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# EJIL Debate. The Whaling case and the Duty to Cooperate: Responding to Professors Thirlway and d'Aspremont

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I am puzzled by the very terms of the debate between Professors Thirlway and d'Aspremont for several reasons. First, there is a considerable ambiguity in both Japan's argument and the Court's position as to the legal effects yielded by the IWC resolutions. Hence, it is inevitable to have a variation of interpretations. Second, I believe that the determination of the implications of the judgment should not be made dependent on an "objectivised" subjective intention of the Parties or the Court — a task which is no work for legal scholars anyway.

Yet, my main source of puzzlement lies elsewhere. While the focus of Thirlway and d'Aspremont's debate is on the Court's position on Article 31 of the VCLT with regards to Japan's non-assertion to the resolution, I submit that the most ground-breaking part of the judgment is that the Court brought back the legal effect of the resolutions from the backdoor, that is via the concept of 'the duty to cooperate'. In this post, I would like to draw the attention of the readers to the unique characteristic of the duty to cooperate referred to in the Whaling case, and the possible necessity for a new conceptual framework. In particular, I argue, neither the logic of sources nor the logic of interpretation can sufficiently explain what the Court did with the duty of to cooperate. In doing so, I want to show that Professors Thirlway and d'Aspremont, despite the appearance of stark opposition, both confined themselves to choices between orthodox understanding of 'interpretation' and 'sources', hence failing to address the central question at the heart of their exchange. This will lead me to question the very argumentative framework of 'logic of interpretation' and 'logic of sources' put forward by Professor d'Aspremont in his EJIL article and discussed by Hugh Thirlway in his rebuttal.

According to the reading of the case proposed here, one of the main questions before the Court in the Whaling case was whether JARPAII was in accordance with Japan's obligations under the International Convention for the Regulation of Whaling. In debating if JARPAII was conducted for the purposes of scientific research, Australia and New Zealand argued that the resolutions of the IWC should be taken into account with regards to the meaning of scientific research under article VIII under the Whaling Convention. On the other hand, Japan replied that it did not support the resolutions and the resolutions do not bind the member states. The Court held that the IWC resolutions were adopted without support of all member states including Japan, and such resolutions cannot be regarded as subsequent agreement nor subsequent practice under Article 31.3(a) and Article 31.3(b) of the VCLT. (para.83). The Court also held that if such resolutions are adopted by consensus or by a unanimous vote, they may be relevant. (para. 46). However, the Court concluded that while JARPAII involved activities that could be broadly characterised as scientific research, the evidence of JARPA II's

design and implementation did not establish that it was 'for purposes of scientific research' pursuant to the Whale Convention article VIII. (para. 227) In drawing this conclusion, the Court stated there was Japan's 'duty to cooperate' with the IWC and the Scientific Committee, which is an obligation for all member states under the Whale Convention. (para. 83)

With regard to this duty to cooperate, the Court concluded that JARPAII's design and implementation did not adequately take into account the possibility of non-lethal methods (judgment paras. 225-227). In so holding, the Court pointed out that the IWC resolutions and Guidelines call upon States parties to take into account whether research objectives can be achieved using non-lethal methods. (para.137) Contrary to the earlier consideration on subsequent practice or subsequent agreement, the Court drew no distinction between resolutions adopted by consensus or a unanimous vote and those that were without support of all member state in assessing the standard of conduct that fall within purpose of scientific research. In other words, the deployment of non-lethal methods was incumbent upon all member States to the Whale Convention by virtue of the duty to cooperate – the obligation to 'give due regard' (para. 137) to the content of obligation — which is defined "objectively", that is regardless of each party's assertion to resolutions (member States, once part of the Convention, having no means to refuse the ex post content of obligation by either consent or argument of opposability). This duty to cooperate is a mechanism to create bindingness that connects the standard setting under the resolutions (non-binding by nature) and the member states who did not support the resolution.

The question — which neither the Court, nor Professors Thirlway and d'Aspremont addressed — is where this duty to cooperate comes from. The Court mentioned that the IWC resolutions and Guidelines call upon States parties to take into account whether research objectives can be achieved using non-lethal methods. (para. 137) However, the Court is not at all clear on which basis the duty to cooperate 'binds' member States. In this respect, it is worth emphasizing that Japan accepted that it has a duty to give due consideration to these recommendations, but emphasized that they are not binding. (para.80)

Professor d'Aspremont touched upon the 'duty to cooperate' part of the Judgement in his EJIL article as interpretation outside of Article 31 of the VCLT. Professor d'Aspremont argues that the Court and the ILC recognizes implicit or explicit support by all parties is not necessarily required for subsequent practice that does not qualify Article 31.3(b). (p.1038) While this argument – the logic of interpretation – seems to provide a rather orthodox ground for identification of the content of obligation, it does not explain the basis of bindingness of the resolution under 'the duty to cooperate'. In that sense, d'Aspremont, despite carefully distinguishing between sources and interpretation, seems to presume that bindingness can be derived from the Whaling Convention itself. Furthermore, he does not explain the reason why interpretation outside of the Article

31.3 does not require the support by the parties as to the legal effect of non-binding instruments. Hence his argument does not explain how the duty to cooperate binds the parties. It is argued here that such a presumption of bindingness is not at all self-evident.

It should be recalled in this respect here that some judges took pains to explain the duty to cooperate through the concept of a regime. Judge ad hoc Charlesworth (Australia) considers that the concept of a duty of cooperation 'is the foundation of legal regimes dealing (inter alia) with shared resources and with the environment' (Separate Opinion, para. 13) While the Court did not elaborate on the Convention's status as a regime, ad hoc Judge Charlesworth points out that the object and purpose of the Convention to create 'a system of international regulation' for the conservation and management of whale stocks. In doing so, she refers to the monitoring role of the IWC given under Article VIII. (para.13) In this regard, it is useful to point out that the typical example of such a regime framework is the United Nations Framework Convention on Climate Change (hereafter the UNFCCC). As is well-known, the design of "framework conventions" leaves the substantial content of rules to be worked out in the subsequent instruments i.e. the decisions by the Conference of Parties (hereafter the COP). However, unlike the Whaling Convention, the UNFCCC and many other framework conventions explicitly define its ex-post norm creating characteristic, and furthermore, decision by the COP are usually made by consensus.

Be that as it may, and irrespective of whether the Whaling Convention and its associated instruments can be construed as any kind of regime, or whether the characteristic of 'regime' justifies the duty to cooperate and its said function, it remains that the finding of a duty to cooperate by the Court in the Whaling case constitutes its most ground-breaking move. Indeed, this construction allowed the Court to bind member States 'objectively' without them being able to evade it through consent or opposability. Such a move cannot be justified solely through the logic of interpretation. In doing so, the Court ended up generating bindingness in a novel way, that does not seem to fit within traditional treaties or customary international law where member states can, to some extent, prevent being bound by an obligation. This is, in my view, the real novelty of the Court's Whaling judgment.