SEPARATE OPINION OF JUDGE SEBUTINDE

The Court should have clarified more precisely the limits of discretion of a Contracting Government under Article VIII as well as the scope of the Court's power to review the exercise of that discretion — In particular, the Court should have specified the criteria which have guided and informed its determination of whether the special permits issued under JARPA II were "for purposes of scientific research" — Japan has not fully complied with the procedural obligations under paragraph 30 of the Schedule to the ICRW.

1. I concur, in principle, with the Court's findings in points 1, 2, 3, 4, 5 and 7 of the operative part of the Judgment and I agree, in general, with the reasoning upon which those findings are predicated. Nonetheless, I believe that there are certain key aspects of this dispute in respect of which the Court has missed an opportunity to elaborate its views and articulate the reasoning underpinning its findings. These include the extent of a Contracting Government's discretion under Article VIII of the International Convention for the Regulation of Whaling (ICRW) as well as the scope of the Court's power to review such discretion. In my view, these aspects merit further elaboration than that accorded to them in the Judgment. Furthermore, I have voted against the finding of the Court, in point 6 of the operative paragraph, that "Japan has complied with its obligations under paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling with regard to JARPA II", because in my opinion, the facts before the Court do not bear out this conclusion. It is precisely these points in respect of which this opinion is offered.

2. The Judgment deals briefly with the question of the discretion of a State party issuing special permits under Article VIII of the ICRW, without elaborating on the nature or extent of that discretion (Judgment, para. 61). Yet, as the Court points out at a later stage, it is precisely the exercise of this discretion that the Court is called upon to review (*ibid.*, para. 67).

I. The Nature and Extent of Discretion Exercisable under Article VIII of the ICRW

3. The ICRW is a historical attempt by the States parties (consisting of both whaling and non-whaling nations) to regulate whaling, in recognition of their common interest in "ensuring the conservation of all species of whales while allowing for their sustainable exploitation" (*ibid.*,

para. 56). To this end, the ICRW was intended to replace unregulated unilateral whaling by individual States with a system of collective regulation whereby States parties to the ICRW chose to work collectively and to abide by the obligations they assumed thereunder, in order to protect their common interests and achieve their common goals. It is against this historical background that the discretion referred to in Article VIII of the ICRW must be understood and appreciated.

4. Article VIII sets up a mechanism whereby a State party may issue special permits to conduct whaling strictly "for purposes of scientific research". In the light of the object and purpose of the ICRW, the scientific research to be conducted under such permits is intended for the benefit of not only the State issuing the permits but also the International Whaling Commission (IWC) and the international whaling community as a whole. Any whaling conducted outside the special permits is subject to the restrictions set out in the ICRW. The discretion afforded by Article VIII is thus an integral part of the collective regulatory mechanism and is necessarily limited in scope and character.

5. First, the discretion to issue special permits must be exercised judiciously or "reasonably" and in accordance with the object and purpose of the ICRW. Second, the special permits must be strictly "for purposes of scientific research". Third, the issuing State must ensure that it sets a catch limit in the permits, and lastly, the issuing State must ensure that the procedural requirements set out in paragraph 30 of the Schedule to the ICRW are complied with. In short, these are the yardsticks that the Court ought to examine in reviewing Japan's exercise of discretion in issuing special permits under Article VIII of the ICRW.

II. The Standard of Review for Determining whether a Whaling Programme Falls within the Scope of Article VIII

6. Similarly, I also consider that in stating its standard of review (see Judgment, para. 67), the Court should have elaborated upon the criteria that guided its determination of whether or not JARPA II fits within the scope of Article VIII. In my view, the criteria logically flow from the yardsticks outlined above. Furthermore, the Court should have regard to the parameters that the States parties to the ICRW consider relevant in this regard. These parameters are reflected in paragraph 30 to the Schedule, which sets out the elements that must be specified in any proposed special permit submitted for review to the Scientific Committee. They are elaborated further in the binding resolutions and Guidelines of the IWC. Among the latter, the Annex P Guidelines may be given a particular weight, since they are the most recent set of Guidelines adopted by consensus and on the basis of which JARPA II will be assessed by the

Scientific Committee in 2014. These criteria are set out in greater detail below.

7. In determining whether a special permit is issued "for purposes of scientific research", it is perhaps only logical that one should start by defining the term "scientific research" as used in Article VIII and elsewhere in the ICRW, since the Convention itself does not define the term. Without this first step, it is difficult to envisage how one can meaningfully determine whether a special permit is issued "for purposes of scientific research".

8. In the Judgment, the Court rightly discards the criteria proposed by Australia as to what amounts to "scientific research", noting that those criteria "appear largely to reflect what one of the experts that [Australia] called regards as well-conceived scientific research, rather than serving as an interpretation of the term as used in the Convention" (Judgment, para. 86). However, the Court then declines to give its own interpretation of the phrase, simply stating that it does not "consider it necessary to devise alternative criteria or to offer a general definition of 'scientific research'" *(ibid.)*.

9. Whilst I accept that the Court should not attempt a forensic definition of what is or is not "scientific research" (a task more suited to scientists rather than lawyers), in my view, the Court should at least have considered the ordinary grammatical (dictionary) meaning of the phrase, as a basis for the reasoning and analysis that follows in the Judgment. Although the concept of "science" is inherently vague, "scientific research" must, in its most basic sense, involve "a systematic pursuit of knowledge concerning the structure and behaviour of the physical and natural world through observation and experiment" *(The Oxford English Dictionary)*. In my view, this is a workable definition that could have been adopted as a basis for the Court's reasoning and analysis.

10. Regarding the parameters or criteria that should be taken into account in reviewing a State party's exercise of its discretion to issue special permits under Article VIII, I consider that the Court should take into account the following factors gleaned from the provisions of the ICRW, its Schedule and the binding resolutions of the IWC.

11. First, the whaling programme for which the special permit is sought must include defined research objectives as required by paragraph 30 of the Schedule. While the Schedule is silent on how precise and elaborate the stated objectives should be, some guidance can be found in this regard in Annex P, which states that research objectives should "be quantified to the extent possible". In terms of substance, the Guidelines in Annex P affirm that these objectives do not have to relate exclusively to the conservation and management of whales, but may also be directed at "improv[ing] the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part

and/or, . . . test[ing] hypotheses not directly related to the management of living marine resources". In addition, any scientific research programme must be based on appropriate scientific methodology.

12. Secondly, Article VIII explicitly requires that the Contracting Government issuing a special permit for scientific research whaling must set limits on the number of whales to be killed, in addition to any other conditions it sees fit. Paragraph 30 of the Schedule requires that the permits specify the "number, sex, size and stock of the animals to be taken". While a Contracting Government enjoys considerable discretion in determining the catch limits, it must exercise that discretion consistent with the object and purpose of the ICRW, in that whales may be killed only to the extent necessary for achieving the stated goals of the scientific research programme. In this regard, Annex P, which provides some guidance on how the Scientific Committee assesses the appropriate balance between lethal and non-lethal methods, requires that the special permit proposal must provide "an assessment of why non-lethal methods . . . have been considered to be *insufficient*" (emphasis added). Thus, the use of lethal methods where non-lethal alternatives are a viable option may serve to indicate that a particular whaling programme is not genuinely designed and/or implemented "for purposes of scientific research".

13. Thirdly, the issuing State must ensure that the proposed scientific research programme is designed and implemented so as not to endanger the target whale stocks. In this regard paragraph 30 of the Schedule requires the proposed permit to specify the "possible effect [of the research programme] on conservation of [whale] stock[s]".

14. Lastly, paragraph 30 of the Schedule requires a State party to submit the proposed special permits to the Scientific Committee for prior review and comments. This procedural requirement enables the IWC and its Scientific Committee to play a monitoring role in respect of special permit whaling, while obligating the issuing State to co-operate with the IWC, a duty I elaborate upon in the paragraphs below. As stated before, it is my considered opinion that the foregoing criteria or parameters should have served to guide and inform the Court in its task stated in paragraph 67 of the Judgment, and should have been set out in the Judgment.

III. The Duty of Co-operation under Paragraph 30 of the Schedule

15. I have voted against point 6 of the operative part of the Judgment because I disagree with the reasoning and findings of the Court regarding

Japan's compliance with its obligations under paragraph 30 of the Schedule to the ICRW. In my view, that paragraph imposes more than a formal or procedural obligation to notify the Scientific Committee of certain information. The obligation entails a substantive duty of meaningful co-operation with the IWC and its subordinate organs such as the Scientific Committee. Thus in determining whether or not Japan is in breach of its obligations under paragraph 30 of the Schedule, the real issue to be addressed is not whether Japan complied with the required procedures in relation to JARPA II but rather, whether Japan fulfilled its obligation of meaningful co-operation with the IWC in relation to that programme. I examine this issue in greater detail below.

16. It will be recalled that under the ICRW system of collective regulation, the IWC (and its subsidiary bodies such as the Scientific Committee) play a crucial role in regulating whaling. The IWC does so through amendments to the Schedule to the ICRW, for example, by designating protected species and ocean sanctuaries, and setting annual catch limits. The IWC is also entrusted with monitoring scientific research whaling. It is this role of the IWC, when viewed in the overall context of the object and purpose of the ICRW, that forms the basis of the duty of co-operation by the States parties. As part of this duty of co-operation, a Contracting Government is required under Article VIII of the ICRW to "report at once" to the IWC all authorizations that it has granted for special permit whaling, and secondly, to transmit to the Scientific Committee, "in so far as practicable and at intervals of not more than one year", scientific information available to that Government resulting from the scientific research conducted pursuant to those permits. (See Art. VIII, paras. 1 and 3.)

17. Furthermore, paragraph 30 of the Schedule, which forms an integral part of the ICRW, was introduced as a procedural guarantee to ensure that States parties do not circumvent the duty of co-operation envisaged under Article VIII. Paragraph 30 thus obliges a Contracting Government, before it issues the special permits, to submit them to the IWC "in sufficient time to allow the Scientific Committee to review and comment on them". In turn, the Scientific Committee is mandated to review and comment upon the proposed special permits and to submit its report and recommendations thereon to the IWC. The IWC may, in turn, make recommendations to the Contracting Government in relation to the proposed permit. (See paragraph 30 of the Schedule and Rule M (4 *(a)*) of the IWC's Rules of Procedure.) There is therefore a link between the Article VIII obligations of notification, reporting and dissemination of scientific information on the one hand, and the obligations of prior review in paragraph 30 of the Schedule, on the other. Thus, while the gathering and dissemination of scientific information is central to the functioning of the IWC and forms part of the system of collective regulation under the ICRW, the review procedures under paragraph 30 serve as the mecha-

nism through which special permit whaling may be monitored and the collective interests of the States parties protected.

18. The review procedure under paragraph 30 is designed to ensure that Article VIII is applied as the parties to the ICRW intended it to. Accordingly, all aspects of a proposed special permit are subject to prior review by the Scientific Committee, including the objectives of the research programme, the number, sex, size and stock of the animals to be taken, opportunities for participation in the research by scientists of other nations, and possible effect on conservation of whale stocks. The duty of co-operation by States parties must be viewed and appreciated in light of the above provisions, and in the context of the overall objectives of the ICRW. In this context, meaningful co-operation requires a State party to do the following:

(a) to submit to the IWC the proposed special permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them;
(b) to provide to the IWC, in relation to the proposed permits, the information specified in paragraph 30 *(a)* to *(d)* of the Schedule;

(c) to give due consideration, in good faith, to the views and recommendations of the IWC, with a readiness to modify the terms of the special permits or the decision to issue them, taking into account such recommendations;
(d) on an annual basis, to keep the Scientific Committee informed of the progress and results of scientific research conducted under the special permits, including by providing accurate information regarding any modifications in the implementation of the research programme; and

(e) to offer opportunities for collaboration to other researchers within the international scientific community.

19. Assessed against these benchmarks, the evidence in the present case clearly shows the following shortcomings in relation to JARPA II. First, against the recommendation of the IWC that no additional Japanese special permit programmes be conducted in the Antarctic until the Scientific Committee had completed an in-depth review of the results of JARPA, Japan launched JARPA II before the Scientific Committee had completed a review of JARPA (see, for example, IWC resolutions 2003-3 and 2005-1). Secondly, there is no indication that Japan has duly considered the IWC comments and recommendations in respect of certain controversial aspects of JARPA II such as its resort to lethal methods (see, for example, IWC resolutions 2005-1 and 2007-1). Thirdly, although the JARPA II Plan provided the essential information required under paragraph 30 of the Schedule, much of the information is not detailed enough

to be considered compliant with the relevant IWC guidelines, a shortcoming likely to hamper the Scientific Committee's upcoming review of JARPA II. Fourthly, Japan has failed to submit the specific special permits issued in respect of JARPA II to the Scientific Committee for prior review, as required by paragraph 30. Given that these permits are virtual replicas of the permits issued under JARPA and that JARPA II differs in implementation at least, from its predecessor, it is imperative that the Scientific Committee ought to have had prior opportunity to review and comment on them. Fifthly, as noted in the Judgment (para. 222), apart from reference to collaboration with Japanese research institutes in relation to JARPA I, there is no evidence of co-operation between JARPA II and other domestic and international research institutions other than an undertaking, in the JARPA II Plan, that "[p]articipation of foreign scientists will be welcomed, so long as they meet the qualifications established by the Government of Japan".

20. In view of the above shortcomings and having regard to the duty incumbent upon States parties to meaningfully co-operate with the IWC, I am unable to join the majority in finding that "Japan has complied with its obligations under paragraph 30 of the Schedule to the [ICRW] with regard to JARPA II".

(Signed) Julia SEBUTINDE.