Should We Presume that Japan Acted in Good Faith? Reflections on Judge Abraham’s Burden of Proof Based Analysis

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Abstract
This contribution focuses on Judge Abraham’s use of the burden of proof, together with a presumption of good faith, to dissent from the findings of the Court on the key substantive question at issue in the Whaling in the Antarctic case (‘Whaling Case’). It assesses the many claims that Abraham made in this connection including (a) that all allegations of bad faith carry with them a heavy burden of proof (section II); (b) that Australia attracted this burden by relevantly alleging that Japan had acted in bad faith (section III); and (c) that Japan, as a sovereign State, should automatically have been entitled to a presumption of good faith when claiming that its whaling activities came within the scope of a recognised legal right (section IV). The analysis reveals Judge Abraham’s approach to be unduly selective yet overly general. He justified how he assigned the burden of proof uniquely on the basis of good faith considerations, ignoring all competing burden of proof presumptions such as those applicable to the invoking of exceptions, yet failed to adduce authority showing how the specific type of bad faith he considered Australia to have implicitly alleged attracts the burden of proof he imposed. His dissenting opinion is also quite inconsistent. At one point it admits that Japan did not have a relevant pouvoir discrétionnaire, but at another it seems to use the combination of a presumption of good faith and the burden of proof to advocate the rehabilitation of the wide notion of sovereign power out-of-step with modern-day international legal thinking. This contribution accordingly shows that judges of the International Court of Justice must take greater care when employing devices common in domestic systems of law, such as the burden of proof, in the quite particular context of state-state dispute resolution.

I. Judge Abraham’s Divergent Method for Resolving the Dispute
The present contribution takes its starting point from the dissenting opinion penned by the French judge on the Court, Ronny Abraham.1 Judge Abraham departed from

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all of the Court’s findings on issues of the merits,2 pursuing a separate path on the
key aspects of the case that led him to ‘fundamental disagreement’ with the majority
over whether the JARPA II whaling activities authorised by Japan3 came within the
scope of Article VIII of the International Convention for the Regulation of Whaling.4

The most obvious distinguishing feature of Judge Abraham’s approach is his
focus on — and particular view of — which of the parties bore the burden of proving
whether or not Japan’s JARPA II whaling activities were ‘for purposes of scientific
research’. Whereas the judgment of the Court does not mention the applicable burden
of proof nor appear to have impliedly ascribed much importance to it, Abraham’s
dissenting opinion focuses on it and its implications from the very first paragraphs in
which it addresses the merits of Australia’s case. While indicating that he is generally
not a devotee of rigid burden of proof rules and does not agree with the notion that
the applicant alone always carries that burden,5 Abraham stated that he nonetheless
considers certain cases to require insisting on the fact that the party making
allegations shoulders the burden of proving them.6

For Judge Abraham, the Whaling Case was such a case and Australia bore an
ultimately quite heavy burden of proving that Japan’s JARPA II whaling activities
were not ‘for purposes of scientific research’.7 Why? For the learned judge, the

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2 See Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (Judgment),
International Court of Justice, General List No 148, 31 March 2014, (‘Whaling in the
Antarctic, Judgment’), [247].

3 Judge Abraham’s dissenting opinion speaks interchangeably of whether (a) the JARPA
II program; (b) the permits delivered as part of it; or (c) the actual taking of whales
carried out under that program’s permits were ‘for purposes of scientific research’ (See,
eg, Whaling in the Antarctic, Dissenting Opinion of Judge Abraham, International Court
Strictly-speaking, under the terms of Article VIII of the ICRW, the only relevant
question is whether the State granted a ‘permit authorizing [... whaling activities] for
purposes of scientific research’. Parts of the judgment also confuse the issue of whether
the whaling activities authorised by the programme were for scientific purposes with
the separate question of whether the programme itself was for scientific purposes (See
Whaling in the Antarctic, Judgment, International Court of Justice, General List No 148,
31 March 2014 [97], [142], [207], [212], [226]). In most cases, these two issues will be
equivalent, but a programme might itself be for some other purpose, yet grant ‘special
permits authorizing [a] national to kill, take or treat whales for purposes of scientific
research’ (and thus come within the scope of the Article VIII right or exception). This
article will accordingly speak uniquely of the ‘JARPA II whaling activities’ and avoid
speaking of the program itself in this precise context.

4 International Convention for the Regulation of Whaling (2 December 1946) 161 UNTS
72 (entered into force 10 November 1948) Article VIII (‘ICRW’).

5 Whaling in the Antarctic, Dissenting Opinion of Judge Abraham, International Court
of Justice, General List No 148, 31 March 2014 [28].

6 Ibid.

7 In some other International Court of Justice cases involving the invocation and exercise
of a right or exception, judges have been reluctant to apply a burden of proof analysis.
For example, in the Fisheries Jurisdiction Case regarding Iceland’s right to unilaterally
extend its fisheries zone, Judge Dillard said: ‘[whether the action is justified] the Court
must determine in light of the applicable law and it does not advance the enquiry to
answer was simple: Australia had alleged that Japan had acted in bad faith and parties making bad faith allegations always bear the burden of establishing them.

By presuming Japan’s good faith and imposing an evidentiary and legal burden on Australia as a corollary of that presumption, Abraham gave himself a means with which he could reject the Court’s principal arguments without having to delve expressly into factual or interpretative questions. He appears to have accepted the Court’s view as to how the number of whales taken in Japan’s contested JARPA II program related to whether the program was ‘for purposes of scientific research’ but, seizing on the Court’s use of the expression ‘cast doubt’ in particular, argued that these considerations did not do enough to discharge the burden that should have been imposed on Australia. Indeed, his dissenting opinion’s insistence that the Court’s arguments merely raised doubt and that the raising of doubt was insufficient appears almost to be a refrain punctuating his assessment of the judgment’s arguments. In paragraphs 41 and 42 of his dissenting opinion, for example, Abraham complained that the Court was again operating ‘on the level of questions, doubts and suppositions. Nothing that is really solid’ and characterised the doubts raised as ‘nothing capable of firmly supporting the conclusion’. He then left his readers in no doubt as to his main grievance with the judgment, saying:

Doubt again. But a doubt, and even an accumulation of doubts, do they suffice for establishing proof? In my opinion, in the present case and in all cases, they do not even come close. II

attempt to indulge in a presumption or to lean on a burden of proof. It can be argued, for instance, that Iceland was the ‘actor’ who sought to change the established law and the burden of proving legal justification rests on her. Conversely it can be argued that the Applicant was in the role of plaintiff and should therefore have the burden of establishing the illegality of Iceland’s actions. In either event the Court must determine the rights of the Parties. Freedom of State action and burdens of proof suggest analogies to the criminal and civil procedures of some States. Applied to the present case the analogy is misplaced. (Fisheries Jurisdiction (United Kingdom v Iceland) (Merits), Separate Opinion of Judge Dillard [1974] ICJ Rep 53, 59). This merely serves to point to the remarkable importance Judge Abraham ascribed to a good faith presumption and the burden of proof implications of Australia’s supposed allegation of bad faith. The Court considered, for example, that the number of whales taken as part of the JARPA II program, when compared to the earlier JARPA program and to the number of whales that the JARPA II program had originally planned to take, objectively suggested that the whaling the program authorised could not be reasonably characterised as being for scientific research purposes (see Whaling in the Antarctic, Judgment, International Court of Justice, General List No 148, 31 March 2014, [147]–[156], [199]–[212]).

For remainder of article, please see: