

Weighing the evidential value of expert opinion: The *Whaling Case*

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1. Introduction

The question of how the International Court of Justice (ICJ) uses experts in disputes involving complex scientific issues seems to be a *trend topic* in academic discussions on international litigation. The two commentaries offered by professors Mbengue and Scovazzi shed significant light on several questions raised after the *Whaling in the Antarctic* judgment rendered by the Court.¹ Both authors agree that the function of the experts in this case was fundamental. They also agree that some problems remain open.

From a theoretical viewpoint, the experts' function in judicial proceedings is generally understood as the translation of the scientific knowledge (or facts) to the legal word. They assist judges, as mentioned by Scovazzi, 'to determine the relevant facts and to qualify them in connection with the relevant legal provisions'.² But, as said by Mbengue, 'it remains for the Court to discharge exclusively judicial functions, such as interpretation of legal terms, legal categorization of factual issues, and assessment of the burden of proof'.³

Judges frequently make use of a number of general criteria for assessing the evidence presented by the parties. In particular, they identify

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¹ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Judgment), 31 March 2014, <www.icj-cij.org/docket/files/148/18136.pdf>.

² T Scovazzi, 'Between law and science: Some considerations inspired by the Whaling in the Antarctic judgment' (2015) 14 QIL-Questions of International Law 15.

³ M Mbengue, 'Between law and science: A commentary on the Whaling in the Antarctic case' (2015) 14 QIL-Questions of International Law 8-9.

distinct elements that may increase and decrease the evidential weight of certain means of proof.⁴ This has also been the approach followed by the ICJ. Guided by the principle of the free assessment of evidence⁵, the ICJ emphasized that ‘within the limits of its Statute and Rules, it has freedom in estimating the value of the various elements of evidence’.⁶

Taking that into account, one of the questions on which further reflections might be appropriate concerns the evidential value attributed by the ICJ to expert opinions. Given that the ramifications of the issue were not fully analyzed by the authors, I would like to offer some reflections on the criteria, if any, used by the Court for evaluating the expert evidence presented by the parties in the *Whaling* case. The determination of the criteria used by the Court when assessing the evidential weight of expert opinions are relevant because they may provide guidance for the parties in future cases; they also serve to better grasp the role of the experts in the ICJ’s case law.

2. *The evidential weight of expert opinion in ICJ’s case law*

When assessing the evidence presented by the parties, the Court frequently finds it appropriate to identify some general criteria for determining the weight to be given to the different evidence. In *Nicaragua* the Court observed that it gives greater evidential weight to statements

⁴ On the issue, see J H Langbein, ‘Historical Foundations of the Law of Evidence’ (1996) 96 Columbia L Rev 1168-1202; A Keane, P McKeown, *The Modern Law of Evidence* (OUP 2012) 31-32; N Monaghan, *Law of Evidence* (CUP 2015) 34, 55-62; A Riddell, B Plant, *Evidence Before the International Court of Justice* (BIICL 2009) 123-201; C F Amerasingue, *Evidence in International Litigation* (Martinus Nijhoff 2005) 185-210; C N Brower, ‘The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence’, in R B Lillich (ed), *Fact-Finding Before International Tribunals* (Transnational Publishers 1991) 147-153; N O’Malley, *Rules of Evidence in International Arbitration: An annotated Guide* (Routledge 2012) 197-201.

⁵ See R Kolb, *The International Court of Justice* (Hart 2012) 930; Ridell, Plant (n 4) 187.

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep para 60.



made by persons who had direct access to the facts in dispute⁷ or to testimonies which presented ‘evidence which is contemporaneous with the period concerned’.⁸ Similarly, in the *Genocide* cases (*Bosnian* and *Croatian*) the Court seemed to give greater evidential weight to statements ‘made by State officials or by private persons *not interested in the outcome of the proceedings*’⁹ and it also stressed that ‘it will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them’.¹⁰

When determining the criteria used by the Court for weighing the evidence, a certain caution is in order. Thus, the Court’s evaluation on witnesses is not absolute and the ‘case by case’¹¹ approach seems to be the main rule.

With regard to the evaluation of expert opinions, the criteria seem to vary according to the different categories of experts that appear before the Court. Mbengue and Scovazzi reconstructed the mosaic of different procedures of appointment and examination of the four distinct categories of experts: *invisible experts*, independent experts in the sense of Article 50 of the Statute, expert counsel and, finally, the party-appointed experts in the sense of Articles 57 and 64 of the Court’s Rules. Depending on the type of experts, the evidential value of their opinion may vary.

In the *Corfu Chanel* case, for instance, when referring to the independent experts appointed under Article 50, the Court stated that ‘it cannot fail to give great weight to the opinion of the Experts who exam-

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) 3 February 2015, <www.icj-cij.org/docket/files/118/18422.pdf>, para 222.

⁸ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 731.

⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 5) para 197, referring to *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (n 6) 731.

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep para 213, referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 41.

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 5) para 196: ‘In determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made’.

ined the locality in a manner giving every guarantee of correct and impartial information'.¹²

As to expert counsels, in the *Pulp Mills* case the Court was rather critical towards their use by the parties. According to the Court, the expert counsels should be tested by cross-examination. One may therefore assume that subjecting experts to cross-examination would enhance the evidential weight of their opinions.¹³ Be that as it may, in the *Pulp Mills* case the Court seemed to give little evidential weight to this category of expert. The Court's criticism seems to have been taken into account by the parties in the *Whaling* case, where expert counsels were not used.

Since the Court has never mentioned in its reasoning that it had made recourse to invisible experts, it is hard to say what could be their evidential weight. As observed by Mbenge and Scovazzi, this instrument is characterized by the lack of transparency and entails a sacrifice of the parties' right to examination. These are elements that justify the criticism addressed against it. In principle, if in the Court's view one of the shortcomings of the expert counsel is the absence of cross examination, it can be noted that the same applies to the evidence *invisibly* presented by the expert *phantôme*.

The last category is that of experts indicated by the parties in accordance to Articles 57 and 64 of the Court's rules. In the Court's practice they have been frequently qualified as witness-experts,¹⁴ since they testify on questions of fact and also according to their technical

¹² *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 21.

¹³ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment of 20 April 2010) [2010] ICJ Rep 72: 'The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court'.

¹⁴ In cases where a person gives their declaration about certain facts but also assesses these facts from their technical or scientific point of view this person is invited to make a declaration as a witness, in the sense of article 64 (a) of the Court's Rules, and also as an expert, in the sense of article 64 (b) of the Court's Rules. As defined by President Higgins, 'the term [expert-witness] refers to a person who can testify both as to knowledge of facts, and also give an opinion on matters upon which he or she has expertise' (R Higgins, *Speech by H.E. Judge Rosalyn Higgins to the Sixth Committee of the General Assembly*, on 2 November 2007, UN DOC A/C.6/62/SR.2). About the issue, see C Tams, 'Article 51' in A Zimmermann, C Tomuschat and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2012) 1263.

knowledge. With respect to this category of experts the Court's case law did not offer much guidance on the question of their evidential weight. The question I intend to address is whether some criteria emerged from the judgment in the *Whaling* case.

3. Evaluating the evidential weight of expert opinion in the Whaling case

It can be said from the outset that, unlike in other cases, in its judgment in the *Whaling* case the Court did not expressly identified general criteria relating to the evidential weight of the expert opinions. There are no statements in the judgement openly identifying factors that increase or decrease the evidential weight of an expert opinion. However, the judgment raises a number of interesting issues in this respect. Moreover, some significant elements can be inferred from the analysis of the Court's general approach to the evidence presented by the experts.

A first issue which is worth examining concerns the selection of the individuals appointed as experts by the parties. The question is whether it would be appropriate for the parties to appoint individuals who were directly involved in the case having acted as experts of one of the parties in relation to the programme or activity which gave rise to the dispute.

In this respect it can be noted that Japan had refrained to appoint as experts the Japanese scientists who were involved in JARPA II. The Court did not fail to notice it. However, it is hard to infer from the judgment what could be the Court's preference on this point.

When examining the use of lethal methods in the JARPA II program the Court stressed that it 'did not hear directly from Japanese scientists involved in designing JARPA II'.¹⁵ A member of the Court asked Japan what analysis it had conducted on the feasibility of non-lethal methods prior to setting the sample sizes for each year of JARPA II. Japan did not offer other satisfying documents to clarify this issue and, eventually, the Court concluded that '[t]he absence of any evidence pointing to consideration of the feasibility of non-lethal methods was not explained'.

¹⁵ *Whaling in the Antarctic Case* (n 1) para 138.



From these two passages, one is left with the impression that the Court tacitly criticized the absence of a *certain* type of expert, i.e. an expert that Japan could have indicated to sustain its position. In this respect, the ‘non-explanation’ of this absence appears to have weakened Japan’s argument.

As a counter-argument, one could say that the decision not to appoint Japanese experts who had participated in the development of the JARPA II program was justified by the need to avoid a ‘biased witness’.¹⁶ It could be observed that, if Japan had appointed experts who had participated in the JARPA II program, the Court would have given little evidential weight to the evidence presented by them since ‘a member of the government of a State (...) tends to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause’.¹⁷

The last observation raises a more general issue which concerns the possibility of transposing some of the general criteria established by the Court with regard to the evidential weighing of witnesses to that of experts. While in principle this possibility cannot be excluded, the judgment did not say anything on this point. Interestingly, the Court appeared to take into consideration when the expert’s opinion collided with the position taken by the State that appointed him. Thus, the Court took into account the criticism of the expert appointed by Japan, Mr. Walløe, with reference to the transparency of the activities performed by the JARPA II program.¹⁸ The fact of giving relevance to expert opinions which contradict the State’s position finds correspondence in the criterion according to which weight must be given to declarations made by the State’s officials when these declarations are unfavourable to the State.¹⁹

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 5) para 213; *Military and Paramilitary Activities in and against Nicaragua* (n 6) para 64.

¹⁷ *Military and Paramilitary Activities in and against Nicaragua* (n 6) para 70.

¹⁸ *Whaling in the Antarctic Case* (n 1) para 159.

¹⁹ *Military and Paramilitary Activities in and against Nicaragua* (n 6) para 64: ‘The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them’.



With regard to the Court's general approach to the assessment of expert opinions, an aspect which emerges from the judgment is that the Court seemed to give particular importance to the existence of an agreement between the opinions expressed by the experts appointed by the parties. For instance, when assessing the transparency of the Japanese program, the Court observed that '[t]he evidence shows that the JARPA II Research Plan lacks transparency in the reasons for selecting particular sample sizes for individual research items. This is a matter on which the experts called by the two Parties agreed, as described above'.²⁰ It also emphasized that 'the process used to determine the sample size for minke whales lacks transparency, as the experts called by each of the Parties agreed'.²¹

To the same vein, the Court gave relevance to the fact that the opinion expressed by an expert appointed by a party had not been contested by the other party. Thus, when assessing whether the number of whales killed was reasonable according to the scientific purposes of the JARPA II program, the Court, referring to the opinion expressed by the expert appointed by Australia, noticed the fact that 'Japan did not refuse this expert opinion'.²²

It is certainly not surprising that the Court attached importance to the existence of an agreement between experts or to the fact that the opinion of one expert was not contested by a party. If the parties bear the burden of proof, it is fair to give importance to the agreement of the experts presented by them in regard to the facts and circumstances of the case. However, the overall impression is that the evidential weight given by the Court to expert opinions was directly related to the extent that they allowed the Court to identify the emergence of a *consensus* between the parties regarding a certain fact or scientific data. In this logic, the interest in having experts in the proceedings lies in the fact that they permit to reveal the existence of an agreement between the parties with regard to the scientific facts in dispute. Accordingly, the evidential weight of expert opinions appears to be closely connected to their contribution to the emergence of that agreement. In this respect, the 'search' for consensus appears, to some degree, to have a greater role

²⁰ *Whaling in the Antarctic Case* (n 1) para 188.

²¹ *Whaling in the Antarctic Case* (n 1) para 225.

²² *Whaling in the Antarctic Case* (n 1) para 190.



than the ‘search’ for scientific truth. This appears to conform to the adversarial logic that governs the Court’s proceedings.

As noted by Scovazzi,²³ a problem arises when experts take different positions on controversial questions of technical and scientific nature. Interestingly, in the *Whaling* case, the Court, when confronted to strongly different opinions, refrained to take a position in favour of one or the other expert. The Court sometimes considered that ‘[t]his disagreement appears to be about a matter of scientific opinion’²⁴. With regard to the experts’ disagreement about the determination of the criteria for establishing the meaning of the expression ‘scientific research’, in the sense of Article VIII of the Whaling Convention, the Court invoked the distinction between questions of fact and questions of law: since the interpretation of the expression ‘scientific research’ is a question of law,²⁵ it was for the Court to solve this question, without decisively taking into consideration the indications offered by the experts. In the Court’s view, even if, ‘as a matter of scientific opinion, the experts called by the Parties agreed that lethal methods can have a place in scientific research, while not necessarily agreeing on the conditions for their use’, ‘[t]heir conclusions as scientists, however, must be distinguished from the interpretation of the Convention, which is the task of this Court’.²⁶

4. Conclusion

The appearance of party-appointed experts in the *Whaling in the Antarctic* case helped the Court to ascertain the scientific facts underlying the dispute. While the Court did not set general criteria for assessing the evidential weight of expert opinions, the Court’s judgment offers food for thought in respect to such issue. In future cases, more attention can be expected from the parties regarding the appointment and the examination of party-appointed experts. Hopefully, the judgment in cases now pending before the Court, such as the *Construction of a Road in Costa Rica along the*

²³ Scovazzi (n 2) 28.

²⁴ *Whaling in the Antarctic Case* (n 1) para 134.

²⁵ Mbengue (n 3) 5.

²⁶ *Whaling in the Antarctic Case* (n 1) para 82.



San Juan River and Certain Activities carried out by Nicaragua in the Border Area cases, might offer further guidance on it.

