DISSENTING OPINION OF JUDGE BENNOUNA

[English Original Text]

Interpretation of the Convention — Discretionary power of State party — Reasonableness of a whaling programme "for purposes of scientific research" — Aim of a whaling programme "for purposes of scientific research" — Choice between lethal and non-lethal methods — Determination of sample sizes — Bases for the Court's findings — Need to decide whether JARPA II is of a "commercial" nature — JARPA II not of a "commercial" nature — Court substituting itself for Convention bodies — Co-operation between States parties to the Convention.

To my great regret, I have had to vote against points 2, 3, 4, 5 and 7 of the Judgment's operative paragraph, since I do not agree with the majority's interpretation of the relevant provisions of the International Convention for the Regulation of Whaling of 2 December 1946 (hereinafter the "Convention") and of the Schedule annexed thereto (hereinafter the "Schedule").

I regret, in particular, that the majority has failed to adhere to the methods of interpretation envisaged by the Vienna Convention on the Law of Treaties (Arts. 31 and 32), which have the status of customary law, and has consequently failed to confine itself to a strictly legal analysis of the Parties' obligations. I know that the issue of whaling is one that carries a heavy emotional and cultural charge, nourished over the centuries by literature, mythology and religious writings. This background was indeed evoked before the Court, but the judges, while they cannot ignore it, are bound, by virtue of their function, to ensure that it does not impinge in any way on their strictly legal analysis. The best way for the Court to contribute to the promotion of co-operation between the States concerned is to do justice by applying international law, in accordance with its Statute.

Unfortunately, the approach adopted by the majority remains somewhat "impressionistic", inasmuch as it rests essentially on queries, doubts and suspicions, based on a selection of indicators from among the mass of reports and scientific studies.

The Convention was adopted in 1946, in a context very different from that in which the Court is called upon to interpret and apply it today. The consumption of whale meat has fallen dramatically, so as to have become negligible, and the whaling industry has declined accordingly. The fact nonetheless remains that, when interpreting a provision of the Convention, the Court is bound to take account of the objectives set out in its Preamble, in particular the conservation and sustainable development of whale stocks. The Court cannot content itself with stating that "neither a restrictive nor an expansive interpretation of Article VIII is justified", and

that programmes for purposes of scientific research "may pursue an aim other than either conservation or sustainable exploitation of whale stocks" (Judgment, para. 58). But we are not concerned here with the issue of whether the interpretation should be "restrictive" or "expansive", but rather with determining "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Vienna Convention, Art. 31, para. 1).

What the Court has to do is to confront Article VIII, as an integral part of the Convention, with the latter's object and purpose, and to ask itself whether, in light of its ordinary meaning, the research programme, in this case JARPA II, is fully covered by this provision.

Furthermore, Article VIII must be analysed in the context of the other provisions of the Convention and of its Schedule, as amended since its adoption. Under that Article, any State party 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 conditions as it "thinks fit". In so doing, the State in question is not required to comply with the other provisions of the Convention, in particular those relating to commercial whaling. At the time when the Convention was adopted, the only concern was to regulate and not to prohibit this category of whaling. And it was for that reason that the power given to a State party to grant permits "for scientific research" was a very wide one, since commercial whaling was regulated by the Convention and subject to compliance with the latter's objectives. As long as it remained within the framework of scientific research, the Government concerned was free to decide on the use to be made of the proceeds from the sale of killed and processed whales. It is implicit that any proceeds from the sale of such whales must be allocated to the objective of scientific research, which lies at the heart of Article VIII, and which justifies the exemption of the State party concerned from all of the other obligations relating to the regulation of commercial whaling.

I accept, as the Court points out (Judgment, para. 61), that a State party's discretionary power under Article VIII of the Convention does not mean that the killing, taking and treating of whales depends "simply on that State's perception".

I am likewise of the view that a State party, in exercising this power, must satisfy itself that "the programme's design and implementation are reasonable in relation to achieving its stated objectives", and that "[t]his standard of review is an objective one" (*ibid.*, para. 67).

The wide normative power which Article VIII nevertheless gives to States parties in issuing permits is offset by the supervision exercised by the central body established by the Convention, namely the International Whaling Commission (Convention, Art. III) (hereinafter the "Commission"), assisted by the Scientific Committee. Thus, under the terms of paragraph 3 of Article VIII, the State concerned

> "shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year,

> scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV".

The Judgment recognizes that Japan has complied with its procedural obligations in relation to the Commission and to the Scientific Committee, in particular by submitting proposals of special permits prior to their granting, as required under paragraph 30 of the Schedule.

Clearly, the Commission's adoption in 1982 of the moratorium on commercial whaling (Schedule, para. 10 *(e)*, the number of whales to be taken for commercial purposes being set at zero), which entered into force during the 1985-1986 season, would have an impact on the meaning and structure of the provisions of the Convention and its Schedule. Japan, having initially opposed the moratorium, withdrew its objection in 1987. However, we should not lose sight of the fact that the moratorium was, by definition, only a provisional decision, pending an evaluation, envisaged for 1990, which ultimately never took place.

In parallel with its acceptance of the moratorium, Japan launched its JARPA research programme. However, there is nothing to lead one to suppose, *a priori*, as was suggested by Australia (Judgment, para. 101), that this was a way of continuing commercial whaling under a different legal guise. In reality, there was nothing surprising in itself about the launch of JARPA, since the moratorium on commercial whaling now prevented access to certain kinds of information about whales, which were needed for scientific research. It has, however, been established that research on whale stocks, and in particular on their diet, had an important role to play as a source of knowledge of the marine ecosystem and its resources. Moreover, in 2006 the Commission did not dispute JARPA's contribution in this regard. In any event, as the Judgment correctly points out, the operation and legality of JARPA are not at issue here (*ibid.*, para. 99). What is in fact at issue here is JARPA II, which succeeded JARPA with effect from the 2005-2006 season.

The legality of this second programme has been challenged before the Court by Australia, which claims that it is not "a programme for purposes of scientific research within the meaning of Article VIII of the Convention", and that, in authorizing and implementing it, Japan has been in breach of paragraph 10 *(e)* of the Schedule on the moratorium on commercial whaling, of paragraph 7 *(b)* on the Southern Ocean Sanctuary, and of paragraph 10 *(d)* on the moratorium on factory ships.

The position adopted by the majority is thus a surprising one, since it amounts to devoting the essence of the reasoning to showing that JARPA II is not a programme "for purposes of scientific research", while ultimately avoiding the issue of what the true aim of such a programme is.

The Court begins by declining to establish a definition of the notion of "scientific research", of which there is not one in the Convention. As regards the definition proposed by the experts, the Court considers that it

is not applicable in the present case (Judgment, para. 86). However, immediately afterwards, the Court undertakes an analysis of the meaning of the phrase "for purposes of scientific research" (*ibid.*, para. 87), which might be regarded as something of a paradox. In effect, the Court seeks to determine the purpose of a given activity without having first clarified what that activity consists of. This is a perilous exercise, all the more so since what it turns out to consist in is a discussion of whether the design and implementation of the programme "are reasonable in relation to its stated scientific objectives" (*ibid.*, para. 88).

It becomes apparent, reading the Court's subsequent reasoning, that in reality it fails to apply the test of correspondence between the programme's objectives, on the one hand, and its design and implementation on the other. Thus the Judgment (in paragraphs 135 to 156) essentially undertakes a comparison between JARPA and JARPA II, in order to conclude that the latter has not been conducted "for purposes of scientific research". And this is said to be because the programme has utilized lethal methods, when it could have had greater recourse to non-lethal methods. However, nowhere does the majority demonstrate the existence of a requirement on the State concerned to give priority to non-lethal methods in the conduct of scientific research.

The Court seeks to remedy the lack of such an obligation by invoking (Judgment, para. 144) the inadequacy of Japan's analysis of non-lethal methods, and its failure to give due regard to IWC resolutions and Guidelines, despite the fact that, by their nature, these are not binding upon that State. We may well ask ourselves how a legal obligation can derive from the inadequacy of an analysis, or 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 my view, a State is perfectly entitled, for purposes of scientific research, to eschew the use of non-lethal methods if it considers them too costly and, if need be, to fund the costs of research out of the proceeds from the sale of the whales taken and processed.

But the Court does not stop there in its comparison between JARPA and JARPA II. It queries the latter's scale, again by reference to the former (*ibid.*, paras. 145 to 156). It concludes this comparison by noting "weaknesses in Japan's explanation" (*ibid.*, para. 156), relying largely on these to justify the assumption made about Japan's intention:

> "These weaknesses also give weight to the contrary theory advanced by Australia — that Japan's priority was to maintain whaling operations without any pause, just as it had done previously by commencing JARPA in the first year after the commercial whaling moratorium had come into effect for it." *(Ibid.)*

Despite having proceeded on the premise that it would not define scientific research, the majority then, however, engages in a detailed analysis of

sample sizes for each species, identifying five stages in this process, illustrated by statistical studies (Judgment, paras. 157 to 202).

At the close of this whole arduous and complex discussion, the Court concludes that "this raises further concerns about whether the design of JARPA II is reasonable in relation to achieving its stated objectives" (*ibid.*, para. 198). These concerns are based on a very elaborate structure of statistics and studies, but a series of concerns cannot result in certainty, namely that there has been a legal breach of an international obligation.

Is it possible, nonetheless, to exclude all reasonable doubt by comparing sample sizes and actual catches?

Having undertaken such an exercise (*ibid.*, paras. 199 to 211), the Court again asserts that the discrepancy noted between sample sizes and the actual take of whales "cast[s] further doubt on the characterization of JARPA II as a programme for purposes of scientific research" (*ibid.*, para. 212). Thus, the Judgment, having again noted this discrepancy in the case of minke whales, goes on to state that "[t]his adds force to Australia's contention that the target sample size for minke whales was set for non-scientific reasons" (*ibid.*, para. 209). In other words, if Japan had taken all the whales provided for in the sample, that would have sufficed to make the programme a credible one "for purposes of scientific research". Such a finding would, moreover, contradict the previous emphasis on the priority of non-lethal methods over lethal methods.

In its final conclusion on the issue of whether JARPA II has been conducted for purposes of scientific research (*ibid.*, paras. 223 to 227), the Court finds that "the use of lethal sampling per se is not unreasonable in relation to the research objectives of JARPA II" (*ibid.*, para. 224), but it is only by comparing the latter with JARPA that it finds that the size of the samples for minke whales has been significantly increased, even though, in absolute terms, the proportion of whales actually taken was limited. Thus, in relation to the minke whale population, which numbers between 338,000 and 1,486,000 individuals (Memorial of Australia, Vol. I, para. 2.116), the actual total take of minke whales for the entire JARPA II programme did not exceed 3,264 individuals (*ibid.*, Fig. 6, and Counter-Memorial of Japan, pp. 178 and 181).

Are all of these concerns and queries sufficient for the Court to conclude that JARPA II was not designed and implemented "for purposes of scientific research" (Judgment, para. 227)?

The Court then addresses (*ibid.*, para. 228) Australia's contentions regarding Japan's breaches of the Schedule, namely the moratorium on commercial whaling (para. 10 *(e)*), the factory ship moratorium (para. 10 *(d)*), and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7 *(b)*). One might have expected, at this stage in the reasoning, that the Court would ask itself whether JARPA II was designed and implemented for commercial purposes. Indeed, the Conven-

tion envisages only three categories of whaling (commercial whaling, whaling "for purposes of scientific research", and aboriginal subsistence whaling). Leaving aside the latter category, which is not at issue in this case, the sole remaining choice lies between the first two categories. Indeed, both Parties and the intervening State do not dispute this, as the Court points out (Judgment, para. 229). Furthermore, it was on the allegation that JARPA II was of a commercial nature that Australia based its claim that the above provisions of the Schedule had been breached.

Why, then, does the Court refuse "to evaluate the evidence in support of the Parties' competing contentions about whether or not JARPA II has attributes of commercial whaling" (*ibid.*, para. 230)?

The Court begins by noting that the moratorium on factory ships (para. 10 *(d)* of the Schedule) makes no explicit reference to commercial whaling, unlike those imposing the moratorium on commercial whaling and establishing the Southern Ocean Sanctuary. Yet the Court nonetheless interprets paragraphs 10 *(e)* and 7 *(b)* of the Schedule, which concern these two latter matters, as not relating exclusively to commercial whaling. According to the Court, any contrary interpretation "would leave certain undefined categories of whaling activity beyond the scope of the Convention" (Judgment, para. 229). I must confess that I cannot see what is the basis for this expansive interpretation of clear texts which prohibit commercial whaling; nor can I work out which, from among the methods of interpretation envisaged by the Vienna Convention, is that relied on here.

I now return to the Court's finding concerning paragraph 10 *(d)* of the Schedule in relation to the moratorium on factory ships. It is true that this provision makes no explicit reference to commercial whaling. However, examination of the *travaux préparatoires* in this regard explains why, unlike the other two subparagraphs of the Schedule with which we are concerned, it contains no such reference.

Paragraph 10 *(d)* of the Schedule originated in a proposal by the United States for a moratorium on commercial whaling. This proposal was taken up by Panama, which proposed that it be divided into two parts, with, on the one hand, a moratorium on factory ships and, on the other, one on land station operations (see Chairman's Report of the Thirty-First Annual Meeting, *Report of the International Whaling Commission*, Vol. 30, 1980, p. 26, Counter-Memorial of Japan, Vol. II, Ann. 46; see also P. W. Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale Watching*, Vol. 1, Oceana Publs., 1985, p. 505). Only the first part of the proposal was adopted by the Commission, and became the current paragraph 10 *(d)* of the Schedule. The moratorium on factory ships was thus drafted on the basis of a proposal for a moratorium on commercial whaling, and it was clear at the time of its adoption that it only concerned

commercial whaling. It follows that paragraphs 10 *(d)*, 10 *(e)* and 7 *(b)* of the Schedule thus apply solely to commercial whaling.

I therefore believe that the majority was not entitled to dispense with an examination of the question whether JARPA II was of a commercial nature. Clearly, it could not have so found, since any commercial activity must be conducted with a view to profit, even if that is not achieved. However, this is simply not the case for JARPA II, or for the special permits issued thereunder, since the proceeds from the sale of whales taken and processed are given to a non-profit whale research institute.

I would add that the position taken by the majority is not only unfounded in law, but has failed to take account of the spirit of the Convention, which aims at strengthening co-operation between States parties for the purposes of managing a shared resource. The Commission and the Scientific Committee play a key role in this regard. In particular, they are required to conduct periodic examinations of the special permits granted by States parties and to comment thereon, including on aspects which might be improved. Moreover, they performed this task in relation to JARPA, as is shown by the list of resolutions adopted by the Commission. As things stand at present, JARPA II underwent a prior examination in 2005, and its periodic examination is currently under way. The results are due to be published shortly. In other words, neither the Commission nor the Scientific Committee has yet had the opportunity to pass judgment on the implementation of JARPA II. In engaging in an evaluation of the programme, the Court has, in a sense, substituted itself for these two bodies.

In order to strengthen the object and purpose of the Convention, it is clearly desirable that States parties should act within the institutional framework established by the latter. That would probably be the best way of strengthening multilateral co-operation between States parties in defence of their common interest — as the Preamble to the Convention emphasizes — and of enabling them to arrive at an authentic interpretation of the Convention.

(Signed) Mohamed BENNOUNA.