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Whaling into a Spider Web? The Multiple International Restraints to States' Sovereignty

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The International Court of Justice's (ICJ) decision in *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)* will hardly be included in the restricted collection of cases that have prompted spectacular developments of international law.[1] Its technical complexity and its demure tone may discourage scholars from drawing from it implications going beyond the particular dispute decided by the Court. Yet, a meticulous analysis will reward the patient reader and will highlight some major developments disguised in the folds of the reasoning of the Court. Three profiles, in particular, deserve careful attention.

First, the International Court of justice mingled quite innovative formal obligations and informal law to determine a complex legal framework on the basis of which the case was finally settled. Second, it made an equally creative use of subsequent practice as a technique of interpretation of the conventional provisions governing the case. Third, it clarified the respective role of states' margin of discretion and international supervision in the context of what commentators have characterized as a silent application of the proportionality test.

In spite of their logical autonomy, these three issues are closely related in the solution of the case. Comprehensively considered, they evidence the role of informal legal techniques and methodologies in interpreting international obligations. In the light of the growing importance of the formal rules of interpretation codified by the Vienna Convention on the Law of Treaties, this notation seems to be remarkable by itself.[2] From a more general perspective, the decision sheds some light on the role of these techniques in materializing the content of undetermined obligations and to solve the real or apparent conflicts between international obligations.

These preliminary remarks may illustrate the aim of this symposium. It intends to offer a collection of monographic studies focusing on each of the three issues mentioned above, with the hope that their combined reading may advance the scientific

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1 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, 31 March 2014, [2014] ICJ Reports 226.

2 Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

knowledge of a relatively overshadowed aspect of international law. In the first article, Jean d'Aspremont will explore the relationship between formal law and informal standards. From this study, he will draw interesting implications on the fuzzy line dividing the process of law-making from that of law determining. The second article, by Stefan Raffeiner, concerns the role of subsequent practice in the process of interpreting treaties, with a focus on the relevance of practice performed by only some of the states parties to a treaty. The third article, by the present author, will try to follow a particularly controversial line of argument from the decision, which attempted to reconcile the irreconcilable: states' discretion and proportionality review. In the view of this author, the two conceptual schemes – the doctrine of the margin of appreciation and the apparently antithetical model of proportionality – actually complement each other and may contribute to appropriately balancing the interest of exerting a strict review of proportionality with the need to allow a certain degree of autonomy in the interpretation of undetermined legal notions.

We hope that these three studies may serve to shed some light, at least minimally, on the overall subject of this symposium: the role of informal law-making in reconciling states' sovereignty and international obligations.