SEPARATE OPINION OF JUDGE *AD HOC* CHARLESWORTH

Special permit whaling under Article VIII of the ICRW — The use of lethal methods "for purposes of scientific research" under the ICRW must be indispensable to the research — The precautionary approach is relevant to the interpretation of the ICRW — States parties to the ICRW have a duty to co-operate with the IWC and its committees — Japan has breached paragraph 30 of the Schedule to the ICRW.

1. As my vote indicates, I largely agree with the conclusions the Court has reached and its reasoning. There are, however, two areas in which my views differ from those of the majority.

Lethal methods

2. My first point of difference from the majority turns on the nature of the restrictions on lethal methods in scientific research on whales in Article VIII of the International Convention for the Regulation of Whaling 1946 (ICRW): can lethal methods be used when a State party considers it necessary or only when no other methods for the relevant scientific research are available? Both Parties to this dispute accept that lethal methods may be essential for research on some scientific questions about whales.

3. At the time the ICRW was adopted, scientific research on whales was largely dependent on lethal methods. As the Court notes, however, the ICRW is an evolving instrument (paragraph 45). The most obvious mechanism of evolution is contained in the ICRW itself. Article V gives the International Whaling Commission (IWC) the power to amend the ICRW though the adoption of amendments to the ICRW's Schedule by a three-fourths majority of those IWC members voting (Art. III.2). The Schedule has the same legal status as the Convention by virtue of Article I.1.

4. A second, less direct, mode of evolution is through recommendations of the IWC (Art. VI) which are adopted by a simple majority of members voting (Art. III.2). Although such recommendations do not bind IWC members, they are relevant to the interpretation of the ICRW if they come within the terms of Article 31.3 *(a)* or *(b)* of the Vienna Convention on the Law of Treaties 1969. Article 31.3 *(a)* requires that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" be taken into account in its interpretation, together with the treaty's context. Article 31.3 *(b)* takes the same approach to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Since the moratorium on commercial whaling came into effect in the 1985/1986 pelagic and 1986 coastal seasons, most IWC resolutions on special permit whaling have attracted a number of negative votes, which precludes them as evidence of the parties' agreement on the ICRW's interpretation. However, there remain some significant resolutions that were adopted by consensus and thus must inform the interpretative task. I note that resolutions adopted by a vote of the IWC have some consequence although they do not come within the terms of Article 31.3 of the Vienna Convention. Particularly when they are adopted by a large majority of IWC members, the resolutions are relevant to the duty of co-operation, discussed below.

5. The issue of the status of IWC resolutions is of special significance in this case with respect to the use of lethal methods "for purposes of scientific research" under Article VIII. While Article VIII envisages the killing of whales for scientific ends, it must be read in light of developments in the treaty parties' views on lethal research methods. Although the Court

acknowledges at a general level that resolutions adopted by consensus or by a unanimous vote "may be relevant for the interpretation of the Convention or its Schedule" (paragraph 46), with respect to lethal research methods it states that any such resolutions "do not establish a requirement that lethal methods be used only when other methods are not available" (paragraph 83). In my view, however, the applicable resolutions establish a principle that lethal methods should be of last resort in scientific research programmes under Article VIII. IWC resolution 1986-2 on "Special Permits for Scientific Research" was adopted by consensus and records the views of parties to the ICRW that both permit-issuing Governments and the IWC's Scientific Committee in reviewing permits should take into account whether the relevant scientific research objectives "are not practically and scientifically feasible through non-lethal research techniques". Annex P, the most recent version of the Guidelines for the Review of Scientific Permit Proposals, adopted by consensus by the Scientific Committee and endorsed by the IWC in 2008, requires an assessment of "why non-lethal research methods . . . have been considered to be insufficient". These resolutions and guidelines give primacy to non-lethal methods in scientific research relating to whaling and insist that permit-issuing States explain why non-lethal methods are inadequate. In turn, the Scientific Committee must assess such explanations against current scientific knowledge and practice. These instruments thus support an interpretation of Article VIII that lethal methods should be essential to the objectives of the scientific research programme.

6. The precautionary approach to environmental regulation also reinforces this analysis of the conditions in which lethal research methods may be undertaken. The approach was formulated in Principle 15 of the Rio Declaration on Environment and Development in 1992 as "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". The precautionary approach entails the avoidance of activities that may threaten the environment even in the face of scientific uncertainty about the direct or indirect effects of such activities. It gives priority to the prevention of harm to the environment in its broadest sense, including biological diversity, resource conservation and management and human health. The essence of the precautionary approach has informed the development of international environmental law and is recognized implicitly or explicitly in instruments dealing with a wide range of subject-matter, from the regulation of the oceans and international watercourses to the conservation and management of fish stocks, the conservation of endangered species and biosafety.

7. This Court has referred to the precautionary approach in *Gabčíkovo-Nagymaros Project* (although not using this term) and *Pulp Mills on the River Uruguay*. In both these cases, the Court contemplated the interpretation of treaty obligations in light of new approaches to environmental protection. In the *Gabčíkovo-Nagymaros* case, dealing with a bilateral treaty signed in 1977, the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System, the Court stated:

> "The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.
>
> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when

> continuing with activities begun in the past." (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140.)

8. In the *Pulp Mills* case, the Court considered that "a precautionary approach may be relevant in the interpretation and application of the provisions of [the 1975 Statute of the River Uruguay]" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 164). It went on to state that:

> "the obligation to protect and preserve, [under the Statute], has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource" (*ibid.*, p. 83, para. 204).

9. These observations suggest that treaties dealing with the environment should be interpreted wherever possible in light of the precautionary approach, regardless of the date of their adoption. This is also consistent with the Court's statement in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*: "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (*Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53).

10. Both Parties to this dispute endorsed the precautionary approach at a theoretical level, although they disagreed about its application to the facts. In my view, the precautionary approach requires that non-lethal methods of research be used wherever possible. In relation to Article VIII, which contemplates the killing of the subject of research by the research activity, an implication of the precautionary approach is that lethal methods must be shown to be indispensable to the purposes of scientific research on whales.

Duty of co-operation

11. The second point on which I differ from the majority is whether Japan has acted consistently with paragraph 30 of the Schedule to the ICRW. Paragraph 30 sets out the process by which States parties submit proposed scientific permits to the IWC's Scientific Committee for review and comment. In my view, paragraph 30 must be read in light of a duty of co-operation of States parties to the ICRW with the IWC and its committees. While the Judgment of the Court recognizes such a duty of co-operation (paragraphs 83 and 240), it does not specifically address Japan's compliance with the duty. As the duty of co-operation is a critical element of the fabric of the ICRW, it merits some elaboration.

12. The ICRW was designed as a new form of international regulation of whaling after the failure of two earlier attempts. The Convention for the Regulation of Whaling 1931, prepared under the auspices of the League of Nations, and the International Agreement for the Regulation of Whaling 1937 (amended by several protocols) had relied on the parties' national regulatory systems for enforcement. Although they laid the foundations for international co-operation to bring scientific knowledge to bear on the whaling industry, neither instrument was able to respond to rampant commercial whaling. The ICRW departed from these treaties' national enforcement schemes by creating an international institution, the IWC, of which each treaty party was a member. The fact that membership of the ICRW is open to all States reinforces its purpose of

internationalizing the regulation of whaling beyond those States directly involved in whaling. As noted above, the IWC has the power to regulate whaling closely through amending the Schedule to the ICRW. The IWC can deploy a variety of mechanisms to this end, including the designation of protected species and sanctuaries, setting annual catch quotas and size limits (Art. V.1).

13. Article VIII of the ICRW was based on Article 10 of the 1937 Agreement, which aimed to promote scientific research. An important difference in the ICRW provision is the monitoring role of the IWC in relation to whaling for purposes of scientific research. This entails a duty of co-operation by States parties with the IWC and its subsidiary bodies reflecting the overarching object and purpose of the Convention, which is to create "a system of international regulation" for the conservation and management of whale stocks (preamble, para. 6). The concept of a duty of co-operation is the foundation of legal régimes dealing *(inter alia)* with shared resources and with the environment. It derives from the principle that the conservation and management of shared resources and the environment must be based on shared interests, rather than the interests of one party. Article VIII incorporates a specific aspect of this duty in mandating immediate reporting to the IWC of the grant of any special permits for lethal activities for purposes of scientific research (Art. VIII.1). Article VIII.3 makes another element of this duty explicit in providing that States parties

> "shall transmit to such body as may be designated by the Commission [the Scientific Committee], 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 [Article VIII.1] and to Article IV [general whaling research]".

Resolutions adopted by the IWC under Article VI, whether by consensus or by vote, may also inform the duty of co-operation. The resolutions express the views of the IWC and, when adopted by consensus or a large majority vote, they represent an articulation of the shared interests at stake in the regulation of whaling. States parties to the ICRW are thus required to consider these resolutions in good faith.

14. The duty of co-operation in relation to lethal whaling for purposes of scientific research was given further definition by paragraph 30, inserted in the Schedule in 1979. The object of paragraph 30 was to deter abuse of Article VIII by States parties authorizing commercial whaling in the guise of scientific research (P. Birnie, *International Regulation of Whaling*, 1985, Vol. 1, p. 190). While the Scientific Committee's views on special permit proposals are not legally binding on States parties under the terms of paragraph 30, the IWC has empowered the Committee to review and comment on such proposals, thereby creating an obligation on the proposing State to co-operate with the Committee. If the proposing State had no such obligation, it would deprive paragraph 30 of any effect.

15. In this context, the duty of co-operation at the heart of paragraph 30 requires a permit-authorizing State to provide the IWC with the permits "before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them"; to provide specified information about the proposed scientific permits; to engage and promote the participation of the international scientific community in the research; and to give consideration in good faith to the views of the IWC and the Scientific Committee. This means that, although a State is not bound to accept the Committee's assessment of proposed permits, it must show genuine willingness to reconsider its position in light of those views. The duty entails keeping the Scientific Committee apprised of the results of scientific research on an annual basis. The duty also implies that permit-authorizing States should provide the Scientific Committee with timely and accurate information about modifications in the implementation of scientific research programmes

already reviewed by the Committee and the implications for the authorization of special permits. States may not take a narrow or formalistic approach to the duty of co-operation. It is a substantive duty to consider the views of the IWC and the Scientific Committee and to co-operate with the international scientific community in any research on whales.

16. The Judgment of the Court states that "consideration by a State party of revising the original design of the programme for review would demonstrate co-operation by a State party with the Scientific Committee" (paragraph 240), but it nevertheless finds that Japan has met the requirements of paragraph 30 with respect to permits issued under JARPA II. In this connection, the Court observes that the submission of the JARPA II Research Plan as the basis for annual permits accords with the practice of the Scientific Committee.

17. In my respectful view, however, the evidence indicates that Japan has not complied with the duty of co-operation with the Scientific Committee and thus that it has breached paragraph 30. First, JARPA II was launched before a review of JARPA by the Scientific Committee had taken place, and there is no sign that the findings of that review were taken into account as JARPA II continued. Second, while the JARPA II Research Plan provided the information specified in paragraph 30 (for example, objectives, sample sizes, methods and possible effects of the programme), as the Court has observed, there was no evidence of Japan's meaningful consideration of the feasibility of non-lethal methods in the design of JARPA II (paragraphs 137 to 141). Third, paragraph 30 provides that "opportunities for participation in the research by scientists of other nations" should be specified in proposed permits. This matter is reinforced in the Annex P Guidelines. The JARPA II Research Plan referred to the use of data from the Commission on the Conservation of Antarctic Marine Living Resources relating to krill predators (p. 10) and Japan's intention "to actively cooperate with international organizations and projects on oceanographic surveys" (p. 15). The Research Plan also noted that "[p]articipation of foreign scientists will be welcomed" if they meet Japan's qualification standards (p. 20). However, there is no evidence of international scientific collaboration in JARPA II's implementation. In response to a question on this issue from a Member of the Court, Japan pointed to JARPA II scientists' collaboration with other Japanese institutions, but did not identify any broader research participation. Finally, as is noted in the Court's Judgment, the conduct of JARPA II has differed in substantial ways from the scheme set out in the Research Plan and yet Japan has not modified the terms of its permits accordingly (paragraph 240). Japan's continued reliance on JARPA II's original Research Plan as a basis for subsequent annual permits is inconsistent with the duty of co-operation. For these reasons, I am unable to join my colleagues in voting for paragraph 6 of the *dispositif*.

(Signed) Hilary CHARLESWORTH.