The Legal Nature of Resolutions of Intergovernmental Organizations:

The Contribution of the Whaling in the Antarctic Case

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The legal nature of resolutions adopted by Intergovernmental Organizations (IGO), the latter understood as international organizations established through intergovernmental agreement, is a topical issue in international law. The Whaling in the Antarctic Case, where this issue played a central role as evidenced not only by the decision itself, but also by the many separate and dissenting opinions specifically devoting attention to it, provides sufficient reason to revisit this topic.

Difficulties often occur when appreciating the correct value to be attributed to different kind of documents that emanate from such IGOs. In order to assess this issue in its proper context, it appears essential to briefly recall why IGOs saw the light of day in the first place. This will explain why, especially in technical matters, the need was felt at a particular moment in time for States to cooperate with one another on a basis which not only superseded the primarily bilateral relations that had governed international relations for a long time, but also required more frequency and stamina than the convening of sporadic international conferences were able to provide on a cost-effective basis. In the beginning, most of these IGOs functioned on the principle of unanimity, but slowly majority voting was introduced often coupled with an opting-out procedure. In modern fisheries law, even the latter has become much more circumscribed, with countries having to explain why they object and these explanations possibly being assessed by others. Despite this shifting environment from the discretionary power of the States parties to the possible emergence of what some have called an *Opinion Juris Communis* generated by the IGOs themselves (Separate Opinion Judge Cançado Trindade), it is submitted that consent, as reflected either in the founding documents of IGOs or in subsequent agreements in relation to treaty interpretation and subsequent practice establishing such agreements of States parties, remains the crux of the matter. This will serve as backdrop against which the legislative functions exercised through the adoption of resolutions of such IGOs in general, and the arguments developed in the Whaling in the Antarctic Case in particular, will be discussed and appreciated.

The Whaling in the Antarctic case indeed seems to take a middle of the road position. It confirms on the one hand that resolutions and guidelines adopted in the framework of the International Convention for the Regulation of Whaling (ICRW), and which according to this founding document are recommendatory in nature, cannot become legally binding on the States parties if there is no clear indication by their later behaviour that these States parties have agreed to change the mere recommendatory nature of these resolutions and guidelines. On the other hand, however, it bases itself on a duty to co-operate for States parties to the ICRW with the International Whaling Commission (IWC) and the Scientific Committee "and thus give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives" (para. 83). This second leg of

the argumentation was however strongly contested by Judge Bennouna who, in his dissenting opinion, wonders “how a legal obligation can derive … from a failure to have regard to acts of international bodies which carry no normative force in relation to those to whom they are addressed”.

In assessing these contradictory points of view, special emphasis will be placed on a certain tendency to be witnessed in the practice of the International Court of Justice (ICJ) of sometimes developing the law on the basis of the agreement of the parties before it. Its argumentation in the present case indeed hinges on the duty of the States parties to the ICRW to co-operate with the IWC and the Scientific Commission (para. 82). *In casu*, the ICJ emphasizes more than once that Japan recognizes this duty (paras 80, 137 and 240), as well as Australia and New Zealand for that matter (para. 240). A similar approach was for instance taken by the ICJ in the recent Territorial and Maritime Dispute Case between Nicaragua and Colombia, decided in 2012. It is suggested that by not always following its own logic, but at times rather being guided by what the States before it are willing to concede, the ICJ may well run the risk of allowing international law to develop in a manner not as coherent as some might have wished.