Introduction

Whaling is a source of issues of great interest not only for lawyers (both national and international) but also for philosophers and anthropologists. It is a topic that has been covered by numerous publications, undoubtedly excellent; however, some, while covering whaling holistically, were published before the latest important developments took place (such as the *Whaling in the Antarctic* case), while others have mainly focused on discrete legal aspects of whaling. More than a few questions of international law have been looked at from very diverse viewpoints, and, on occasion, have been the cause of highly emotional reactions. The history of whaling is certainly not short of examples where whaling emerges as a complex, conflict-ridden and divisive field.

The complexity of whaling became patently clear in the 2014 *Whaling in the Antarctic* case before the International Court of Justice (ICJ), analysis of which is contained in a subsequent chapter of the present publication. Whaling engages a plethora of legal issues, ranging from biodiversity considerations to those relating to trade and the environment, to questions of, among other things, interpretation within the context of the law of treaties. Furthermore, whaling is an example of the close link between, and the dynamic interplay of, science and law.

From a philosophical and, more specifically, ethical point of view, one could query whether animals in general (and whales in particular) have rights, and, if so, what might be the interplay of such rights with those of other rights holders. To be more precise, how might animal rights engage with the right to cultural identity not only of, say, indigenous peoples, but also of other peoples who, although not indigenous in the traditional sense, are peoples whose history is not unrelated to whaling: for instance, the Japanese, the Icelanders, the Faroese and the Norwegians. Therefore, the matters that whaling engages are certainly not limited to the field of environmental law (or the notion of biodiversity).

This collection of thematically self-standing chapters does not aim to present whaling in an all-encompassing and exhaustive manner; rather it

seeks to highlight particular issues that, for the most part, are complex and contentious in legal and ethical senses. It also provides some historical background that points towards the presence of contentious issues from the early stages of interstate whaling regulation and that are still very much present. The historical background demonstrates not only that the complexity of the issues connected to whaling is not new (but has had a rather continuous character), but also that these issues are not exclusively confined to the International Whaling Commission phenomenon.[1] From a historical perspective, the conflict between utilisation and conservation was already present during the negotiations of the first whaling conventions, and some of the main actors that were engaged in a (contentious) dialogue still play a prominent role in the whaling conflict.

The book covers contemporary issues of whaling, and includes an analysis of the 1946 Whaling Convention and its Commission. It also explores issues of whaling for commercial, aboriginal and scientific purposes.

The book provides analyses of the ethical questions relating to whaling, and introduces the doctrine of intergenerational equity as it may apply to whaling. It includes observations on the relationship between the International Whaling Convention and other multilateral environmental agreements – both global (such as the Bonn Convention on Migratory Species) and regional (such as the Agreement on Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas and the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area). It analyses the relationship of the Whaling Convention with trade (regarding the Convention on International Trade in Endangered Species of Wild Fauna and Flora). Furthermore, the book also deals with whaling outside the framework of the Whaling Convention.

Finally, it contains certain suggestions for the future, particularly in relation to methods of conflict resolution within the International Whaling Commission with regard to whaling for commercial, aboriginal and scientific purposes.

[1] This is well evidenced in the excellent book of Kurkpatrick Dorsey, *Whales and Nations: Environmental Diplomacy on the High Seas* (University of Washington Press, 2014).

1

The history of whaling

Introduction

The present chapter is devoted to outlining, albeit only briefly, the historical aspects of whaling, since, as was stated in the Introduction, this book focuses principally on current issues concerning whaling. This chapter will be primarily focused on whaling and its development throughout the centuries, with special attention to the pre-conventional and early conventional regulation. A substantial part of this chapter will be devoted to analysis of the two pre-Second World War Conventions, the 1931 Geneva Convention and the 1937 London Agreement. The main purpose of this chapter is to show that the contemporary problems concerning whaling are to some extent a continuation of the issues that existed earlier and which prompted States to conclude the above-mentioned treaties.

The 1931 and 1937 Conventions formed the basis for the 1946 Convention for the Regulation of Whaling (which will be discussed in Chapter 2). In order to fully appreciate the 1946 Convention and its role in relation to whales and whaling, it is necessary to present an analysis of previous international instruments. As will be seen, neither of the two preceding Conventions can be hailed as a success. The 1946 Convention is considered by many not to be the most effective international treaty, the reasons for which are complex and are not confined only to legal issues but also extend to scientific and political issues. However, this Convention is still operational after almost seventy years since its signing; therefore, despite the serious problems, it exhibits a certain resilience and longevity.

1.1 Pre-conventional whaling

Modern whaling began in 1868. Until that year,

> the capture of whales was as crude as it was daring: men from rowing boats would hurl hand-harpoons or bomb-lances at the swiftly moving

whale, limiting the catch to those species, such as the Right, Greenland, and Sperm Whales, which floated when dead.[1]

Whaling appears to have begun thousands of years ago, possibly as early as 2200 BC.[2] It is believed that the first organised hunt was conducted by the Basques in 700 AD, followed by the Flemish and the Normans, and then the British and the Dutch, surpassing the whaling activities of the Basques. Spain, Norway and France started whale hunting in the ninth century AD. The British, the Dutch and the Germans expanded their whaling activities to the North Atlantic. Japan and Russia are considered to have started coastal whaling in the twelfth century and the US in the sixteenth century.[3] The early period of whaling was characterised by whaling from land stations as the main method, with the use of hand-thrown harpoons and nets from rowing boats. After that, the captured whales were processed in coastal waters. Subsequent to the depletion of coastal whale resources, the period of pelagic – that is to say, in the open ocean away from the coast – whaling began.[4] Pelagic whaling also resulted in the following: the expansion of whaling techniques; Russia establishing stations in Korea; and land stations opening in many other littoral States, such as Australia and Canada.[5] With the development of new technology relating to vessels, however, land stations lost their importance. Whales were processed entirely on-board factory ships, which resulted in States expanding their operations beyond territorial waters. Whale catches also increased due to new technology, such as shell harpoons with an explosive head which detonated inside the whale, shortening the time of dying for the whale, and sonar devices and helicopters to

[1] On the history of whaling, see in particular: Richard Ellis, *Men and Whales* (New York: Knopf, 1991); L. Larry Leonard, 'Recent Negotiations Toward the International Regulation of Whaling', AJIL 35 (1941), 90–113, 91. See also: James M. Savelle and Nobuhiro Kishigami, 'Anthropological Research on Whaling: Prehistoric, Historic and Current Contexts', *Senri Ethnological Studies, No. 84, Anthropological Studies of Whaling* (Osaka: National Museum of Ethnology, 2013), pp. 1–48.

[2] Lisa Kobayashi, 'Lifting the International Whaling Commission's Moratorium on Commercial Whaling as the Most Effective Global Regulation of Whaling', *Environs* 29 (2006), 177–219.

[3] Ibid., p. 181.

[4] www.britannica.com/EBchecked/topic/449062/pelagic-zone, last accessed 27 December 2014.

[5] Kobayashi, above n. 2, 181.

track whales. In the end, the main commercial whaling concentrated on the Antarctic.[6]

Tønnessen and Johnsen have observed that old and modern whaling differ biologically, technically and economically.[7] They explain that the baleen whales caught in the past were right whales (mostly the Nordkaper), and, from about 1600 onwards, the Greenland whale.[8] In contrast, modern whaling is based on hunting rorquals, due to the fact that the stocks of right whales were in effect decimated in the nineteenth century, and so were no longer profitable. Rorquals' physical characteristics (such as their speed) required different hunting methods to right whales. This was the beginning of modern whaling.[9] The modern method (first introduced by the Norwegian Sven Foyn, off the coast of Finnmark) involved steam- or diesel-driven boats; a harpoon fired from a canon, positioned on the bow of the boat; a grenade attached to the harpoon, which exploded inside the whale; and a line attached to the harpoon, in order to haul the whale to the surface and tow it to the shore station or to a floating factory. Commercially, this method was almost exclusively aimed at the extraction of oil, demand for which played a crucial role in the development of whaling.[10] Tønnessen and Johnsen describe in great detail the rapid development of various non-humane methods of killing whales by many whaling countries, including Great Britain and the United States, but also by others such as Germany. Two such methods, developed in Great Britain, were the use of 'bomb-lances', that is to say whale shell, and exploding harpoons (invented in 1831), which were a combination of shell and a harpoon in a single projectile equipped with a line.[11]

Unlimited and unregulated whaling commenced in 1883 and lasted for twenty-one years that 'proved more than stocks of whales could stand'.[12] The whale catchers had to find new grounds, as, for instance, stocks around Northern Finnmark became entirely depleted. However, the technique of killing whales by the grenade harpoon, introduced by Foyn, remained unchanged for another hundred years.[13] Until 1883, there are no reliable data on the number and type of species caught. Tønnessen

[6] Ibid., 182–3.
[7] J. N. Tønnessen and A. O. Johnsen, *The History of Modern Whaling*, trans. R. I. Christophersen (Canberra: Australian National University Press, 1982), p. 6.
[8] Ibid., p. 5. [9] Ibid., p. 6. [10] Ibid., pp. 6–7. [11] Ibid., p. 18. [12] Ibid., p. 35.
[13] Ibid., p. 35. See also Savelle and Kishigami, above n. 1, 7.

and Johnsen are of the view that, despite the lack of data, it is without doubt that all species of whales were caught, not only blue whales.[14]

Another invention contributing to an increase in the number of whale species hunted occurred in 1921 when Peter Sørlle patented a 'slip-way' for factory ships (it was a vent through which whales could be hauled onto the deck to be flensed). This invention rendered unnecessary the presence of whalers in harbours and shores.[15] Ships whaling in waters off South Georgia and the South Shetland Islands, west of the Antarctic Archipelago, and using their harbours and shores, which were under British sovereignty, had required permits from the British Colonial Office for such activity. Therefore, the permits system could be seen as providing a degree of regulation in the pre-conventional era, given that such permits were a means of limiting whaling and controlling the industry. However, the introduction of 'slip-way' vessels made permits from the British Colonial Office redundant, thus leading to whaling reverting to its formerly unregulated state. From 1925, due to 'slip-way' use, 'pelagic whaling became the order of the day; expeditions made of catchers and factory ships could remain at sea for long periods of time, following the whale migrations, catching fresher whales, and thereby obtaining larger quantities of oil'.[16]

1.2 The history of whaling immediately before and during conventional regulation

The largest expansion in the entire history of whaling occurred in two separate periods: 1927–31 relating to Norwegian–British whaling and 1934 relating to Japanese–German whaling.

The most important factor for this expansion was the improvement in world markets following the world economic crisis of the interwar period that had affected whale oil sales and therefore production.[17] Tønnessen and Johnsen have produced figures relating to the scope of the expansion of whaling. For instance, for the period 1927–8, 13,775 whales were caught, resulting in 1,037,393 barrels of oil. During that period, there were 6 shore stations, 18 floating stations and 84 catchers. For the period 1930–1 the figures were: 40,201 whales caught; 3,608,348 barrels of oil; 6 shore stations, 41 floating factories; and 238 catchers. In relation to pelagic Antarctic whaling, in 1927–8 10,138 whales were caught,

[14] Tønnessen and Johnsen, above n. 7, p. 36. [15] Leonard, above n. 1, 91.
[16] Ibid., 92. [17] Tønnessen and Johnsen, above n. 7, p. 367.

resulting in 733,912 barrels of oil, and there were 17 floating factories and 61 catchers. In 1930–1, 37,438 whales were caught, resulting in the production of 3,384,048 barrels of oil, and there were 41 floating stations and 200 catchers.[18] These numbers clearly indicate that most whaling was conducted as Antarctic pelagic whaling; it quadrupled in the course of three successive periods. However, over-production and over-expansion coincided with the world crisis and a decrease in the price of all raw materials, which resulted in the collapse of the excess capacity (that is to say, the production capacity that was not being absorbed by market demand) in the whaling industry.[19]

Certain changes in numbers of caught whales occurred after the 1931 Geneva Convention.[20] However, the United Kingdom only ratified this Convention four and a half years after its signing, and, in the meantime, continued with its unrestricted whaling. Eighteen nations, including Norway, ratified before the United Kingdom did. 'In Norwegian quarters it was stated that Norway may be forced to abolish all restrictions, given that unrestrained British catching had created so much bitterness among Norwegian whalers that the situation was untenable.'[21] After the 1931 Convention entered into force, for the first time in the history of whaling the term 'quotas' was used in the production agreement between Norway and Unilever (the consumer goods company).[22] However, the Convention did not result in any great success, largely due to the reluctance of States and companies to adhere to a system of private quota agreements.[23]

The 1937 London Agreement on Whaling was no more successful than the 1931 Convention. Suffice it to note at this point that the primary object of the London Conference – namely, to restrict catches in order to preserve whale stocks – proved a total fiasco.[24] It failed to prevent 11,519 more baleen whales being killed and 683,815 more barrels of oil being produced than in the previous season. Antarctic pelagic whaling never

[18] Ibid., p. 385. There are some discrepancies in these numbers. For example, for the season 1930–1 the number of killed whales was, according to International Whaling Statistics, even higher at 42,874. International Whaling Statistics, vol. 13 (1939), 3–4.
[19] Tønnessen and Johnsen, above n. 7, p. 385.
[20] Convention for the Regulation of Whaling, 24 September 1931, 155 LNTS 349.
[21] Tønnessen and Johnsen, above n. 7, p. 401.
[22] Unilever is an Anglo-Dutch multinational consumer goods company co-headquartered in London and Rotterdam. Its products include food, beverages, cleaning agents and personal care products.
[23] Tønnessen and Johnsen, above n. 7, p. 406.
[24] Ibid., p. 453.

recovered after the excessive whaling of the 1930s (partly due to the increased number of whale catchers). Japan and Germany accounted for 84 per cent of the production increase in the 1937–8 period.[25] World production in the 1936–7 period totalled 3 million barrels of oil.

The London Agreement also failed to restrict the number of catchers. Between 1936 and 1937, 19 catchers were built in Norway, 20 in the United Kingdom, 40 in Germany and 28 in Japan, thus bringing the world total to 107. Out of the total number, 23 were for Norwegian companies, 30 for British, 24 for German, 28 for Japanese and 2 for Panamanian companies. The talks during the London Conference on restricting the number of whale catchers failed.[26] The late 1930s resulted in a slaughter of fin whales, due to a decrease in numbers of caught blue and humpback whales, which had been over-fished. The 1938 amendment to the London Agreement also failed.

Generally, the late 1930s were characterised by a decrease in the production of whale oil but this was due only to over-fishing, not to conservation efforts. During the Second World War, there was a slump in catches. For the 1940–1 period the figures for pelagic whaling were as follows: the Norwegians caught 2,387 whales and produced 203,317 barrels of oil; the British caught 3,116 whales and produced 229,780 barrels of oil; the Japanese (over the course of six expeditions) caught 9,992 whales and produced 622,413 barrels of oil.[27] An additional cause of concern was the number of immature whales killed. The percentage of immature blue whales killed more than doubled from 8.14 per cent in 1930–1 to 20.83 per cent in1938–9.[28]

1.3 The 1931 Geneva Convention on Whaling: circumstances leading to its conclusion

The need for the regulation of whaling was brought to the attention of the League of Nations in 1925 by M. José Suarez in his report on Codification, Questionnaire No. 7, 'Exploitation of the Products of the Sea',[29] in which he observed that the modern whaling industry was 'rapidly exterminating the whale' and added further that:

[25] Ibid., p. 454. [26] Ibid., pp. 455–6. [27] Ibid., p. 483.
[28] International Whaling Statistics, vol. 14 (1940), 10, cited in Leonard, above n. 1, 93–4.
[29] Report of M. José Suarez, 'Exploitation of the Products of the Sea'. The Committee of Experts, convened by the Council of the League of Nations (in accordance with the Assembly Resolution of 22 September 1924), was authorised after sending a

> [t]oday [whaling] is carried out with the help of a perfected form of weapon and special craft; but the increase in its scope is due to the manner in which the animal is treated once it has been killed. The extraction of the *oil*, which previously had to be done ashore, is now done in floating factories, which accelerates the process ten- or twenty-fold and renders national control impossible.[30]

Early efforts to regulate whaling were not aimed at the protection of whales but, rather, at securing a high price for whale oil. During the 1932–3 period, Norwegian whaling companies concluded production agreements for this purpose, and later secured a decision of the *Storting* (the Norwegian Parliament) to that effect. The whaling companies had limits on the absolute number of whales they could kill but the number of barrels of oil that these companies were allowed to produce could be increased by more efficient processing of the whale.[31] The minimum production was calculated per blue whale and was fixed at 100 barrels. These production agreements also concerned closed seasons; no hunting was to take place before 20 October, with the exception of South Georgia, for which there was an early start date (10 October).[32] However, British and Japanese companies did not enter into any such agreements, and continued with their activities without being subjected

questionnaire to various governments to draw up a list of questions which were 'ripe' for codification. On 7 April 1927, the Committee submitted seven questions that were ready to be codified. The question of exploitation of the products of the sea was no. 7 on the list. Report to the Council of the League of Nations on the Questions Which Appear Ripe for Codification, League of Nations Doc. C.196.M.70.1927.V, p. 122, cited in Leonard, above n. 1, 97. See also Philip Jessup, 'L'exploitation des richesses de la mer', RCADI 29 (1929), 401–514; Arnold Raestad, 'La chasse à la baleine en mer libre', *Revue de Droit International* 2 (1928), 595–642.

[30] In his Report Suarez adopted a very modern approach to the protection of natural resources of the sea and referred to the wealth of the sea as the patrimony of the whole human race, therefore: '[t]o save this wealth, which, being today the uncontrolled property of all, belongs to nobody, the only thing to be done is to discard the obsolete rules of the existing treaties, which were drawn up with other objects, to take a wider view, and to base a new jurisprudence . . . on the scientific and economic considerations which . . . may be put forward, compared and discussed at a technical conference by the countries concerned'. Reproduced in Shabtai Rosenne (ed.), *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* (1970); League of Nations, *Committee of Experts on the Progressive Codification of International Law (1925–1928),* 2 vols. (1972); League of Nations, *Conference on the Codification of International Law* (1930), 4 vols. (1975), at 146.

[31] Leonard, above n. 1, 96.

[32] International Whaling Statistics, vol. 5 (1934), 2, cited in Leonard, above n. 1, 96.

to any regulation. Soon, this resulted in Norwegian companies returning to unrestricted whaling.

There were certain oddities in the League of Nations' timid attempts at regulating the whaling industry.[33] For example, leadership on the work on whaling under the auspices of the League of Nations (in conjunction with ICES)[34] was provided by Johan Hjort, a Norwegian who also on occasion (and unofficially) represented whale oil industrial interests, including at the meeting in Geneva that had led to the first treaty on the conservation of whales. It appeared to be a daunting task to reconcile the interests of the expanding whaling industry (in the 1920s) with the welfare of whales. The United Kingdom made diplomatic efforts to head off 'ill-conceived and embarrassing proposals, which seemed to be anything coming from the League of Nations'.[35] These 'embarrassing' proposals related to the attempts to regulate whaling, including closed seasons, a cap on whaling, sanctuaries and generally concluding an international convention.[36] However, in the years leading to the conclusion of the 1931 Convention two leaderships emerged: Norway with regard to legal matters; and the United Kingdom with regard to scientific research. These two leading whaling nations were not always in agreement, and had very different ideas relating to one of the most basic questions: how and when whale migration took place. However, the expansion of whaling was so great that Hjort was of

[33] See excellent monographs on the history of whaling, including contemporary issues, by Kurkpatrick Dorsey, *Whales and Nations: Environmental Diplomacy on the High Seas* (University of Washington Press, 2014), p. 36; and Graham Burnett, *The Sounding of a Whale. Science and Cetaceans in the Twentieth Century* (University of Chicago Press, 2012), in particular chapters 1–3.

[34] The International Council for the Exploration of the Sea (ICES) is a global organisation that develops science and advice to support the sustainable use of the oceans. Established in 1902, originally for the purpose of setting up a forum to discuss aspects of marine research, ICES evolved into a leading collector of marine information, bringing together scientific experts from a broad range of specialties: www.britannica.com/EBchecked/topic/290834/International-Council-for-the-Exploration-of-the-Sea-ICES, last accessed 27 December 2014. ICES is a network of more than 4,000 scientists from over 350 marine institutes in 20 member countries and beyond. 1,600 scientists participate in ICES activities annually. Through strategic partnerships its work is also extended into the Arctic, the Mediterranean Sea, the Black Sea and the North Pacific Ocean. ICES advances this through the coordination of oceanic and coastal monitoring and research, and advises international commissions and governments on marine policy and management issues: www.ices.dk/Pages/default.aspx, last accessed 27 December 2014.

[35] Cited in Dorsey, above n. 33, p. 36. [36] Ibid., p. 36.