientific data were revealed in the *Southern Bluefin Tuna Case* at the International Tribunal for the Law of the Sea (ITLOS).⁵² Therefore, although everyone considers the same scientific data on whales gathered by the IWC, evaluation of this data differs depending on the party in question.⁵³ The upshot of this is that science-based management of marine living resources is not a panacea able to resolve all disputes. Differing evaluations point to the need to consider values, and their importance when considering the evaluation of scientific data in many areas, such for setting catch limits or MSY for many fish stocks and whales.

Incorporating consideration of values to the evaluation of scientific data represents a thorny problem, potentially causing significant difficulties for sovereign states striving to implement national policies in cooperation with other states via international organizations, such as in the case of Japan's whaling policy. Within an international framework such as the IWC, resolutions or decisions are adopted in accordance with the rules of procedure adopted by the member states of the international organization concerned.⁵⁴ In the case of an IWC resolution, states are required to obtain a "three fourths" majority, if they intend to pass their proposal, for example, to increase a catch limit based on scientific data. Thus, states are required to seek support from the majority. So long as a state cannot obtain the necessary votes to support its draft proposal, it cannot stick to its original policy, and is instead bound to obey the outcome of the international organization. Accordingly, international society has established common rules which are to be implemented by sovereign states, within a framework structured and regulated by said majority. Nowadays it is increasingly important for international society to cooperate and regulate issues which one state is unable to resolve alone. The number of international legal frameworks continues to increase, and with them, the international regulations, especially on international environmental issues, that stipulate states' duties. Accordingly, states' freedom to decide their own policy is also becoming gradually more restricted. One example of such might be ongoing negotiations for an international legally-binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, which might have the effect of limiting the traditional "freedom of the oceans" for each state based on UNCLOS. Consequently, so long as a state is a member of an international organization (which it increasingly must be in order to be part of international society), it is quite difficult for said state to keep its own policy in the event that it is not accepted by the majority voting in that organization.

51 See, for instance, Ministry of Agriculture, Forestry and Fisheries, Frequently Asked Questions, Q3 and Q4, <https://www.jfa.maff.go.jp/e/whale/attach/pdf/index-15.pdf>.

52 For Japanese statement, see Judgement of the ITLOS, *Southern Bluefin Tuna*, Provisional Measures, para. 42 and for Australia and New Zealand statement, para. 43.

53 This could be reflected in the states' attitude to the implementation of the precautionary principle for conservation of biodiversity.

54 IWC's rule of procedure 2018.

This brings us back to the major issue that I raised in the introduction, namely, that as systems of regulations continually expand, does each state necessarily need to lose something of its individual character, as its behavior is increasingly governed by a uniform set of values? To some extent, international society has sought to alleviate this possible problem by creating mechanisms enabling respect for diverse cultural values even in the event of an established legal framework, such as for the protection of the environment at the global level. One such mechanism is world heritage, recognized by the Convention Concerning the Protection of the World Cultural and Natural Heritage⁵⁵. Another is the recognition of indigenous peoples' rights⁵⁶, one example being the aforementioned recognition of such as aboriginal subsistence whaling⁵⁷ in the IWC. This, however, still requires majority consent: a culture needs to be recognized as an indigenous specific culture, or as an instance of world heritage, before it is afforded legal protection.

In the case of Japanese whaling culture, however, a tradition is preserved by non-indigenous peoples⁵⁸ and is unlikely to ever receive status as world heritage. This problem is not unique to Japanese whaling, however, because the majority of traditions and cultural activities qualify as neither indigenous or as instances of world heritage, meaning any could face difficulty if they diverge from the values of the majority of states.

While ostensibly indigenous or country-specific traditions can be recognized within international systems, if such traditions are rooted in values different from that of the majority comprising international society, it becomes difficult to justify the maintenance of those traditions. This is the larger problem lurking behind the whaling issue: international society recognizes "minority" rights within an international legal framework, which makes it possible to accept diversity, but if we wish to live in a society increasingly regulated through international rule-making, many complicated issues will continue to emerge – first and foremost, how we can manage different values.

This work was supported by JSPS KAKENHI Grant Number 18K01394 and 21K01284.

55 The Convention Concerning the Protection of the World Cultural and Natural Heritage, UNTS 1037, p. 151.

56 United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, UNGA RES 61/295.

57 In terms of "aboriginal", there might be some issues on determination on which Japan insisted in the past meeting of the IWC.

58 In Japan there is indigenous peoples who are recognized as such. However, Japanese whaling is not undertaken by them.

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