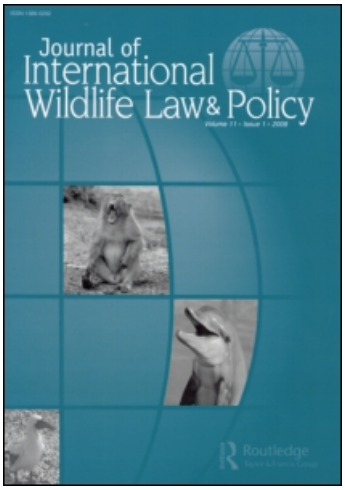


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Vassili Papastavrou; Patrick Ramage

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# Commercial Whaling by Another Name. The Illegality of Japan's Scientific Whaling: Response to Dan Goodman

VASSILI PAPASTAVROU[1]
PATRICK RAMAGE[2]



If Goodman[3] were correct that Japan's whaling is fully consistent with the International Convention for the Regulation of Whaling (ICRW), then what would be the point of the Convention and the International Whaling Commission (IWC) that was set up under it? Throughout its history, any decision by the IWC could have been sidestepped by any party at any time, simply by invoking Article VIII of the Convention, the provision that permits whaling for special purposes, more commonly known as scientific whaling. Yet since 1946, most countries have abided by the great majority of the IWC's decisions.

Goodman refers to two independent panels of experts that were commissioned by the International Fund for Animal Welfare to provide expert advice on the legal issues surrounding use of Article VIII. *The Report of the International Panel of Independent Legal Experts on: Special Permit ("scientific") Whaling under International Law* resulted from the work of a panel convened in Paris in May 2006 (the Paris Report). Subsequently, a second panel was convened in London and reported on *The Taking of Sei and Humpback Whales by Japan: Legal Issues Arising under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)* (the London Report).[4]

Goodman suggests the reports should be relegated "to the status of IFAW propaganda," ignoring the independent nature of the two panels and their members, all of whom are internationally recognised and distinguished

[1] Author for correspondence, International Fund for Animal Welfare, 290 Summer Street, Yarmouth Port, MA 02675, USA. E-mail: VPapastavrou@ifaw.org
[2] Whale Program Director, International Fund for Animal Welfare, 290 Summer Street, Yarmouth Port, MA 02675, USA.
[3] D. Goodman, *Japan's Research Whaling Is Not Unlawful and Does Not Violate CITES Trade Rules*, 13 J. INT'L WILDLIFE L. & POL'Y (2010), this issue.
[4] Both reports are available from http://www.ifaw.org/legalpanelreports

lawyers with independent practices.[5] Following the publication of the London Report, its main findings were also published in the peer-reviewed literature,[6] and as Goodman himself acknowledges, both reports were presented by panel members to the 103rd Annual Meeting of the American Society of International Law (ASIL).

Goodman often quotes the panel reports selectively. For example, he states that the "Paris Panel's conclusion" is "that Japan's research whaling in the Antarctic is unlawful." However, that conclusion is much more general, stating that the scientific whaling conducted by "some members of the IWC" is unlawful: it therefore refers also to the scientific whaling conducted by Japan in the North Pacific and that conducted by Norway and Iceland since the moratorium. And it is not the only conclusion. The panel also concluded that there is strong evidence that such scientific whaling is in violation of the commercial whaling moratorium and raised serious questions of compliance with the UN Convention on the Law of the Sea (UNCLOS). In addition to UNCLOS, serious questions of compliance with a variety of other conventions were identified, including the Convention on Biological Diversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the Convention on the Conservation of Antarctic Marine Living Resources.

According to Goodman the Paris panel "got it wrong" because it based its conclusions on a "minority report attached to the report of the Scientific Committee." However, the facts are as follows. In 2006, a statement made by scientists from a *majority* of countries represented at the IWC Scientific Committee made a number of points regarding the review of the Second Phase of the Japanese Whale research programme under Special Permit in the Antarctic (JARPA II). The full Scientific Committee refers to its comments as follows: "[The group] objected to the review of the JARPA II proposal because the Committee has had no opportunity to conduct a formal review of the results of the original JARPA programme," and, "These members further stated that they had substantial concerns about all aspects of the JARPA II proposal, but that it would be inappropriate to provide a detailed critique

[5] The panel members of the Paris Report were Professor Philippe Sands, Ambassador Alberto Szekely, Ambassador William Taft IV, Professor Laurence Boisson De Chazournes, Professor Pierre-Marie Dupuy, Professor Donald Rothwell, and Kate Cook (rapporteur). The panel members of the London Report were Professor Peter Sand, Professor Philippe Sands, Ambassador Alberto Szekely (co-ordinator), and Kate Cook (rapporteur).

[6] P.H. Sand, *Japan's "Research Whaling" in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)*, 17 REV. EUR. COMMUNITY & INT'L ENVTL. L. 56 (2008); P.H. Sand, *Japan's "Forschungswalfang" und das Washingtoner Artenschutzabkommen (CITES)*, in FRIEDEN IN FREIHEIT / PEACE IN LIBERTY / PAIX EN LIBERTÉ: FESTSCHRIFT FOR MICHAEL BOTHE 681 (A. Fischer-Lescano et al., eds., Nomos-Dike, 2008); and P.H. Sand, *"Scientific Whaling": Whither Sanctions for Non-Compliance with International Law?*, 18 FINNISH Y.B. INT'L L. 187 (2007).

until after a JARPA review had been conducted by the IWC."[7] Thus, Japan presented its second proposal for a continuation of scientific whaling in the Antarctic before taking into account any comments by the IWC on the results of the first programme.

An additional problem that the IWC had to contend with at that stage was that the proponents of JARPAII were also involved in the review process. Inevitably, these scientists would support their own proposal. The science of Japan's scientific whaling has received major criticisms[8] both within and outside the IWC. A legal journal is the wrong place for Goodman's efforts to justify the scientific merits of Japan's scientific whaling, which do not in any event address these criticisms.

Goodman does not contest the London Panel's conclusion that, "the taking of sei whales in the North Pacific and the proposed taking of humpback whales *plainly constitute international trade in the form of 'introduction from the sea'* under Article III.5 of the CITES Convention." However, he does object to the Panel's conclusion that, "the current and proposed takings of humpback and sei whales, as well as other whale species (minke and fin whales), are for *primarily commercial purposes*, having regard to the provisions of the CITES Convention and the terms of Conference Resolution 5.10." Goodman's assertion is simply that Japan has sole responsibility for determining whether the import is for primarily commercial purposes and that Japan states that the primary purpose is research.[9] However, CITES Resolution 5.10 states unequivocally that "all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature, with the result that the importation of specimens of Appendix I species should not be permitted." Goodman does not dispute the fact that all humpback whales and North Pacific sei whales are Appendix I (fully protected) species, for which Japan has no reservations. Consequently, the London report notes that:



[7] IWC, 8 J. CETACEAN RES. & MGMT. 49 (2006 Suppl.).

[8] For a brief summary of the scientific issues, see, for example, V. Morell, *Killing Whales for Science?*, 316:5824 SCIENCE 532 (2007); N. Gales, T Kasuya, P.J. Clapham, and R. L. Brownell, *Japan's Whaling Plan Under Scrutiny: Useful Science or Unregulated Commercial Whaling?*, 435 NATURE 883 (2005); P. Corkeron, *Reconsidering the Science of Scientific Whaling*, 375 MARINE ECO. PROGRESS SERIES 305 (2009).

[9] Goodman relies on an informal e-mail from the Secretary-General of CITES to the UK Management Authority (dated November 7, 2007; i.e., after the London Report) suggesting that Japan is "solely responsible" for a determination as to whether imports are commercial or scientific. Yet, the CITES Secretariat has no legal mandate or authority whatsoever for authentic treaty interpretation, which is the undisputed prerogative of the Conference of the Parties (by way of conference resolutions adopted by a two-thirds majority); see P.H. Sand, *Endangered Species: International Protection*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed., Oxford University Press, 2009, available online at http://www.mpepil.com).

> Any certificate granted by the Japanese Management Authority in circumstances where the specimens are to be used for primarily commercial purposes would be invalid and the issue of a certificate in these circumstances would constitute a breach of Article III.5(c) of the [CITES] Convention by Japan;

Nor is it correct for Goodman to state that there was no comment in the panel reports on the words that introduce ICRW Article VIII, "Notwithstanding anything contained in the convention." This is dealt with in the Paris Report from paragraphs 42 onwards. Specifically, the Report states in paragraphs 52 and 53 that:

> 52. *Article VIII as an Exemption*: "We note that Article VIII is framed as creating an exemption to the operation of the Convention (Article VIII.1). As an exemption to the general rules applied under the Convention, it should be construed narrowly. Furthermore, in order for that exemption to apply (and for scientific whaling to be lawful under the ICRW), the conditions for the grant of special permits must all be met. Specific conditions for the grant of special permits arise from the language of Article VIII itself and from the IWC Guidelines for the Review of Scientific Permit Proposals adopted by the IWC for the purposes of the review provided for in paragraph 30 of the Schedule . . . . . ." and;
>
> 53. "*Specific Conditions*: The first specific condition which arises in relation to the operation of Article VIII is that any whaling conducted pursuant to that Article must be carried out "for the purposes of scientific research." In our view, the ordinary meaning of the phrase "for the purposes of" entails that the whaling is conducted exclusively for those purposes and not only incidentally for those purposes. Clearly a situation where the whaling was not genuinely conducted for the purposes of scientific research would not fall within the exemption laid down in Article VIII."

These are straightforward legal arguments. Either science is the primary reason for conducting the whaling, or it is being used as a way of getting around the IWC's regulations. In the case of Japan, the motives for scientific whaling are made explicit by Dr. Seiji Ohsumi,[10] a previous director-general of Japan's Institute of Cetacean Research (the organization that conducts Japan's whaling), "Through scientific research we have continued to strive for [a resumption of whaling] while safeguarding our whaling culture and whaling technology." Such candor and similarly forthright comments even in recent weeks by Foreign Minister Katsuya Okada lead inescapably to the conclusion that Japan's

[10] Introduction by S. Ohsumi, in S. Ohsumi and Y. Umezaki, MISINFORMATION: THE PROTEST AGAINST JAPAN'S SCIENTIFIC WHALING 3 (Institute of Cetacean Research, March 1, 2000).

scientific whaling is motivated by a desire to maintain commercial markets and infrastructure, hard as it may be for Goodman to find.[11]



[11] *See* for example, *The Australian* (December 11, 2009), where Okada is quoted as saying, "We should try to discuss this issue in a calm, not emotional way. Because our ancestors, we have a tradition in Japan where we have been eating whalemeat": http://www.theaustralian.com.au/news/world/well-continue-whale-kill-japan-insists/story-e6frg6so-1225809220883