DISSENTING OPINION OF JUDGE YUSUF

The Court misconstrued the applicable law — The parameters of review of Japan's conduct are Article VIII of the ICRW, paragraph 30 of the Schedule, and the Guidelines adopted, not extraneous standards such as "reasonableness" — The question before the Court is treaty interpretation — It is whether Japan's decision to authorize JARPA II was consistent with the applicable law — The Court should have assessed the effect of recent amendments on the object and purpose of the Convention — Article VIII should have been interpreted in light of that evolution — The Court's function is not to conduct a scientific review of the design and implementation of JARPA II — Whether or not a programme is for purposes of scientific research cannot be determined on the basis of the reasonableness of the scale of the use of lethal sampling — The distinction between "scientific research" and "for purposes of scientific research" adopted by the Judgment is unpersuasive — It is paradoxical to conclude that something constitutes scientific research but is not for purposes thereof — Paragraph 10 (e)*, paragraph 10* (d)*, and paragraph 7* (b) *of the Schedule only apply to commercial whaling — The Court has not established that JARPA II was commercial whaling — The finding that Japan has breached the moratorium, the Southern Ocean Sanctuary and the ban on factory ships is thus unwarranted.*

I. Introduction

1. I regret not to be able to join the majority that has voted in favour of most of the operative paragraphs of this Judgment. I regret it all the more since I am certainly no less sensitive than my colleagues to the taking and killing of the whales.

2. Many of us are disturbed by the killing of these iconic and intelligent animals and by the manner in which they are killed. However, these perfectly justified emotional reactions should not make us overlook that it is only by reference to the law that the issues before this Court can be resolved. The judicial settlement of disputes between States cannot be made on emotional or purely ethical grounds.

3. I have decided to dissent because I have serious doubts about the legal correctness of the Court's reasoning and its conclusions. First, the question before the Court is one of treaty interpretation and it is whether or not Japan's decisions are consistent with the relevant provisions of the ICRW. The parameters to determine the legality of Japan's special per-

mits for JARPA II, are to be found in the treaty itself, particularly Article VIII, paragraph 30, of the Schedule and the Guidelines adopted for the application of Article VIII (such as Annex P); and not in some extraneous and undefined standard of review. Resort to such a standard negates the relevance of the specific provisions of the treaty which constitute the law applicable to this dispute.

4. The dispute before the Court in the instant case is not about the fit between the aims of JARPA II and its design and implementation as a scientific research programme; nor is it the task of the ICJ to review and evaluate the design and implementation of a research plan for scientific whaling (para. 67). That is the function of the Scientific Committee of the International Whaling Commission (IWC).

5. Secondly, I think that the reasoning of the majority is seriously flawed in characterizing, on the one hand, JARPA II activities as "scientific research", while concluding, on the other, that the special permits granted by Japan for JARPA II are not "for purposes of scientific research". JARPA II is not implemented for commercial purposes and the Judgment recognizes as much. If it was not designed for purposes of scientific research, it could not have simply stumbled into scientific research activities, unless it is accepted that serendipity was at work here. In any case, it appears to me paradoxical that a programme that is broadly characterized as scientific research is considered by the majority not to be "for purposes of scientific research", particularly without its qualification as commercial whaling under Article VIII, paragraph 4, of the ICRW and without a definition of the words "scientific research".

6. Thirdly, both the obligation to respect zero catch limits of whales from all stocks (generally known as the moratorium) established in paragraph 10 *(e)* of the Schedule and the prohibition on whaling in the Southern Ocean Sanctuary (para. 10 *(d)* of the Schedule) apply only to commercial whaling, not to research whaling. Thus, there is, in my view, no legal basis to the conclusion that JARPA II is in breach of those provisions, or of the factory ship moratorium (para. 7 *(b)*), particularly in the absence of clear evidence which establishes that JARPA II is commercial whaling in disguise.

7. Finally, the Court should have assessed whether the evolving regulatory framework of the Convention — particularly the recent amendments to the Schedule setting zero catch limits and establishing whale sanctuar-

ies — should be taken into account in the interpretation of Article VIII and the discretionary power it grants to States parties for purposes of scientific research to shed light on the extent to which the conservationist approach now adopted in the Convention restricts the right to issue special permits.

8. I will further elaborate on these matters below.

II. The Dispute between the Parties and the Applicable Law

A. The Dispute between the Parties

9. The dispute between the Parties concerns the interpretation and application of Article VIII of the ICRW and the discretionary power it grants any Contracting Government to issue special permits to its nationals "to kill, take and treat whales for purposes of scientific research". This discretionary power is subject to "such restrictions as to number and . . . to such other conditions as the Contracting Government thinks fit" and to the other requirements and obligations arising from Article VIII itself and from other related provisions. More specifically, what is in issue is whether Japan has used that discretionary power for purposes other than scientific research in connection with the authorization granted to JARPA II.

10. According to Australia, Japan is not conducting whaling under the JARPA II programme for purposes of scientific research, but for commercial purposes, and is therefore in breach of its international obligations under the ICRW, and particularly those relating to commercial whaling included in the Schedule, which is an integral part of the Convention. Japan asserts the contrary and insists on its right to issue special permits under Article VIII, paragraph 1, of the Convention. At the heart of the dispute between the Parties is the lawful exercise of that right by Japan in issuing special permits for JARPA II and its compliance with the corresponding requirements under Article VIII and related instruments adopted by the IWC or by the Scientific Committee.

11. In determining whether a given programme is "for purposes of scientific research" under the ICRW, and may therefore be granted a special permit by a State party, the relevant legal criteria to be considered are those contained in Article VIII of the Convention, together with paragraph 30 of the Schedule and Annex P[1], the latter being the latest relevant

[1] The 2009 version of "Annex P" is Annex 116 to the Counter-Memorial of Japan. The 2012 revised version is available on the IWC website at: http://iwc.int/index.php?cID=3100&cType=document&download=1.

set of Guidelines for the application of Article VIII adopted by consensus at the IWC. It is on the basis of the interpretation and application of these provisions, which constitute the law applicable to the circumstances of the present dispute, together with the assessment of whether Japan has breached any other treaty obligations, that the Court should have tried to resolve the dispute before it, and not on the basis of an analysis of the fit between the design and implementation of a research programme and its stated objectives.

B. The Standard of Review Applied by the Court

12. The Court does not, however, use that applicable law to evaluate whether the special permits issued by Japan for JARPA II are for purposes of scientific research. Instead of using those parameters, the Court comes up with a standard of review that is extraneous to the Convention. The need to resort to such a standard is not explained, nor is it indicated that the applicable provisions of the Convention are somehow inadequate to the task. Moreover, the Court does not apply the standard it sets forth to the subject of the dispute between the Parties, namely the legality of Japan's conduct in issuing special permits to JARPA II, but rather to a review of the design and implementation of JARPA II. Thus, it is stated in the Judgment that:

> "the Court will consider if the killing, taking and treating of whales is 'for purposes of' scientific research by examining whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one." (Para. 67.)

13. Consequently, for the Court the object of the review is "the design and implementation of JARPA II" rather than the legality of the conduct of Japan and whether or not Japan, by issuing special permits for JARPA II, has violated or is violating its obligations under the Convention.

14. It is true that Australia, in its oral pleadings, suggested that

> "[I]n assessing the actual purpose of a Contracting Government in issuing a special permit it is instructive to have regard to the design and implementation of the whaling programme, as well as any results obtained."[2]

However, it is one thing to use design and implementation as an "instructive" factor and another to treat it as the sole object of review to which regard should be had by the Court. Similarly, the suggestion by Japan to use the standard of "objective reasonableness"[3] concerned the review of "a State's decision" to issue special permits and not the "design and implementation" of JARPA II. Japan's suggestion was also accompanied

[2] CR 2013/8, p. 53, para. 92 (Crawford).
[3] CR 2013/22, p. 60 (Lowe).

by certain criteria for determining what the appropriate standard of review would consist of[4]. Even if the Court wanted to use the standard suggested by Japan, it should have defined the criteria underlying its application by the Court, or otherwise tried to define it.

15. In any case, I am not persuaded that the standard of "reasonableness of the design and implementation of JARPA II in relation to the stated objectives of the programme", applied by the Court, is grounded in law or in the practice of this Court. The Court used the test of "objective and reasonable" grounds for a decision it was reviewing only once before, in the 2012 Advisory Opinion on the IFAD, where the standard was adopted concerning what was essentially an administrative matter[5]. There are of course some cases where the Court employed the more general concept of "reasonableness", but rarely as a standard of review of discretionary acts. For example, in the *Barcelona Traction* case, the Court held that "in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably"[6]. But this, as other cases, concerned methods of interpretation[7].

16. The only case where a standard of review of reasonableness was referred to is the *Elettronica Sicula* case, concerning "unreasonable requisitions" of foreign property. Here the Court had to determine whether under the treaty which the Court was interpreting the requisition of certain property by Italian authorities was "arbitrary". On cue from United States counsel, the test of "reasonableness" was used by the Court as one which constituted the opposite of "arbitrariness"[8]. But this test arose from the terms of the treaty, and was not adopted by the Court on its own.

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[4] "Japan agrees with Australia and New Zealand in regarding the test as being whether a State's decision is objectively reasonable, or supported by coherent reasoning and respectable scientific evidence and . . . in this sense, objectively justifiable." (CR 2013/22, p. 60 (Lowe).)

[5] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion*, *I.C.J. Reports 2012 (I)*, pp. 27 and 29.

[6] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 48.

[7] See, e.g., *Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, Judgment, I.C.J. Reports 1961*, pp. 32-33:

> "Moreover, the Court has held in the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1952*, p. 104) that the principle of the ordinary meaning does not entail that words and phrases are always to be interpreted in a purely literal way; and the Permanent Court, in the case of the *Polish Postal Service in Danzig* (*P.C.I.J., Series B, No. 11*, p. 39), held that this principle did not apply where it would lead to 'something unreasonable or absurd'. The case of a contradiction would clearly come under that head."

[8] *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, pp. 76-77.

17. In the present case, the Court should have focused its analysis on the lawful use by Japan of its discretionary power under Article VIII, in light of the object and purpose of the Convention, in issuing a special permit for JARPA II and whether or not Japan has violated or is violating its obligations under the ICRW in authorizing and implementing JARPA II, instead of reviewing the design and implementation of a scientific research programme, which is the task of the Scientific Committee of the IWC. The reasonableness of the design and implementation of JARPA II in relation to achieving its stated objectives is a debatable matter the assessment of which may give rise to genuine differences of opinion among scientists who have to deal with the design and implementation of research plans. This is confirmed by the work of the Scientific Committee of the IWC, where the divergences of opinion on JARPA and JARPA II are often reflected in its reports. It is also confirmed by the views expressed by the experts presented by the Parties during the oral proceedings.

C. The Applicable Law

18. Article VIII of the ICRW, which is at the core of the dispute between the Parties, reads as follows:

> "1. 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, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.
>
> 2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.
>
> 3. Each Contracting Government 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.
>
> 4. Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of

> the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data."

19. Article VIII constitutes an exception to the regulatory régime established by the Convention for commercial whaling, but it is not, as initially argued by Japan, "outside the scope of the ICRW". It cannot be outside the scope of the ICRW, because it is an integral part of the Convention, and was included therein to deal with a distinct type of whaling, which may be referred to as "scientific whaling" or whaling for purposes of scientific research. It establishes a system of special permits for this type of whaling, a system that is "exempt from the operation of this Convention" in so far as the killing, taking and treating of whales is carried out "in accordance with the provisions" of Article VIII.

20. The opening words of paragraph 1, i.e., "Notwithstanding anything contained in this Convention any Contracting Government may grant a special permit", have to be interpreted in the sense of a discretionary power granted under the Convention to States parties to issue a special permit for purposes of scientific research subject to such restrictions and conditions "as the Contracting Government thinks fit". The discretionary power granted to States parties distinguishes this type of whaling from the commercial whaling regulated in other parts of the Convention for which the Commission has to fix the conditions and restrictions, such as stock status and commercial quotas, in accordance with the Schedule annexed to the Convention.

21. The fixing of the number of whales to be taken, the combination of non-lethal methods with the lethal ones permitted by Article VIII and any other conditions rest with the discretion of the Contracting Government issuing the permit. Nonetheless, the killing, taking and treating of whales for which special permits are issued have to be carried out "in accordance with the provisions" of Article VIII; i.e., for purposes of scientific research and in compliance with the requirements laid down in paragraphs 2 and 3 of that provision. Thus, there is a correlative obligation under Article VIII itself not to use such a right or discretionary power for reasons contrary to the purpose for which it was granted, or in an arbitrary or capricious manner.

22. Consequently, the discretionary power granted under Article VIII is far from being unrestricted. It is to be lawfully used only for the achievement of the purposes laid down in the Convention, namely scientific research, and in accordance with the provisions of Article VIII. Besides the primary requirement that such special permits can only be issued "for purposes of scientific research", other limitations to the discretionary power of the issuing State under Article VIII include the duty to "report at once to the Commission all such authorizations which it has granted" (para. 1) and to

> "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"[9] (para. 3).

23. In addition, the meat of any whales taken for scientific research has to be processed and disposed of in accordance with directions issued by the Government by which the permit was granted (para. 2). As indicated above, these requirements are further complemented by the obligations laid down in paragraph 30 of the Schedule which have been specifically elaborated to enable the Scientific Committee to review and comment on such special permits and by the Guidelines in Annex P both of which are examined in paragraphs 33-34 below.

24. The obligations and requirements limiting the discretionary power granted in Article VIII are not to be sought, as has been done in the Judgment, in an assessment of the reasonableness of the relationship between the design and implementation of JARPA II and its stated objectives as a research plan. They are to be found in Article VIII itself and in the related instruments developed by the ICW and by its Scientific Committee to review and ascertain the lawful use of such discretionary power by those States issuing the special permits. It is these provisions and instruments that should have been used by the Court to determine the legality of the conduct of Japan in issuing such permits for JARPA II, and not the extraneous standard of reasonableness of the design and implementation of the programme in relation to its stated objectives.

25. Moreover, the amendments made to the Schedule with respect to the regulatory framework for commercial whaling, and in particular the moratorium adopted in 1982, which is still in place, and the Schedule on the prohibition on commercial whaling in the Southern Ocean Sanctuary, cannot be considered to be devoid of influence on the interpretation and implementation of Article VIII of the Convention in so far as they reflect a shift in attitudes and societal values towards the use of lethal methods for whaling in general. Thus, the application of Article VIII in the context of JARPA II should have been interpreted through the prism of all these developments, and in light of their effect on the object and purpose of the Convention.

26. On account of the developments that have taken place both in the ICRW and in international environmental law in general, the Court should have assessed whether the continued conduct of JARPA II, as a programme that uses lethal methods for purposes of scientific research under Article VIII, constitutes an anomaly, which may frustrate the object and purpose of the Convention in light of the amendments introduced to it in recent years which have resulted in an evolution of the

[9] Article IV deals with the collaboration of the Commission with independent agencies of the Contracting Governments to encourage, recommend or organize studies and investigations relating to whales and whaling.

regulatory framework of the Convention. Indeed, the balance between conservation and sustainable exploitation has clearly shifted in the Convention in favour of more conservation and less exploitation. Although JARPA II does not appear to have adverse effects on whale stocks at the moment, such an assessment could have perhaps shed light on whether a programme for purposes of scientific research, such as JARPA II, may still be considered to be consistent with the conservationist approach adopted in the Convention or whether this new approach restricts the right to issue permits for scientific research purposes.

27. Although the Judgment recognizes the centrality of the interpretation and application of these provisions in its paragraph 50[10], it quickly skates over their analysis to embark in an extremely detailed assessment of "whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives" (see subtitle B, para. 127), which is adopted as the standard of review on whether or not JARPA II is for purposes of scientific research. It bears to be emphasized that neither the design and implementation of scientific research programmes nor their reasonableness in relation to achieving a programme's stated objectives are mentioned in Article VIII of the ICRW or in the related instruments mentioned above. Nonetheless, they have surprisingly managed to occupy centre stage in the Judgment.

28. The Judgment also recognizes that:

> "since Article VIII, paragraph 1, specifies that 'the killing, taking and treating of whales in accordance with the provisions of this Article shall be exempted from the operation of this Convention', whaling conducted under a special permit which meets the conditions of Article VIII is not subject to the obligations under the Schedule concerning the moratorium on the catching of whales for commercial purposes, the prohibition of commercial whaling in the Southern Ocean Sanctuary and the moratorium relating to factory ships" (para. 55).

However, instead of analysing whether the special permits issued by Japan meet the conditions of Article VIII, the Judgment takes up the examination and application of the extraneous standard of "reasonableness in relation to achieving the stated objectives of the programme" and derives its final conclusions from it. Thus, the law applicable to the subject of the dispute between the Parties, recognized by the Court itself in the Judgment, is set aside in favour of an obscure and debatable standard which cannot be found anywhere in the Convention while the effects of the conservationist approach adopted in the Convention in recent years

[10] Paragraph 50 reads as follows: "The issues concerning the interpretation and application of Article VIII of the Convention are central to the present case . . ."

on the interpretation of the discretionary power granted under Article VIII are ignored.

D. The Assessment of the Legality of the Special Permits for JARPA II

29. Is the primary purpose of the special permit issued to JARPA II to undertake scientific research or to facilitate the supply of whale meat to a commercial market? Is there evidence to support that JARPA II was granted special permit for a purpose other than scientific research? What are the criteria for determining whether a programme is for purposes of scientific research under the ICRW? To answer these questions and others relating to the legality of the special permits issued by Japan in connection with JARPA II, recourse must be had to the applicable law outlined above.

30. An objective test of whether a programme for which a special permit has been issued is "for purposes of scientific research" and is carried out "in accordance with the provisions of Article VIII" is not, as stated in the Judgment, whether the use of lethal sampling is on a larger scale than is reasonable in relation to achieving the programme's stated objectives, nor whether the sample sizes are reasonable with respect to those objectives. Those are matters on which scientists and the statistical calculations they use for that purpose can differ. They are not criteria established under Article VIII or in any other provisions of the Convention.

31. Likewise, whether or not a programme is for purposes of scientific research cannot be determined on the basis of the reasonableness of the scale of the use of lethal sampling. The killing or taking of even a single whale may be considered illegal today under the provisions of the ICRW unless it is done for purposes of scientific research. Thus, the fact that the sample size of minke whales taken under JARPA II is much larger than that of JARPA makes no difference unless it is established first that both programmes are for purposes of scientific research.

32. As indicated above, the assessment of the legality of the special permits issued for JARPA II should focus first and foremost on the procedural and substantive requirements of Article VIII itself and with those of paragraph 30 of the Schedule. It should also take into account the effect of recent developments in the regulatory framework of the Convention on the interpretation of Article VIII in light of its object and purpose. Did Japan transmit to the Scientific Committee of the IWC, and at intervals of not more than one year, scientific information available to it with respect to whales and whaling, including the results of research conducted, as required by paragraph 3 of Article VIII? Did it submit the proposed permits for review and comment by the Committee, in accordance with paragraph 30 of the Schedule, which was adopted in 1979? To

answer these questions, it is important to examine, in addition to the procedural requirements, whether Japan has breached its treaty obligations by the use of lethal methods in JARPA II, by the scale of the sampling size involved, by authorizing JARPA II to offer for sale the by-products of the whales killed or taken in the implementation of the programme.

33. To begin with the procedural requirements, paragraph 30 of the Schedule requires Contracting Governments to "provide the Secretary to the International Whaling Commission with proposed scientific permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them". It elaborates further on the requirement of paragraph 3 of Article VIII, identifies the four types of information to be specified in the proposals[11] and prescribes that "Proposed permits shall be reviewed and commented on by the Scientific Committee at Annual Meetings when possible . . ." With regard to these requirements, the Court finds that "[a]s regards the substantive requirements of paragraph 30 . . . the JARPA II Research Plan, which constitutes the proposal for the grant of special permits, sets forth the information specified by that provision" (para. 239). It then concludes that: "the Court is persuaded that Japan has met the requirements of paragraph 30 as far as JARPA II is concerned" (para. 242).

34. These findings of the Court contradict its other conclusions that the special permits granted by Japan in connection with JARPA II are not for purposes of scientific research pursuant to Article VIII, paragraph 1, of the Convention. Compliance with the requirements of paragraph 30 is by itself a significant distinguishing feature of a programme for purposes of scientific research. The JARPA II programme was duly reviewed and commented by the Scientific Committee of the IWC in 2005 in accordance with the Guidelines contained in Annex Y (now Annex P) with regard to its methodology, the effects of catches on the population concerned and the opportunities for participation in the research[12]. In other instances, when the Scientific Committee took the view that a permit proposal submitted by a State did not meet its criteria, it specifically recommended that the permits sought should not be issued. Indeed, in 1987 the Scientific Committee explicitly recommended that the Commission request the Republic of Korea to refrain from issuing permits until it can show that such permits will not further deplete the stock and that it will materially contribute to the comprehensive assessment of this

[11] They are: *(a)* objectives of the research; *(b)* number, sex, size and stock of the animals to be taken; *(c)* opportunities for participation in the research by scientists of other nations; and *(d)* possible effect on conservation of stock.

[12] Report of the Scientific Committee (SC Report) 2005, *J. Cetacean Res. Manage* 8 (Suppl.), 2006, p. 49. All the reports of the Scientific Committee are available at: http://iwc.int/scientific-committee-reports.

stock[13]. Similarly, in 1990 with relation to a proposal by the USSR, the Committee explicitly noted that "the proposed investigations on the whales to be caught do not appear to be structured either to provide information essential for rational management of these stocks, or to contribute to the comprehensive assessment or other critically important research needs"[14]. This was not the case with regard to JARPA II despite the fact that 63 out of 195 members of the Scientific Committee declined to participate in the relevant meeting of the Scientific Committee (see paragraph 241 of the Judgment).

35. Moreover, as discussed below in paragraph 53, the Scientific Committee in its Report of 2012 specifically recommended the use of data arising, *inter alia*, from both JARPA and JARPA II for catch-at-age based analyses for the minke whale population dynamics model it is investigating; while in its 2013 Report it referred to non-lethal sampling of humpback whales occurring within the JARPA/JARPA II programmes as useful in the assessment of certain breeding stocks of humpback whales. If JARPA II were not a programme for purposes of scientific research, as the Judgment concludes, would the Scientific Committee of the IWC continue not only to review and comment on it, but also to recommend the use of its data for the advancement of its own work?

36. A second test for assessing whether JARPA II is for purposes of scientific research is whether it satisfies the criteria laid down in the Annex P Guidelines adopted by consensus by the States parties to the Convention in 2006 and revised in 2009. Annex P establishes clear criteria and conditions, which all special permit proposals should meet, and against which they are to be reviewed and commented by the Scientific Committee. Such proposals have to specify the objectives of the study[15], the methods

[13] *Rep. Int. Whal. Commn* 38, 1988, pp. 53-54, the Committee:

"reiterated its serious concern at the lack of the collection of even basic biological information from the previous year's permit catch [proposed by Korea]. There is no reason to believe the new proposal will be any more useful in assisting the Committee's work. The Committee, therefore, *requests* that the Commission strongly urges the Government of Korea to refrain from issuing a special scientific permit until it can fully show that the take of 80 whales per year will not further deplete the stock and that it will materially contribute to the comprehensive assessment of this stock."

[14] *Rep. Int. Whal. Commn* 41, 1991, pp. 74-75.

[15] The objectives should:

(a) be quantified to the extent possible;
(b) be arranged into two or three categories, if appropriate: "Primary", "Secondary" and "Ancillary";
(c) include a statement for each primary proposal as to whether it requires lethal sampling, non-lethal methods or a combination of both;

to address objectives[16], the assessment of the potential effects of catches on the stocks involved[17], and provide the results of a simulation study on the effects of the permit takes on the stock and a note of the provisions for co-operative research[18]. These Guidelines are given a curt treatment in the Judgment (para. 240), but their importance cannot be underesti-

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(d) include a brief statement of the value of at least each primary objective in the context of the three following broad categories objectives:

(i) improve the conservation and management of whale stocks,
(ii) improve the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part and/or,
(iii) test hypotheses not directly related to the management of living marine resources;

(e) include, in particular for *(d)* (i) and *(d)* (ii), at least for each primary objective, the contribution it makes to *inter alia*:

(i) past recommendations of the Scientific Committee,
(ii) completion of the comprehensive assessment or in-depth assessments in progress or expected to occur in the future,
(iii) the carrying out of implementations or implementation reviews of the RMP or AWMP,

(iv) improved understanding of other priority issues as identified in the Scientific Committee Rules of Procedure (IWC, 2006, p. 180),
(v) recommendations of other intergovernmental organizations.

[16] Methods to address objectives:

(a) field methods, including:

(i) species, number (and see *(c)* below), time frame, area,
(ii) sampling protocol for lethal aspects of the proposal, and
(iii) an assessment of why non-lethal methods, methods associated with any ongoing commercial *whaling, or analyses of past data have been considered to be insufficient*;

(b) laboratory methods;
(c) analytical methods, including estimates of statistical power where appropriate;

(d) time frame with intermediary targets [emphasis added].

[17] Assessment of potential effects of catches on the stocks involved:

(a) a summary of what is known concerning stock structure in the area concerned;
(b) the estimated abundance of the species or stocks, including methods used and an assessment of uncertainty, with a note as to whether the estimates have previously been considered by the Scientific Committee;
(c) provision of the results of a simulation study on the effects of the permit takes on the stock that takes into account uncertainty and projects (1) for the expected life of the permit (i.e., *n* years); (2) for situations where the proposal is assumed to continue for *(a)* a further *n* years, *(b)* a further 2*n* years and *(c)* some longer period of years since the start of the proposal.

[18] A note on the provisions for co-operative research:

(a) field studies;
(b) analytical studies.

mated since they were used by the Scientific Committee in the initial review and commentary on JARPA II and continue to be used by it to ensure its compliance with paragraph 30 of the Schedule to the Convention as well as Article VIII.

37. Japan submitted the JARPA II proposal in March 2005 and furnished the information required by paragraph 30 and Annex Y (now P). The Committee recognized that "[t]he proposal provides the information under paragraph 30 of the Schedule"[19]. The Committee does not have the power to disallow or authorize a permit, which rests in the discretion of the State party under Article VIII. However, its views and comments are of utmost significance. When the Committee reviews a proposal, the Government concerned must take serious account of the discussions which have taken place, and of the conclusions and recommendations of the Committee. Paragraph 30 also requires that "[p]reliminary results of any research resulting from the permits" should be made available.

38. The evidence before the Court indicates that Japan continues to submit annual cruise reports to the Scientific Committee to share with it the preliminary results of JARPA II and to show the extent to which the recommendations of the Committee have been taken into account[20]. Thus, there appears to be an ongoing dialogue and co-operation between the Japanese scientists involved in JARPA II and the Scientific Committee. This has recently led the Committee to note in one of its reports that the stock structure model used in JARPA II was "simple and potentially powerful" and that "[a]side from the general relevance of the results to understanding [of] Antarctic minke whale dynamics, it might in the future prove useful in allocating historical catches to stocks"[21]. Would the Scientific Committee make such favourable comments about JARPA II if it were not for purposes of scientific research?

39. JARPA II is the successor programme to JARPA and although the legality of JARPA is not in issue here, there can be no doubt that the two programmes pursue overlapping objectives as recognized in the Judgment. In this connection, it is important to note that in 2007, when reviewing the results from the JARPA programme, the review workshop established by the Scientific Committee reiterated the view already expressed by the Commission in 1997 that some use could be found for the data arising from JARPA:

[19] *J. Cetacean Res. Manage* 8 (Suppl.), 2006, p. 50.

[20] See, for example, SC Report 2012, p. 85. All the JARPA/JARPA II cruise reports are available at: http://www.icrwhale.org/CruiseReportJARPA.htm.

[21] SC Report 2012, p. 35 and *J. Cetacean Res. Manage* 14 (Suppl.), 2013, p. 26.

> "The results from the JARPA programme, while not required for management under the RMP, have the potential to improve management of minke whales in the southern hemisphere in the following ways: (1) reductions in the current set of plausible scenarios considered in Implementation Simulation Trials; and (2) identification of new scenarios to which future Implementation Simulation Trials will have to be developed (e.g., the temporal component of stock structure). The results of analyses of JARPA data could be used in this way perhaps to increase the allowed catch of minke whales in the southern hemisphere, without increasing depletion risk above the level indicated by the existing Implementation Simulation Trials of the RMP for these minke whales."[22]

40. Turning now to the use of lethal methods and the scale of the sampling involved under JARPA II, it should be recalled that Article VIII of the Convention authorizes Contracting Governments to grant special permits to their nationals to kill and take whales for purposes of scientific research subject to such restrictions and other conditions that the Government "thinks fit". At the same time, following the adoption of paragraph 30 of the Schedule in 1979, the exercise of that right is subject to the review and commentary of the Scientific Committee of the IWC and the respect for the Guidelines issued by the Committee for that purpose, namely Annex P. This Annex, which was approved by consensus by all the States parties to the Convention, requires, as indicated above, "an assessment of why non-lethal methods, methods associated with any ongoing commercial whaling, or analyses of past data have been considered to be insufficient". Thus, the use of lethal methods for purposes of scientific research or the insufficient consideration of non-lethal methods in scientific research programmes has to be assessed and justified, and is subject to review and comment by the Scientific Committee of the IWC.

41. Did Japan comply with these conditions and did it give adequate consideration to the use of non-lethal methods in JARPA II? Are such non-lethal methods used in JARPA II? The evidence submitted to the Court shows that the JARPA II plan clearly mentions the non-lethal methodologies which are to be employed in the programme, including "sighting" surveys, "ecosystem surveys" of the habitat environment of whales, "oceanographic and meteorological observations . . ., including sea ice, surface temperature, sea surface height and chlorophyll α concentration over the entire research area, using satellite data"[23].

[22] See at: http://iwc.int/jarpa.
[23] Counter-Memorial of Japan, Ann. 150, pp. 14-15.

42. Moreover, at the oral hearings, Counsel for Japan affirmed that "Japan has put much effort into non-lethal research methods" and that JARPA II "scientists have . . . had some success with biopsy sampling and satellite tagging of large, slow-moving whale species such as the humpback"[24]. As evidence, he referred to the cruise report of the JARPA II scientists for the year 2009-2010, which gives precise details of the non-lethal sampling conducted on blue, humpback, fin and southern right whales in that year[25]. Similar data are also available in the most recent JARPA II cruise report for the year 2012-2013[26]. This gives details of the non-lethal experiments conducted, which included "sighting distance and angle experiment", "photo-identification experiment", "biopsy sampling", "satellite tag", "vomiting and faecal observation", "marine debris observation", and "oceanographic survey"[27].

43. With regard to sample sizes, the only requirement laid down in paragraph 30 of the Schedule is that the proposal should specify "number, sex, size and stock of the animals to be taken"; while Annex P refers to the need to include a "sampling protocol for lethal aspects of the proposal". The JARPA II plan includes such a protocol in Appendices 6-8[28]. The statistical formula that is used to calculate the sample sizes is also reproduced in the Appendix to Appendix VI of the JARPA II plan. Fuller accounts of the sample size calculations and the statistical methodology used are set out in the JARPA II research plan and in its Appendices 3 to 8, which were submitted to the Scientific Committee of the IWC for comment in 2005. However, the experts presented by the Parties during the oral proceedings disagreed as to whether the sample size eventually determined by Japan for JARPA II is appropriate to the objectives of JARPA II.

44. It is understandable that different scientists could reasonably come to different conclusions about the sample sizes, in view of the computational methodology used in JARPA II, the elements of discretion involved in choosing the statistical parameters upon which sample calculations are made, and the range of variables which can lead to a range of possible sample sizes. However, I must say that I do not understand how the

[24] CR 2013/15, p. 61 (Boyle).
[25] See at: http://www.icrwhale.org/pdf/SC62O3.pdf, p. 9.
[26] See at: https://events.iwc.int/index.php/scientific/SC65a/paper/viewFile/356/331/SC-65a-O09.
[27] *Ibid.*, pp. 3-4.
[28] JARPA II Research Plan (2005), IWC SC/57/01, Apps. 6-8.

majority came to the conclusion that "the sample sizes are larger than are reasonable in relation to achieving JARPA II's stated objectives" (para. 212). It is not indicated anywhere in the Judgment what methodology or criteria should be used to arrive at "reasonable" sample sizes in light of the objectives of JARPA II or what "reasonable" sample sizes should be. Nor does the Judgment provide an indication of what sample sizes would be most appropriate to the objectives of JARPA II. Indeed, it would be difficult for a Court of law to reach such a determination, which befits scientists, not jurists.

45. The above analysis shows that the special permits issued by Japan in connection with JARPA II clearly comply with the requirements and conditions prescribed by the provisions of the ICRW and related Guidelines dealing with special permits issued for purposes of scientific research, and that JARPA II has been acknowledged by the Scientific Committee of the IWC to contribute to the understanding of Antarctic minke whale dynamics and to be useful in the assessment of certain breeding stocks of humpback whales. These are not characteristics that can be associated with a programme the design and implementation of which are not for purposes of scientific research. The Scientific Committee of the IWC has pointed out on several occasions that "only scientific and not ethical issues should be considered" when issuing scientific permits[29]. A similar consideration should apply in the assessment of the legality of the authorization granted by Japan in connection with JARPA II.

46. Nonetheless, another issue that should have been addressed in the context of the legality of JARPA II is whether the evolving regulatory framework of the Convention setting zero catch limits and establishing the Southern Ocean Sanctuary should be taken into account in interpreting Article VIII of the Convention and assessing the extent to which it might restrict the special permits issued under that provision for purposes of scientific research. It is my view that the Court should have assessed whether a programme, such as JARPA II, that continues to use lethal methods for purposes of scientific research under Article VIII, constitutes an anomaly, which may frustrate the object and purpose of the Convention in light of the conservationist approach adopted in the Convention in recent years. Such an assessment, in addition to anchoring the reasoning and conclusions of the Court on the law applicable to the dispute between the Parties, would have been of great value to the States parties to the Convention in view of the growing disconnect between Article VIII and other provisions of the Convention on commercial whaling.

47. Article V of the Convention authorizes the IWC to make such amendments to the Schedule as are necessary to carry out the objectives

[29] SC Report 2005, *J. Cetacean Res. Manage* 8 (Suppl.), 2006, p. 48.

and purposes of the Convention and to provide for the conservation, development and optimum utilization of whale resources. It also provides that such amendments shall be based on scientific research. In view of the recent amendments to the Schedule which have done away with the objective of optimum utilization of whale resources through the establishment of zero catch limits, the special permits issued under Article VIII had to be assessed in light of the overall evolution of the Convention and, in particular, of its object and purpose to ensure an integral and effective interpretation of all its provisions.

III. Is JARPA II Conducted for Purposes other than Scientific Research?

48. It is stated in the Judgment that:

> "Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research . . . but that the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives. The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not 'for purposes of scientific research pursuant to Article VIII, paragraph 1, of the Convention'." (Para. 227.)

49. On the basis of that conclusion, it is further stated that:

> "[t]he Court therefore proceeds on the basis that whaling that falls outside Article VIII, paragraph 1, other than aboriginal subsistence whaling, is subject to the three schedule provisions invoked by Australia" (para. 230).

These three provisions are paragraph 10 *(e)* of the Schedule dealing with the obligation to respect zero catch limits for the killing for commercial purposes of whales from all stocks; paragraph 7 *(b)* of the Schedule on the prohibition on commercial whaling in the Southern Ocean Sanctuary and paragraph 10 *(d)* of the Schedule on the factory ship moratorium.

50. The activities conducted under JARPA II are, on the one hand, characterized in the Judgment as scientific research, while, on the other hand, it is concluded that the special permits granted by Japan for JARPA II are not "for purposes of scientific research". This is very unpersuasive for the following reasons.

51. First, the distinction made in the Judgment between a programme that involves "scientific research" and a programme "for purposes of scientific research" is rather artificial and unsubstantiated (para. 67), par-

ticularly in view of the fact that the term "scientific research" is not defined in the Judgment. It is like saying: "I know how to identify the activities undertaken for the purpose of the 'term X', but I do not know how to define the term itself". It also gives the impression that serendipity was at work here and that JARPA II, though not designed for purposes of scientific research, accidently stumbled into scientific research activities.

52. Secondly, to the extent that it is not clearly proved that a programme which involves scientific research activities has as its preponderant purpose commercial whaling, and consequently the scientific activities are incidental to the commercial whaling, as provided in Article VIII, paragraph 4, of the Convention, such a programme cannot be deemed not to be for purposes of scientific research.

53. Thirdly, the Court's conclusion that JARPA II is not for purposes of scientific research is also unpersuasive in light of the indisputable evidence on the recognition by the Scientific Committee of the IWC of the generation by JARPA II of data which is useful to the work of the Scientific Committee, on the use by JARPA II of non-lethal methods which are uncharacteristic of commercial whaling, on the presence of scientists on vessels, and on the continuing review and commentary on JARPA II by the Scientific Committee. In its 2012 Report, the Committee specifically recommended the use of data arising, *inter alia,* from both JARPA and JARPA II for catch-at-age based analyses[30]. In the subsequent Report, reference is made to non-lethal sampling of humpback whales occurring within the JARPA/JARPA II programmes as useful in the assessment of certain breeding stocks of humpback whales[31]. Similar references were made in this Report to JARPA and JARPA II photographic data concerning blue whales[32], and to blubber thickness data arising from lethal sampling in JARPA and JARPA II[33].

54. Fourthly, there is no clear evidence to show that the special permits issued by Japan for JARPA II were not for purposes of scientific research,

[30] *J. Cetacean Res. Manage* 14 (Suppl.), 2013, p. 29:

> "Section 10.1.4 Continue development of the catch-at-age models: Population dynamics modelling provides a way to explore possible changes in abundance and carrying capacity within Areas IIIE-VW, where appropriate data are available. The inputs are catch, length, age and sex data from the commercial harvests and both JARPA programmes, as well as abundance estimates from IDCR/SOWER."

[31] IWC Scientific Committee Report 2013, https://archive.iwc.int/pages/view.php?ref=2128, para. 10.2.1.1.

[32] *Ibid.*, para. 10.3.1.4.

[33] *Ibid.*

unless the bad faith of Japan is presumed. As correctly stated in the *Lac Lanoux* case: "there is a general and well-established principle of law according to which bad faith is not presumed"[34]. In any case, it is not the function of the Court to investigate the motives lying behind Japan's conduct in granting special permits to JARPA II, as long as those permits are in compliance with Japan's obligations. It appears, however, that both the review and the conclusions of the Judgment entail a finding of bad faith which is not explicitly expressed, since JARPA II is considered to be in violation of the commercial whaling provisions of the ICRW.

55. Fifthly, there is also no evidence to support the claim that the programme is being carried out for commercial purposes. The term "for purposes of scientific research" does not, under Article VIII of the ICRW, mean that such killing and taking of whales has to be exclusively for purposes of scientific research. Article VIII (2) explicitly requires that whales killed under the special permits should be processed and dealt with as directed by the Government concerned including for commercial purposes. Thus, Article VIII provides for a subsidiary or incidental purpose which may have a commercial character. Of course, the preponderant purpose must be scientific research, but the sale of whale meat in accordance with Article VIII does not deprive a special permit programme of its quality as a programme conducted for purposes of scientific research.

56. Turning finally to the conclusion in the Judgment that the authorization granted to JARPA II is in breach of three provisions of the Schedule (i.e., paras. 7 *(b)*, 10 *(d)* and 10 *(e)*), there is, in my view, no legal basis to such a finding unless it could be clearly shown that JARPA II is commercial whaling in disguise, or that its activities are preponderantly of a commercial nature. In order to affirm that a breach of the commercial whaling moratorium or the prohibition of whaling in the Southern Ocean Sanctuary has occurred, it would be necessary to demonstrate that JARPA II is a programme for the purposes of commercial whaling.

57. The word "commercial" in paragraphs 10 *(d)* and 10 *(e)* was not defined at the time of adoption of the amendments of the Schedule, nor afterwards. There is no doubt, however, that it refers to whaling for commercial purposes. The Judgment does not characterize JARPA II as commercial whaling, but the conclusion that the programme is in breach of the moratorium on commercial whaling (para. 10 *(e)*) and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 10 *(d)*) implies that it is conducted for commercial purposes.

[34] *Lac Lanoux* Case, 16 November 1957, at XII *Reports of International Arbitral Awords (RIAA)* 305: "[I]l est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas."

58. How can such a conclusion be reconciled with the use of non-lethal methods in the JARPA II programme or with the recognition by the Scientific Committee of the IWC of the usefulness of the data obtained with these methods as described in paragraph 53 above? How does one account for the evidence of the many scientific outputs produced exclusively with the use of data arising from the non-lethal methods employed in JARPA II? This evidence indicates that 100 scientific outputs were produced between 1988 and 2013 exclusively with the data arising from non-lethal methods in JARPA and JARPA II[35]. It is doubtful that such a scientific output could be produced by a programme of commercial whaling.

59. It is stated in paragraph 230 of the Judgment that: "the Court sees no reason to evaluate the evidence in support of the Parties' competing contentions about whether or not JARPA II has attributes of commercial whaling". This statement is, however, contradicted by the distinction made in the Judgment between activities involving scientific research and a programme for purposes of scientific research. Such a distinction could make sense only if it was proved that JARPA II was a commercial whaling programme with incidental collection and analysis of biological data as provided in Article VIII, paragraph 4, of the ICRW. The statement is equally contradicted by the conclusion that JARPA II is in violation of the moratorium on commercial whaling (para. 10 *(d)* of the Schedule).

IV. Conclusion

60. The evidence before the Court does not support the conclusion that the special permits for JARPA II have been issued for a purpose other than scientific research. Nor does it establish that such special permits do not comply with the requirements and conditions prescribed by the provisions of Article VIII of the ICRW, paragraph 30 of the Schedule and related Guidelines dealing with scientific research programmes. The real issue is whether the evolving regulatory framework of the Convention in setting zero catch limits and establishing the Southern Ocean Sanctuary should be taken into account in interpreting Article VIII of the Convention and the legality of the special permits granted by Japan under that provision for purposes of scientific research, and the extent to which Article VIII and the use of lethal methods for purposes of scientific research might have been restricted by the fact that the optimum utiliza-

[35] See at: http://www.icrwhale.org/pdf/ScientificContributionJARPA.pdf, p. 3.

tion of whale resources has been set aside as one of the central objectives of the Convention.

61. It is a pity that instead of such a legal assessment, the Court has engaged in an evaluation of the design and implementation of the programme and their reasonableness in relation to its objectives, a task that normally falls within the competence of the Scientific Committee of the IWC, which is scheduled to undertake an overall review of the JARPA II programme in 2014. As a matter of fact, when the Scientific Committee took the view in the past that a permit proposal submitted by a State did not meet its criteria, it specifically recommended that the permits sought should not be issued. This has not been the case with regard to JARPA II, but it shows at least that the Committee's practice is adequate to the task of evaluating the design and implementation of scientific research programmes under the ICRW and accordingly advising the IWC on that matter.

(Signed) Abdulqawi A. YUSUF.