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Managing Uncertainty: The International Court of Justice, 'Objective Reasonableness' and the Judicial Function

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Abstract
As a standard of review, 'objective reasonableness' has been in the academic spotlight after the *Whaling in the Antarctic* judgment of the International Court of Justice (ICJ or the Court). The Court's approach was conceptually innovative and seemed to have operated a partial reversal of the burden of proof in favour of the applicant. In response to certain criticisms addressed to that decision, this article makes two claims. First, 'reasonableness', while being inherently vague, gives a justifiable degree of discretion to judges, thereby enabling them to make difficult adjudicatory choices without departing from the applicable legal framework. Second, the term finds sufficient support in the Court's case law dealing with state discretion in the implementation of treaties. Both claims relate to the very same core idea: that even if one remains sceptical as to the capacity of the term to enhance certainty, 'reasonableness' is a basic conceptual tool that facilitates judicial review in complex cases, including those of a scientific nature.

Keywords
good faith; International Court of Justice; proportionality; reasonableness; standard of review

1. Introduction

One of the most intangible notions in the jurisprudence of the ICJ, and probably of any judicial body, is 'reasonableness'.

The term is frequently invoked by national, regional or international jurisdictions. Its functions differ. The determination of individual criminal responsibility,[1] the fixing of procedural delays,[2] and the protection of the right to liberty and security

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1 See for all, Art. 66(3) of the 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3.

2 Art. 21(3) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 of the 1994 WTO Agreements, 33 ILM 1226); see also, Art. 21 of the Statute of the Court of Justice of the European Union (Protocol No 3 to the Treaty on European Union and the Treaty on the Functioning of the

and the right to a fair trial[3] are some common uses of the term. But if there is an area in which 'reasonableness' plays a relevant role, it is in the determination of the applicable standard of review in judicial proceedings. This was notably the case of the WTO Appellate Body decision in *EU-Hormones*, which defined a 'deferential reasonableness standard' as requiring it 'to determine whether th[e] risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable'.[4]

The ICJ has also mentioned the notion frequently. In addition to its own procedural law,[5] it has invoked 'reasonableness' in relation to treaty interpretation, maritime delimitation, and compensation issues.[6] The list also includes a case concerning a review of state discretionary powers.[7] Yet despite this extensive use, the Court's application of the term has gone mostly unnoticed by scholars so far.[8]

The judgment in *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*, rendered in January 2015, has reversed this scenario.[9] In the context of a dispute concerning the implementation by Japan of a whaling program providing for the lethal capture of certain whale species (the *Japanese Whale Research Program under Special Permit in the Antarctic Phase II* or JARPA II), the Court has both defined and applied 'reasonableness' as a standard of review of the legality of Japan's conduct under the International Whaling Convention (IWC). In other words, for the first time, 'reasonableness' (qualified by the Court as 'objective reasonableness') has been critical in adjudicating a high-profile case dealing with the review of state discretionary powers in the implementation of a treaty.

Considering the complex scientific disputes at issue (relating to the methodology, aims, and outcome of Japan's whaling programme), the Court's finding that the respondent had not complied in a 'reasonable' manner with its international obligations may appear surprising or even counter-intuitive. In fact, the four

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European Union (1992) OJ 212/C 326/1) and Art. 41(1) of the Permanent Court of Arbitration Rules 2012, available at www.pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf.

3 See Arts. 6(3), 5(1) and 5(3), 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222; Art. 9(3), 1966 International Covenant on Civil and Political Rights, 999 UNTS 171; Arts. 7(1)(d), 7(5) and 8(1), 1969 American Convention on Human Rights, 1144 UNTS 123.

4 EC Measures Concerning Meat and Meat Products (EC-Hormones), WT/DS26/AB/R, WT/DS48/AB/R, Appellate Body Reports of 16 January 1998, para. 590.

5 See, for instance, *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of 29 November 2001, [2001] ICJ Rep. 660, at 681, paras. 48–9 (deadline for submitting counter-claims) and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment of 26 November 1984, [1984] ICJ Rep. 292, at 420, para. 62 (withdrawal of an optional clause declaration).

6 See, for instance, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, at 181, and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment of 19 June 2012, [2012] ICJ Rep. 324, at 335, para. 24. Regarding treaty interpretation and maritime delimitation, further references will be provided in subsequent sections.

7 *Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, Merits, Judgment of 20 July 1989, [1989] ICJ Rep. 15, at 74, para. 124.

8 The exceptions are the well-known works of O. Corten, *L'utilisation du 'raisonnable' par le juge international, Discours juridique, raison et contradictions* (1997), and J. Salmon, 'Le concept du "raisonnable" en droit international public', in *Mélanges Reuter* (1982), 447–78. See also E. Cannizaro, *Il principio della proporzionalità nell'ordinamento internazionale* (2000), 166–202.

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

dissenting judges have characterized the term either as useless,[10] impossible to be applied 'in a general way',[11] requiring that the burden of proof rests with the applicant,[12] or simply as extraneous both to the legal regime of the IWC, and the Court's case law.[13] At least one scholar has seconded some of these criticisms,[14] while others have questioned more generally the theoretical underpinnings of standards of review, a critique that applies to 'reasonableness'.[15]

Notwithstanding these reactions, the *Whaling* judgment is notable for the careful scrutiny by the Court of the different elements of Japan's whaling programme. In this regard, the decision has been praised as a model for international adjudication in environmental matters,[16] a field of law of increasing relevance in the Court's jurisprudence,[17] and one in relation to which categorical findings on scientific matters are prone to be criticized as interventionist.

In light of such diverging opinions, in this article I will make two claims with regard to 'reasonableness' as a standard of review.[18] First, I will argue that the term, while being inherently vague, gives a justifiable degree of discretion to judges, enabling them to make difficult adjudicatory choices without departing from the legal framework under consideration. From that point of view, 'reasonableness' facilitates the accomplishment of one of the most difficult judicial tasks: managing adjudicatory uncertainty.[19]

Second, I will argue that 'reasonableness' finds support in the Court's case law. In this regard, I will attempt to demonstrate that the term is grounded on two general principles of international law: good faith and proportionality.[20]

Both claims, which relate to the core idea that 'reasonableness' is a valid tool for the decision of complex scientific disputes by the ICJ, will be addressed as follows. First,

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10 Ibid., at 316, para. 39 (Judge Owada, Dissenting Opinion).

11 Ibid.

12 Ibid., at 328, para. 28 (Judge Abraham, Dissenting Opinion).

13 Ibid., at 386–8, paras. 12–17 (Judge Yusuf, Dissenting Opinion).

14 S.R. Tully, '"Objective Reasonableness" as a Standard for International Judicial Review', (2015) 6 JIDS 546. For a more nuanced approach, see G. Gros, 'The ICJ's Handling of Science in the Whaling in the Antarctic Case: A Whale of a Case?', (2015) 6 JIDS 578.

15 See, for instance, C. Foster, 'Motivations and Methodologies: Was Japan's Whaling Programme for Purposes of Scientific Research?' (2014), at 14, available at www.edu.kobe-u.ac.jp/ilaw/en/whaling_docs/paper_Foster.pdf; M. Ioannidis, 'Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals* (2014), 95.

16 See in particular W. de la Mare, N. Gales and M. Mangel, 'Applying Scientific Principles in International Law on Whaling', (2014) 345 *Science* 1125–6; see also E. Cannizaro, 'Margin of Appreciation and Reasonableness in the ICJ's Decision in the Whaling Case', in *Les limites du droit international: essaies en l'honneur de Joe Verhoeven - The Limits of International Law: Essays in Honour of Joe Verhoeven* (2015), 449; R. Kolb, 'Short Reflections on the ICJ's Whaling Case and the Review by International Courts and Tribunals of "Discretionary Powers"', (2015) 32 *Australian Yearbook of International Law* 135; J. Wyatt, 'Should We Presume that Japan Acted in Good Faith? Reflections on Judge Abraham's Burden of Proof Based Analysis', ibid., at 145.

17 M. Bennouna, 'La Cour internationale de Justice et les droits de l'homme', conference delivered at the University of Salamanca in commemoration of the 70th Anniversary of the UN Charter, 8 April 2015, on file with the author.

18 While the title of this article uses the ICJ's terminology, I will use 'reasonableness' and 'objective reasonableness' interchangeably. I will elaborate on this point in *infra* note 98.

19 For a systematic analysis of the problem of uncertainty in international law, J. Kammerhofer, *Uncertainty in International Law, A Kelsenian Perspective* (2011).

20 On notions of 'variable geometry' or 'variable content' in law, see C. Perelmann and R.V. Elst, *Les notions à contenu variable en droit* (1984).

I will argue that 'reasonableness' is a conceptual tool that enables courts to balance values underlying competing teleological choices. Next, I will trace the normative roots of the term in the Court's case law by focusing on the two above-mentioned general principles of law. Subsequently, I will assess how innovative the *Whaling* judgment was in relation to the Court's case law. The final section concludes by reflecting on the capacity of standards of review to articulate predictable judgments.

2. 'Reasonableness' and the judicial function

In essence, judicial adjudication[21] can be described as a careful balancing of two opposite elements: particularism and predictability.[22] On the one hand, judges are called to scrutinize the factual and legal specificities of every case with the knowledge that it is a unique species. On the other hand, considerations of coherence require the use of 'systemic' parameters, allowing judges to apply the same reasoning in comparable situations.

In this section, I assess whether 'reasonableness' is suited to this dual purpose. To this end, I first explain how the term facilitates the fulfilment of one of the most challenging judicial functions: the management of adjudicatory uncertainty. Next, I briefly examine whether 'reasonableness' is suited to that task as a *legal* term.

2.1. Between particularism and predictability: 'Reasonableness' and judicial adjudication

Many argue that the power of judicial decisions is entrenched in the persuasiveness of their reasoning.[23] This consideration applies *a fortiori* to the ICJ, a judicial organ that operates in a horizontal judicial system and whose jurisdiction relies on state consent.[24] In fact, the authority of the Court's decisions depends heavily on what Franck defined as 'the power of the intellectual process by which they [the judges] arrive at their opinions'.[25]

One of the crucial factors enhancing the authoritativeness of judicial reasoning is the underpinning of decisions with adequate concepts that combine rigour and flexibility. This is so for two main reasons. First, a certain level of abstraction facilitates predictability in judicial adjudication. This not only enables the impartial application of law, but also endows judgments with the authority of self-referral,

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21 I understand 'judicial adjudication' as the task of 'spécifier et … fixer la teneur de la règle et les conséquences juridiques qui en découlent par rapport à une situation donnée de manière définitive, pour les besoins de la sécurité juridique' (the task of 'defining the content of legal rules and establishing the consequences derived from non-compliance with them in a particular situation ; see G. Abi-Saab, 'Cours général de droit international public', (1987) 207 RCADI 9, at 214) (my own translation).

22 S. Besson, 'Legal Philosophical Issues of International Adjudication', in P.R. Romano, K. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2013), 413 at 420; G.I. Hernández, *The International Court of Justice and the Judicial Function* (2014), 101; Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law' (2006) 16(5) EJIL 907, at 912–13.

23 A. Von Bogdandy and I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', (2013) 23(1) EJIL 7, at 15.

24 G. Cahin, 'La motivation des décisions des juridictions internationales', in H. Ruiz-Fabri and J.-M. Sorel (eds.), *La motivation des décisions des juridictions internationales* (2008), 9 at 10–14.

25 T.M. Franck, 'Fairness in the International Legal and Institutional System: General Course on Public International Law', (1993) 240(III) RCADI 9, at 303.

that is, the gradual articulation of a judicial discourse that gains solidity through years of repetition, recognition, and consistent implementation by states.[26]

Second, the infinite number of situations that may arise with regard to the application of norms calls for a certain level of flexibility. While such a solution may give rise to concerns relating to the law-making function of judges, this is inherent in any process of application of law.[27]

Most often, the concepts referred to above are enshrined in legal rules. But as is known, Montesquieu's naive conception of the judicial function as '*la bouche de la loi*' (the mouthpiece of the law) is inadequate to describe the complexities of day-to-day adjudication,[28] let alone foresee the unclear nature of many rules of international law.[29] This is particularly the case for rules establishing standards of judicial review of state conduct in the implementation of a treaty, the definition of which is frequently left vague or even avoided by lawmakers.[30] In this context, 'reasonableness' may contribute to fulfilling a task that relates to the very essence of the judicial function.

In effect, while being difficult to grasp in abstract terms, the notion underpins legal reasoning with an appeal to an egregious human feature: rationality.[31] Such an appeal is of the utmost relevance in the context of a multicultural court such as the ICJ.[32] As former President Bedjaoui affirmed:

> [c]'est donc que des quinze juges de différents pays ayant un "vécu" différent, des philosophies différentes, possèdent quand même quelque chose de commune, qui est la convergente universalité du droit international moderne et de la manière de penser.[33]

It is to be noted that while 'reasonableness' is often associated with the common law tradition,[34] it also has deep roots in civil law.[35] Roman law sources referred to the concept of 'reasonableness' under different variations, be it *ratio naturalis*,

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26 This is what Besson labels the 'interpretive authority' of judicial decisions (see Besson, *supra* note 22, at 420. See also Cahin, *supra* note 24, at 50–1).

27 For the purposes of this article, I will establish a formal distinction between interpretation and application of a treaty, although the difference between both notions is relative (see on this point G.I. Hernández, 'Interpretative Authority and the International Judiciary', in A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (2015), 166 at 175–81. *Contra*, J. Kommerhafer, *Uncertainty in International Law: A Kelsenian Perspective* (2011), 124).

On another issue, the above finding applies also to scientific disputes. See A. Orford, 'Scientific Reason and the Discipline of International Law', (2014) 25(2) EJIL 369, at 382. More specifically, with regard to whaling, see M. Fitzmaurice, *Whaling and International Law* (2015), 57 and 87.

28 P. Martens, 'L'irrésistible ascension du principe de proportionnalité', in *Présence du droit public et des droits de l'homme: Mélanges offerts à Jacques Velu* (1992), 49 at 60–1; Bogdandy and Venzke, *supra* note 23, at 14.

29 See Besson, *supra* note 22, at 420–33. See also M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 63.

30 See, for instance, J.E. Álvarez, 'What are International Judges for? The Main Functions of Judicial Adjudication', in Romano, Alter and Shany (eds.), *supra* note 22, at 167 and 169–70; and Shany, *supra* note 22, at 911.

31 See Corten, *supra* note 8, at 368.

32 See Hernández, *supra* note 22, at 100–101.

33 'Thus, fifteen different judges having a different experience and different philosophies, have yet something in common: the converging universality of modern international law and of its way of thinking' (my own translation) (M. Bedjaoui: 'La fabrication des décisions de la Cour internationale de Justice', in M. Bedjaoui et al. (eds.), *La méthode de travail du juge international: Actes de la journée d'études du 23 novembre 1996* (1997), 55 at 65). See also Corten, *supra* note 8, at 368 and 423.

34 See for all P. Craig, 'The Nature of Reasonableness Review', (2013) 66(1) *Current Legal Problems* 131.

35 I am nevertheless aware of the fact that the term 'reason' may not find easy accommodation in some non-Western legal cultures. In the case of China, see for instance M. Delmas-Marty, *Ordering Pluralism: A Conceptual*

ratio civilis, *ratio humanus*, *ratio strictus* or simply *rationabilis* ('reasonableness').[36] The very notion of *jus gentium* was based on rationality; in fact that primitive form of international law was considered the rational legal order *par excellence*, notably as a consequence of its universalistic features.[37] Interestingly, Roman and medieval sources often mentioned the notion together with good faith and equity.[38]

Despite these universalistic features (and perhaps because of them), 'reasonableness' may be criticized as a vague and indeterminate conceptual tool. In this regard, one may consider that judicial recourse to such a term is to be made whenever more precise concepts are unsuitable or have not been defined.[39] Even if this may be true in some instances,[40] this does not necessarily entail that, in order to adjudicate a case under a standard of 'reasonableness', the applicable *substantive* rules must necessarily be vague, as happens for instance in the field of maritime delimitation.[41] Quite the contrary, the appeal to 'human reason' may be necessary in complex cases in which, while the applicable law is sufficiently detailed, judges are called to balance competing values that are simply impossible to quantify.[42] In those circumstances, to aim at a high level of predictability would be problematic, for such a pretention would disregard not only the difficulty of abstract precepts to accommodate the complexity of human relations,[43] but also the limits of law as a linguistic construct.[44] Since uncertainty is an intrinsic component of the application of legal rules,[45] judges cannot be expected to articulate exacting parameters whose application is clear in difficult cases – all the more since, as indicated above, legislators often avoid defining standards of review.

Framework for Understanding the Transnational Legal World (2009), 5 (with an example concerning Art. 1 of the 1948 Universal Declaration of Human Rights).

36 G. Luchetti and A. Petrucci, *Fondamenti romanistici del diritto europeo: Le obbligazioni et i contratti dalle radici romane al* Draft Common Frame of Reference (2010), 55–62.

37 R. Kolb, *Théorie du droit international* (2013), 785.

38 Luchetti and Petrucci, *supra* note 36, at 55–62. See also the Draft Common Frame of Reference (an authoritative scholarly work aimed at systematizing the main principles, definitions and rules of European Contract Law), which defines 'reasonableness' both as a general principle of contract law and as a parameter of assessment of good faith behaviour (C. Von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (2009), 178).

39 See Cannizaro, *supra* note 8, at 21. The author describes 'reasonableness' as having a 'lower technical character' ('*minore caratterizzazione tecnica*').

40 H. Lauterpacht, *The Function of Law in the International Community* (1933), 110–35.

41 See, in particular, *Continental Shelf (Libya v. Malta)*, Judgment of 3 June 1985, [1985] ICJ Rep. 3, at 53–5, para. 75; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Merits, Judgment of 8 October 2007, [2007] ICJ Rep. 659, at 742, para. 277; *Maritime Delimitation in the Black Sea (Romaine v. Ukraine)*, Merits, Judgment of 3 February 2009, [2009] ICJ Rep. 61, at 88, para. 75.

42 See, for instance, the assessment by the European Court of Human Rights of the 'strict proportionality' of a detention measure following declaration of a state of emergency under Art. 15 of the European Convention on Human Rights (*A. and others v. United Kingdom* (3455/05, para. 182)).

43 See Craig, *supra* note 34, at 37. I will not deal here with *factual* uncertainty, in relation to which 'reasonableness' may also be pertinent, as the ICJ's case law shows (*Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4, at 18; *Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, para. 147; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 July 1986, [1986] ICJ Rep. 14, at 83, para. 153).

44 Kammerhofer, *supra* note 19, at 124. See also Koskenniemi, *supra* note 29, at 61–2.

45 H. Kelsen, *Pure Theory of Law* (1970), 352. See also Abi-Saab, *supra* note 21, at 215.

2.2. The ICJ and the blurry legal contours of 'reasonableness': Between balancing values and treaty purposes

Explaining 'reasonableness' in terms of balancing values might suggest that, in deciding disputes, judges take into account extra-legal considerations.[46] In the case law of the ICJ, such inference could be made from judgments dealing with maritime delimitations or the law of international watercourses, in which 'reasonableness' is often paired with the principle of equity, as synonymous with 'remedial justice'.[47] To mention but three examples, in *Gabcikovo-Nagymaros*, the Court invoked the customary law formula that every riparian state of an international watercourse has a right to an 'equitable and reasonable share' of the natural resources of the river.[48] In *Pulp Mills*, the Court went further by underscoring the interconnectedness between the 'equitable and reasonable' utilization of a shared resource '[a]nd the balance between economic development and environmental protection'.[49] Finally, in *Delimitation of the Maritime Boundary in the Region of the Gulf of Maine*, a Chamber of the Court indicated that 'equitable criteria' for the purposes of maritime delimitation '[*a*]*re not themselves rules of law* and therefore mandatory in the different situations, but "equitable", or even "reasonable", criteria . . . '.[50]

This reference to extra-legal considerations may be a distinguishing feature of cases dealing with specific fields of international law in which equity plays a key role. However, when it comes to the 'reasonable' application of treaties, one has to be aware of the limits of the Court's judicial function, which in my view were correctly defined in the (otherwise infamous) *South West Africa* cases as follows:

> . . . The Court . . . is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. *Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline.* Otherwise, it is not a legal service that would be rendered.[51]

Undoubtedly, the line between law and morality, political or socio-economic considerations is blurred. But this does not contradict the proposition that, in assessing how 'reasonably' a state behaves in implementing a treaty (a task requiring legal interpretation), international courts cannot directly rely on such considerations.

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46 Abi-Saab, *supra* note 21, at 33 (my own translation).

47 O. Schachter, 'International Law in Theory and in Practice: General Course on Public International Law' (1982) 178(V) RCADI 9, at 85. See Aristotle, *Nicomachean Ethics* (Trad. 1999), 89: 'When the law speaks universally, then, a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission – to say what the legislator himself would have said had he been present, and would have put into his law if he had known.'

48 See *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Merits, Judgment of 25 September 1997, [1997] ICJ. Rep. 7, at 53, para. 75; and Art. 5 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, no UNTS yet determined, available at www.treaties.un.org/Pages/UNTSOnline.aspx?id=1.

49 *Pulp Mills on the Uruguay River (Argentina v. Uruguay)*, Judgment of 20 April 2010, [2010] ICJ Rep. 14, at 74–5, para. 177.

50 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Merits, Judgment of 12 October 1984, [1984] ICJ Rep. 246, at 313, para. 58, emphasis added. This is notwithstanding the fact that, in *Continental Shelf (Libya v. Malta)*, the Court re-oriented this extreme conception of the principle towards a more objectivistic approach, as a consequence of which equitable criteria became more general and predictable (*Continental Shelf (Libya v. Malta)*, Merits, Judgment of 3 June 1985, [1985] ICJ Rep. 13, at 38–40, paras. 40–5.

51 *South West Africa (Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, at 34, para. 49 (emphasis added).

Instead, they have to remain within the legal limits of the treaties they have to apply. For that purpose, the can only rely on the well-known methods of interpretation enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

Of course, this does not mean that extra-legal considerations relating to the 'infra-level of law' are *per se* alien to the Court's assessment of state behaviour. But this can only be done as part of the said methods of interpretation, most notably under the guise of teleology.[52] As the Court famously affirmed in *Gabcikovo-Nagymaros*, '[t]he principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized'.[53] Since, on many occasions, treaties are the result of a carefully negotiated equilibrium between competing purposes, the Court is often called to weigh such purposes in order to decide whether a treaty has been implemented 'reasonably'.[54] In so doing, it may be required to balance legal parameters with a socioeconomic dimension. While this task may require the appraisal of extra-legal considerations,[55] it can be carried out in full respect of the limits of legal reasoning.[56]

From this point of view, 'reasonableness' is not dissimilar to other standards of review commonly applied by international courts and tribunals.[57] While the diversity of legal regimes makes it sometimes difficult to ascertain *a priori* the applicable standard of review, the *legal process* leading to the definition and application of a 'reasonableness' review by the ICJ is comparable to that followed by a human rights court with regard to proportionality, or by a WTO Panel with regard to the standard of 'objectiveness' enshrined in Article 11 of the WTO Dispute Settlement Understanding.[58]

3. The contours of reasonableness in the case law of the Court

This section aims to identify the jurisprudential roots of 'reasonableness' in the case law of the Court in order to challenge the view that the *Whaling* judgment was

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52 Abi-Saab, *supra* note 21, at 33 (my own translation).

53 See *Gabčíkovo-Nagymaros Project* case, *supra* note 48, at 78–9, para. 142. Certainly, this statement was made with regard to the particular circumstances of the case. Thus, after years of non-compliance by the Parties with various provisions of the 1977 Treaty concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks and the progressive development of international environmental law, the Court had to focus on the object and purpose of the treaty instead of relying on a literal interpretation of that Treaty (see below 3.1).

54 This is famously the case of the ICRW, which, as is known, is based on a difficult tension between sustainable whaling and the conservation of whale populations (M. Fitzmaurice, *Whaling and International Law* (2015), 67). See more generally N. MacCormick, *Rethoric and the Rule of Law* (2005), 180–1.

55 MacCormick, *supra* note 54, at 186.

56 On judicial adjudication as an act of will, see Kelsen, *supra* note 45, at 353–5; Kammerhofer, *supra* note 19, at 109–11; Hernández, *supra* note 27, at 169.

57 See Corten, *supra* note 8, at 378. For an enlightening attempt to systematize the Court's standards of review, see K. del Mar, 'The International Court of Justice and Standards of Proof', in K. Bannelier, T. Christakis and S. Heathcote (eds.), *The ICJ and the Evolution of International Law* (2012), 98–123.

58 According to this provision, '[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements …' (Art. 11 of the Understanding on rules and procedures governing the settlement of disputes). As to human rights courts, see *infra* note 77.

revolutionary. In so doing, I will pay particular attention to the nexus between the Court's reasoning and the principles of good faith and proportionality, as applied in previous judgments. But before going into details, a brief explanation of the *Whaling* case seems necessary.

As indicated above, the dispute had its origin in the implementation by Japan of JARPA II. According to Australia, Japan was acting in violation of a number of provisions of the Schedule to the 1948 International Convention for the Regulation of Whaling (ICRW), a legally binding text establishing zero catch limits for commercial whaling. For its part, the respondent argued that the program complied with Article VIII ICRW, which provides that:

> Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales *for purposes of scientific research* subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit ....[59]

For the parties, the main source of contention lay in the interpretation of the expression 'for purposes of scientific research'. This in turn raised two intertwined problems: first, the margin of discretion of state parties to determine whether a whaling permit complies with this criterion; second, the limits of the Court's judicial review. According to Australia, the applicable standard of review should not be limited to determining the existence of bad faith (as argued by Japan in the first round of oral hearings), but should instead be based on an objective analysis of 'reasonableness'.[60] Japan argued in the second round of oral hearings that the *application* of the test of 'reasonableness' in the case had to be tempered by the scientific nature of the activity at stake.[61]

The Court, in order to ascertain the scope of its review, separated two limbs of Article VIII ICRW: the notion of 'scientific research' and the teleological element '*for purposes* of scientific research'. Since consideration of the former would have entangled the Court in discussions of a rather scientific nature, the Court focused on whether Japan's research program was 'for purposes of scientific research'. In this regard, while acknowledging that Article VIII ICRW '[g]ives discretion to a State party ... to reject the request of a special permit or to specify the conditions under which a permit will be granted ...',[62] the Court deemed it necessary to determine whether, in using lethal methods, '[t]he program's design and implementation are reasonable in relation to achieving its stated objectives', a standard of review that it defined as 'objective'.[63]

Subsequently, the Court explained in great detail the main features of JARPA II and carefully assessed Japan's compliance with the stated research objectives under the previously defined standard of review. In so doing, the Court considered Japan's reasons both for its decision to use lethal methods[64] and for the scale of its sample

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59 1946 International Convention for the Regulation of Whaling, 161 UNTS 364.
60 CR 2013/19, at 65, para. 22 (Crawford).
61 CR 2013/22, at 60, para. 21 (Lowe).
62 *Whaling in the Antarctic* case, *supra* note 9, at 253, para. 61.
63 Ibid., at 254, para. 67.
64 Ibid., at 268–71, paras. 128–44.

sizes;[65] as well as additional elements relating to the design and implementation of JARPA II (notably its time frame and scientific output).[66] The Court concluded that the scale of lethal sampling of Japan's whaling programme was not reasonable,[67] thereby ordering Japan to cease granting research permits in connection with that program.[68]

3.1. 'Reasonableness' and good faith

The point of departure for the purposes of our analysis is the link between 'reasonableness' and the principle of good faith, set out in the abovementioned passage of *Gabcikovo-Nagymaros*.[69] While this *dictum* of the Court was not mentioned in the *Whaling* Judgment, in my view it is possible to associate the two, if only at a general level.

The judgment in *Gabcikovo-Nagymaros* emphasized the general object and purpose of the treaty, in order to underscore that the parties must find a way to implement the legal obligations at stake (arising under a 1977 treaty providing for the construction and operation of a system of locks), in light of the evolution of the dispute and the development of international environmental law. Rather than establishing a standard of review *strictu sensu*, the Court seems to have been hinting at the need to apply the treaty without too much regard for the text. At the same time, it also seems to have been indicating that the principle of good faith added 'something' to the text of the Treaty that went further from the catalogue of specific obligations enshrined in its precepts. Indeed, the existence of a distinct obligation not to defeat the object and purpose of the treaty had already been acknowledged in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*.[70]

In my view, *Gabcikovo-Nagymaros* anticipated an understanding of 'reasonableness' as a parameter to assess compliance with good faith. What this means in specific terms is difficult to ascertain *a priori*. 'Reasonableness' cannot be described in the abstract as a rigorous or lenient standard of review, since the determination of such question depends on the circumstances of the case, as reflected in the dissenting opinion of Judge Owada in the *Whaling* case.[71] For instance, in the proceedings in the latter case, the difference between the arguments of the parties rested on their dissimilar understanding of the very same standard of review, as a consequence of which they weighed the contextual elements of the case differently. Thus, while

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65 Ibid., at 272–90, paras. 145–212
66 Ibid., at 290–2, paras. 213–22.
67 Ibid., at 292–4, paras. 224–7.
68 Ibid., at 298, para. 245.
69 See *supra* note 48.
70 *Nicaragua* case, *supra* note 43, at 136–8, paras. 272–6 (with regard to the 1956 treaty of Friendship, Commerce and Navigation). See, for more details, R. Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (2003), 283–91; *Contra*, H. Thirlway, *The Law and Procedure of the International Court of Justice* (2013), 1118.
71 According to this Judge, the Court erred in applying 'reasonableness' as an objective standard of review. In his view, it is not the Court's task to make '[a] *de novo* assessment of the activities of the Respondent', but rather to ascertain whether a decision or an action is or is not 'arbitrary' or patently 'out of bounds'. See *Whaling in the Antarctic* case, *supra* note 9, at 316, para. 39 (Judge Owada, Dissenting Opinion).

Japan's approach would have required the Court to pay greater deference to scientific considerations, for Australia (and New Zealand) it was preferable to go deeper into the details of the research program. Finally, in the first round of oral hearings Japan evoked 'bad faith/arbitrariness' as the applicable standard of review.[72]

Notwithstanding these divergences, in my opinion, the respective interpretations put forward by the parties relied – directly or indirectly – on good faith as a yardstick for assessing state conduct. The difference may lie in the way that principle comes into play: whereas, in the case of 'reasonableness' as an objective standard, it is the objective dimension of good faith that is at stake; in the case of 'bad faith/arbitrariness', emphasis is put on the subjective elements of state conduct.[73] Since the Court avoided dealing with the problem of the alleged 'commercial' purposes of JARPA II, it is understandable that it did not refer to good faith in defining the standard of review. However, its judgment also has to be understood through the prism of the objective dimension of that principle.

Having said that, the connection between good faith and 'reasonableness' in *Whaling* was more limited than in *Gabcikovo-Nagymaros*. As suggested above, the added value of referring to good faith is the emphasis put on the general purpose and aim of the treaty at stake. In *Whaling*, one of the underlying questions concerned the interplay between the comprehensive ban on whaling adopted in 1982, Article VIII ICRW, and the purpose of 'sustainable whaling' put forward in the preamble to the Convention.[74] The Court did not address the problem and distinguished the interpretation of Article VIII ICRW from the general purpose of the Convention, focusing only on whether JARPA II was, 'for the purposes of scientific research', within the meaning of that provision.[75] Thus, the Court did not assess Japan's conduct in light of the general purpose of the ICRW. While valid,[76] such interpretation limited the relevance of general considerations of good faith in the definition of the applicable legal framework.

3.2. 'Reasonableness' and proportionality

Whaling is probably the most paradigmatic application by the Court so far of 'reasonableness' in connection with proportionality. However, in my view, the Court's prior case law had already followed a similar line in various occasions.

It is first necessary to clarify the notion of proportionality used here. In my analysis, I will assume that, as legal concept, proportionality can be applied under three different variations.[77] First, it can be invoked in order to assess whether a particular measure is *adequate* to fulfil a specific purpose. Second, it can be used in order to

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72 See CR 2013/15, at 21-23, paras. 38–45 (Lowe).

73 On both dimensions of the principle, see Kolb, *supra* note 70, at 111 and 134.

74 See *Whaling in the Antarctic* case, *supra* note 9, at 303–4, paras. 9–12 (Judge Owada, Dissenting Opinion) and Fitzmaurice, *supra* note 54, at 44–7. In the preamble to the ICRW, the state parties make clear their intention to 'conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'.

75 *Whaling in the Antarctic* case, *supra* note 9, at 252, para. 58.

76 On the difference between the two kinds of purposes see R. Kolb, *Interprétation et création en droit international public: Esquisse d'une herméneutique juridique moderne pour le droit international public* (2006), 538.

77 I am basing myself on Kolb's analysis dealing with sanctions and counter-measures, which, in my view, contains a conceptual framework that is useful to assess proportionality in international law (see R. Kolb, 'La

ascertain whether a measure is necessary, which requires determining whether a specific purpose cannot be achieved without recourse to a less harmful measure. Finally, proportionality can be used to evaluate whether a particular measure is proportional *strictu sensu*, namely to determine whether on balance the benefit it gives outweighs the prejudice it causes. While the latter (enshrined in many treaties)[78] is probably the most intuitive definition of proportionality, the former two are expressions of the very same principle.

In this subsection, I analyze how the ICJ has associated 'reasonableness' with the two variations of proportionality that it has considered in greatest detail in its case law: 'necessity' and 'adequacy'.

3.2.1. 'Necessary'

Before *Whaling*, the Court had been increasingly strict in its application of this variation of proportionality to review state discretionary powers. The most relevant cases are *Nicaragua* v. *United States*, *Elettronica Sicula S.P.A. (United States* v. *Italy)*, and *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*.

In *Nicaragua* v. *United States*, the Court had to determine, on the merits, whether a number of acts allegedly carried out by the *contras* (the mining of Nicaraguan ports, a series of direct attacks on ports and oil installations, and a trade embargo) could have been justified as measures 'necessary' to protect 'essential security interests' in the sense of Article XXI(d) of a bilateral 1956 Treaty of Friendship, Commerce and Navigation. In determining the applicable standard of review,[79] the Court explained its task as requiring it '[t]o assess whether the risk run by these "essential security interests" is *reasonable*', and to scrutinize 'whether the measures presented as being designed to protect these interests are not merely useful but "necessary"'.[80] The Court clearly stated that, under the terms of the said Treaty, the determination of whether a measure was necessary to protect the essential security interests of a party '[i]s not purely a question for the subjective judgment of the party'.[81]

In *Elettronica Sicula S.P.A. (United States* v. *Italy)*, the Court had to apply Article 1 of the Supplementary Agreement to the 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States, which prohibited the adoption of any 'arbitrary or discriminatory' measures against nationals of the other state party. According to the applicant, a requisition order made by the Mayor of Palermo (which prevented two US owners from liquidating an Italian company) constituted an

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proportionnalité dans le cadre des contre-mesures et des sanctions – essai de clarification conceptuelle', in L. Picchio Forlati and L.A. Sicilianos (eds.), *Economic Sanctions in International Law: Les sanctions économiques en droit international* (2004), 379 at 380). In the context of international human rights law, see Y. Arai-Takahashi, 'Proportionality', in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013), 446. The latter author underlines that human rights courts – with the possible exception of the Inter-American Court of Human Rights – normally focus their proportionality assessments on the third limb of the principle.

78 See, for instance, Art. 51(5)(b) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 1125 UNTS 3.

79 In this case and many others before *Whaling*, the Court had barely used the term 'standard of review'. See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgment of 6 November 2003, [2003] ICJ Rep. 161, at 234, para. 33 (Judge Higgins, Separate Opinion).

80 *Nicaragua* case, *supra* note 43, at 114, para. 224 (emphasis added).

81 Ibid., at 141, para. 282.

'[u]nreasonable or capricious exercise of authority'.[82] Unlike other cases commented on here, the standard of review of 'arbitrariness' at stake was enshrined in a legal rule.

The Court explained the limits of Italy's margin of discretion in the following terms: '[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ... It is *a wilful* disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety'.[83] In determining whether the decision made by the Mayor of Palermo was lawful, the Court used the notion of 'unreasonableness' as a synonym with arbitrary or unjustified.[84] In so doing, it seemed more to address the claims of abuse of power put forward by the applicant than to define a general standard of review.[85]

More recently, in *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the Court has used a more refined standard of strict necessity to evaluate certain restrictive measures implemented by Nicaragua in the San Juan River, which marks in part the boundary between both states. In the opinion of Costa Rica, those measures restricted its navigational rights. At first sight, one may think that the Court applied a strict assessment of necessity. In fact, in reaction to certain arguments put forward by Costa Rica, the Court stressed that, '[t]he regulator ... has the primary responsibility for assessing the need for regulation and for choosing, on the basis of its knowledge of the situation, the measure that it deems most appropriate to meet that need'.[86] In other words, the Court seemed to recognize the existence of a certain margin of appreciation for the regulating state. At the same time, however, in evaluating the 'reasonable' character of two of the measures challenged by Costa Rica,[87] the Court inquired into whether less restrictive measures were available. After having answered this question in the affirmative, the Court suggested that Nicaragua adopt some of them.[88] Thus, *Costa Rica* v. *Nicaragua* was based on a standard of strict necessity.

This was the *status quo* before *Whaling*. The Court's assessment of 'necessity' in this case was particular in that the recommendations of a scientific body (the IWC) were highly relevant in considering the feasibility of less harmful measures. For that reason, the Court paid careful attention to the IWC's recommendations on the use of non-lethal methods in order to assess scientific projects under Article VIII ICRW. But methodologically the Court's assessment of necessity was not essentially different from that carried out in *Navigational Rights*. The Court did not affirm that lethal

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82 *Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)* case, *supra* note 7, at 76–7, para. 129.

83 Ibid., at 76, para. 128 (emphasis added).

84 Ibid., at 74, para. 124.

85 It was probably for this reason that the Court concluded that, '[t]he Respondent has not violated the FCN Treaty in the manner asserted by the Applicant ...' (*supra* note 7, at 81, para. 136. For more details, see Cannizaro, *supra* note 16, at 451.

86 *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Merits, Judgment of 13 July 2009, [2009] ICJ Rep. 213, at 253, para. 101.

87 Such measures included the requirement for Costa Rican vessels to stop at any Nicaraguan post along the river and to require their passengers to carry passports, as well as the requirement that Costa Rican riparians obtain visas to navigate the river.

88 *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* case, *supra* note 86, at 257–8, paras. 111–18.

methods are prohibited under Article VIII ICRW. Rather, it clearly indicated that states are obligated to present an analysis of the feasibility of the use of non-lethal methods.[89] Since Japan never provided such assessment, the Court concluded that '[n]o *strict* scientific necessity could justify the use of lethal methods to achieve the scientific objectives of JARPA II'.[90] Thus, JARPA II was 'unreasonable' because the means it envisaged were not necessary to achieve its purported aims.

In sum, there was nothing revolutionary in the Court's approach in *Whaling*. An appraisal of that decision in light of other judgments reveals that the Court is ready to appraise the 'reasonable' nature of state conduct under the limb of necessity, provided that this is justified by the factual and legal context of the case.

3.2.2. 'Adequate'

A second limb of the connection between 'reasonableness' and 'proportionality' is the test of 'adequacy' of a measure. Even in extreme cases where a court leaves it to states to determine what is 'necessary' in a given situation, the wide margin of discretion resulting therefrom is rarely unfettered, since judges may still carry out an assessment of 'adequacy' in order to ascertain whether international obligations have been implemented proportionately. For that purpose, a state will be required to prove that its conduct is capable of attaining its alleged purpose; otherwise its action or inaction may be considered arbitrary.[91] As an objective standard, 'reasonableness' may play a role here,[92] although in my view it intervenes without any autonomous meaning as a mere conceptual substitute for 'adequacy'.

So far, only in *Whaling* has the Court understood 'reasonableness' as synonymous with 'adequate'. However, this does not prejudice the relevance of other precedents.

In particular, in the *Wall* advisory opinion, the Court assessed whether restrictions on freedom of movement under Article 12(3) of the International Covenant on Civil and Political Rights had been '[d]irected to the ends authorized'.[93] In the circumstances of the case, the Court was unable to find the existence of such a connection. A similar conclusion was made with regard to the alleged restrictions of economic, social, and cultural rights of Palestinians resulting from the construction of the wall, a measure that, according to the Court, was not aimed at promoting 'the general welfare in a democratic society' as required by Article 4 of the 1977

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89 Ibid., at 269, para. 137.

90 Ibid., at 289, para. 211.

91 Kolb, *supra* note 77, at 384.

92 See *mutatis mutandis* Shany, *supra* note 22, at 910–11. In *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the Court had to deal with a more delicate situation: the failure by French judicial and governmental authorities to execute an international letter rogatory for the purposes of investigation of a criminal case in Djibouti. While the Court's judicial review was limited for reasons related to the protection of French 'essential interests', it was nonetheless facilitated by the obligation enshrined in Art. 17 of the 1986 Convention on Mutual Assistance in Criminal Matters to state reasons for the decision (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Merits, Judgment of 4 June 2008, [2008] ICJ Rep. 177, at 229–33, paras. 145–56). No reference was made to 'reasonableness' in this case.

93 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 192, para. 136.

International Covenant on Economic, Social and Cultural Rights.[94] In both instances, the test applied was one of adequacy.

Similarly, in *Navigational Rights*, the Court held that the requirement for tourists to buy a visa in order to be authorized to navigate the San Juan River was unlawful. In the Court's view, such a measure was of itself unable to facilitate control by Nicaragua of access to the river.[95] Again, the Court applied an assessment of adequacy.

Whaling is important for two reasons. On the one hand, at a general level, the judgment can be understood as an evaluation of Japan's research program in light of its stated objectives, in the sense of being adequate to attain them. On the other hand, the Court engaged in a detailed examination of numerous elements of JARPA II through the prism of adequacy. In so doing, it carefully scrutinized the size and research timeframes for each whale species, the gap existing between the target sample size of the program and the actual number of whales killed, as well as the scientific output of JARPA II.

4. How innovative is the *Whaling* judgment?

In previous sections I have emphasized the jurisprudential roots of the standard of 'reasonableness' applied by the Court in the *Whaling* case in order to show that the judgment is far from being revolutionary. Such findings do not prejudice the proposition that the judgment was an evolution on the issue of judicial scrutiny of state discretionary powers. This is so in two ways that I will address in this section.

4.1. *Whaling* as a conceptual evolution

The first evolution is conceptual, and refers to the overall consideration of 'reasonableness' as a standard of review. As I have explained, in previous decisions the reference to this notion had been limited to a particular limb of the principle of proportionality, be it 'necessity' or 'adequacy'.[96] At the same time, though, in none of them did the Court explain in great detail the applicable standard of review. In fact, in decisions such as *Military and Paramilitary Activities*, *Navigational Rights*, and *ELSI*, the expression 'standard of review' does not appear at all.[97]

The *Whaling* case is different, for here the Court not only devoted a specific section to this issue (presumably in response to the parties' clashing arguments), but also approached 'reasonableness' from a very broad perspective. The Court understood 'reasonableness' as an 'umbrella concept' covering at the same time two

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94 Ibid. See the 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

95 *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, *supra* note 86, at 258–9, para. 119.

96 In my view, those previous cases had been decided on the basis of some kind of legal parameter that can defined as a standard of review. Thus, I disagree with the view that such cases had been decided without such a standard, as sometimes is suggested (see, for instance, Foster, *supra* note 15, at 5).

97 With regard to the *ELSI* case, see Cannizaro, *supra* note 39, at 176. The expression does not appear either in *Oil Platforms (Iran v. United States)*, another decision dealing with judicial control of state discretionary powers. In that judgment the Court affirmed, with regard to the customary rule on self-defence, that, 'the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion"' (Merits, Judgment of 6 November 2003, [2003] ICJ Rep. 161, at 196, para. 73).

different 'standards of review' ('necessity' or 'adequacy'), with diverging implications for the burden of proof as I will explain below. In other words, the term was not unidirectional, but rather a broad conceptual instrument that facilitated judicial control of different aspects of Japan's research programme both from an 'adequacy' and 'necessity' point of view. Although such approach is not without problems,[98] in my view nothing prevents the Court from tailoring the 'reasonableness' test to the particularities of Article VIII ICRW.

4.2. The partial reversal of the burden of proof and 'procedural' reasonableness

The second innovative element of the judgment is the Court's application of the burden of proof in assessing the necessity of Japan's whaling programme.

As explained above, the Court's approach in similar cases – most notably *Navigational Rights* – based on an interpretation of the burden of proof as resting with the applicant.[99] Instead, in a relevant section of *Whaling* (dealing with the necessity of Japan's lethal methods), 'reasonableness' was a *strict* standard to be applied under the interpretative logic of the general rule and its exception, according to which exceptions to a general rule have to be interpreted restrictively.[100] From this point of view, the judgment came close to an asymmetric reversal of the burden of proof.[101]

In the oral proceedings, the Court inquired into the feasibility of non-lethal methods to achieve the purposes of JARPA II.[102] In its judgment, the Court evoked resolutions issued by relevant bodies of the IWC as well as advances in scientific research. In affirming that, as a consequence of those developments, 'it stands to reason' that a research proposal needs to contemplate non-lethal methodologies, the Court was probably introducing considerations relating to scientific ethics in its legal reasoning.

The latter finding influenced the Court's approach to the burden of proof regarding the feasibility of non-lethal methods. The Court required the respondent, and not the applicant, to explain how state discretion regarding the killing of whales for research purposes could have been justified in the particular case. The Court was unsatisfied with Japan's explanations on this point, which included a mathematic formula and the overall positive assessment made by an eminent expert.[103] Although it requested the respondent to provide a convincing explanation of all the elements of the programme, such explanation was found to be insufficient.[104]

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98 See in particular Gros, *supra* note 14, at 593–606, who criticizes the conceptual ambiguity of the term. In my opinion, the Court's qualification of 'reasonableness' as 'objective' had one main purpose: to avoid the question of Japan's 'subjective' intentions in planning and implementing JARPA II, which according to Australia and New Zealand was a disguised 'commercial' programme. On this question, see *Whaling in the Antarctic* case, *supra* note 9, at 438 (Judge Bhandari Separate Opinion).

99 On the burden of proof before the Court, see del Mar, *supra* note 57, at 98.

100 On this rule, see Kolb, *supra* note 76, at 673–87.

101 By 'asymmetric' I mean that the Court reversed the burden of proof with regard only to the specific question of the feasibility of non-lethal methods, and not with regard to other elements of JARPA II. See Fitzmaurice, *supra* note 54, at 93 and especially Foster, *supra* note 96, at 7–8.

102 *Whaling in the Antarctic*, *supra* note 9, at 270, para. 98.

103 Ibid., at 335, paras. 47–8 (Judge Abraham, Dissenting Opinion).

104 Ibid., at 284, para. 193.

Accordingly, the Court concluded that JARPA II was not 'transparent' enough even if it was potentially justifiable from a scientific point of view.[105] The conclusion followed that, 'there is no *strict* scientific necessity to use lethal methods in respect of [the program's] objective'.[106]

At first sight, this emphasis on 'argumentative' considerations relating to 'transparency' seems new, especially because it results from the interplay between 'reasonableness' and 'strict necessity'. However, although the Court's reasoning was not particularly meticulous,[107] such an approach is not a novelty either in its case law[108] or in decisions of other judicial bodies.[109] In a similar vein, the Court's emphasis on 'strict necessity' was not an original feature either, as in decisions such as *Navigational Rights*, *Military and Paramilitary Activities*, and the *Wall* advisory opinion, the Court seemed to have operated under the principle that exceptions to a general rule have to be interpreted restrictively.[110] The novelty in *Whaling* was the partial reversal of the burden of proof, which in my view resulted from the adjustment of the rule of 'reasonableness' to the level of rigour of the test of necessity. On this point, the Court seemed to apply a rule that can be formulated as follows: the more demanding the necessity test, the more the burden of proof rests with the defendant; conversely, the more discretion a state has in appraising what is necessary in a particular case, the more the burden of proof rests with the applicant.[111]

5. Conclusion

Uncertainty is a basic component of law, in part because law exists to regulate uncertainty in social relations. Similarly, judicial reasoning is not based on mathematical reasoning, but rather on a justification of why, in a specific case, certain incommensurable factors (principles, objectives, values) deserve more weight than others.[112] Thus, to affirm that what is 'reasonable' in a particular case depends on the circumstances is not only to state the evident, but also to put an emphasis on the very nature of the judicial function.

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105 Ibid., 284-285, para. 195.
106 Ibid., at 289, para. 211 (emphasis added).
107 Gros, *supra* note 14, at 615–19.
108 For instance, in the *ELSI* case, a key element in rejecting US' claims had been precisely the fact that the respondent had given a coherent reason to justify its behaviour (*ELSI* case, *supra* note 7, at 396–7, para. 129).
109 For a detailed analysis, see Corten, *supra* note 8, at 403–25. See also M. Ioannides, 'Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals, Standard of Review and Margin of Appreciation* (2014), 104–6.
110 Obviously, the *Wall* advisory opinion was not a contentious case and cannot be approached purely under a 'burden of proof' logic. However, in many ways, that opinion can be assimilated to a contentious case, or at least the analysis carried out therein is relevant for issues of burden of proof. See also *Gabčíkovo-Nagymaros Project* case, *supra* note 48, at 40–1, para. 52 (with regard to 'reasonableness' and state of necessity under the law of state responsibility) and *Oil Platforms* case, *supra* note 79, at 196, para. 73.
111 This is explained in the Dissenting Opinion of Judge Tanaka in the *South West Africa* cases with regard to the policy of apartheid and the prohibition of discrimination (*South West Africa* cases, *supra* note 51, at 309–10 (Judge Tanaka, Dissenting Opinion)).
112 MacCormick, *supra* note 54, at 180–6.

The standard of 'objective reasonableness' used by the ICJ in the *Whaling* case was not a *contradictio in terminis*.[113] While one can understand the scepticism such an ambiguous notion may provoke, I do not believe that other standards of review widely used in international adjudication (such as 'proportionality *strictu sensu*' or 'necessity') facilitate more predictable decisions. Standards are not accurate algorithms that, by filtering the less convenient solutions to a case, enable mechanical adjudicatory choices in accordance with certain pre-established parameters.[114] Instead, they are conceptual constructions that enable judges to make the transition from the abstract (the applicable legal rule), to the particular. As Schwarzenberger affirmed, '[o]n the international judicial level, absolute rights tend to be transformed into relative rights in the course of a balancing process, in which considerations of good faith and reasonableness play a prominent part'.[115] In Kelsenian terms, this 'transition' or 'transformation' has at its very basis an inevitable element of will that cannot be articulated by means of logical reasoning. This element, which underpins the very nature of judicial adjudication, makes it difficult to consider standards of review as proper 'legal algorithms'.

For similar reasons, I do not agree with the opinion that, in adjudicating cases under a 'reasonableness' standard, judges necessarily encroach upon executive functions by, 'substitu[ting] the subjective intentions of litigants with judicial subjectivity'.[116] Such a conclusion can only be made on a case-by-case basis, particularly when the factual circumstances make the application of the law so 'intrinsically indeterminate' that a deferential approach seems to be a legitimate solution.[117] But this alone does not entail that cases adjudicated under a 'reasonableness' test escape *by definition* the logic of the applicable rules.

The latter consideration is linked with the second claim made in this article, namely that 'reasonableness' finds precedents in the Court's case law. The difference between *Whaling* and previous decisions is related both to the unusual multidimensional understanding of the term 'reasonableness' and the allocation of the burden of proof with regard to the necessity of certain aspects of JARPA II. But as the Court's case law shows, the connection with the general principles of good faith and proportionality (especially with the latter) is clear. *Whaling* was an evolution, not a revolution.[118] Whether such evolution was the result of the particular circumstances of the case, or whether the judgment represents a tendency toward a more assertive stance in environmental disputes, this is still to be seen.

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[113] See in particular *Whaling in the Antartic* case, *supra* note 9, at 342 (Judge Bennouna, Dissenting Opinion).
[114] Arai-Takasashi, *supra* note 77, at 467.
[115] G. Schwarzenberger, 'The Fundamental Principles of International Law' (1955) 87 RCADI 191, at 326.
[116] Tully, *supra* note 14, at 546. See, more generally, Besson, *supra* note 22, at 430–3.
[117] As one may argue with regard to the scientific dispute underlying the *Whaling* case (see *mutatis mutandis* Shany, *supra* note 22, at 913).
[118] See Gros, *supra* note 14, at 619–20.