SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. Introduction

1. I have concurred with my vote to the adoption today, 6 February 2013, by the International Court of Justice (ICJ), of the present Order, whereby it declared admissible New Zealand's Declaration of Intervention under Article 63 (2) of the Statute, in the present case concerning *Whaling in the Antarctic*, opposing Australia to Japan. The present decision just taken by the ICJ today, added to the decision it took one and a

half years ago (Order of 4 July 2011), granting permission to Greece's intervention (under Article 62 of the Statute) in the case concerning the *Jurisdictional Immunities of the State (Germany* v. *Italy)*, constitute two positive steps taken by the Court for the development of the institute of intervention in international legal procedure.

2. Intervention under Article 63 and under Article 62 of the Statute rest on two quite distinct grounds, disclosing various interrelated aspects which have not been sufficiently or satisfactorily studied to date. Given the importance that I ascribe to the matters dealt with by the Court in the present Order, and those underlying it, in the case concerning *Whaling in the Antarctic*, I feel obliged to leave on the records the foundations of my personal position on the matter, in all its aspects. I feel even more compelled to do so as, although I have reached the same conclusion as the Court and have voted in favour of the adoption of the present Order, I have done so on the basis of a reasoning which is distinct from that of the Court.

3. In the present separate opinion, I shall, accordingly, at first, review all the documents conforming the *dossier* of the present case, relating to the proceedings before the Court concerning intervention, namely: *(a)* New Zealand's Declaration of Intervention (under Article 63); *(b)* written observations of Australia and Japan on New Zealand's Declaration of Intervention; *(c)* comments of New Zealand on Japan's written observations. I shall then turn to the examination of points of international legal theory which I deem of particular relevance for the consideration of the subject-matter at issue, namely: *(a)* the position beyond State consent; *(b)* discretionary intervention (Article 62 of the Court's Statute) and intervention as of right (Article 63 of the Court's Statute): historical origins, conceptualization, and precedents in the Court's history (PCIJ and ICJ); *(c)* collective interest and collective guarantee; *(d)* the preventive dimension; and *(e)* the *resurrectio* of intervention in contemporary judicial proceedings before the ICJ. The path will then be open for the presentation of my concluding observations on the matter.

II. New Zealand's Declaration of Intervention

4. In its Declaration of Intervention in the present case on *Whaling in the Antarctic*, lodged with the Court on 20 November 2012, under Article 63 (2) of its Statute and Article 82 (2) of the Rules of Court, New Zealand relies on the jurisprudence of the Court[1] to claim that the Court has recognized that Article 63 of its Statute confers a *right* to intervene, when the State seeking to intervene confines its intervention to "the

[1] In its aforementioned Declaration of Intervention, New Zealand refers to the cases of *Haya de la Torre (Colombia* v. *Peru), Judgment, I.C.J. Reports 1951*, p. 76; and *Continental Shelf (Tunisial/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, pp. 13 and 15, paras. 21 and 26.

point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case"[2]. To avail itself of the right of intervention (under Article 63), New Zealand relies on its status as a party to the 1946 International Convention for the Regulation of Whaling (hereinafter "the Convention").

5. New Zealand deems it necessary to intervene in order to place its interpretation of the relevant provisions of the Convention before the Court. It claims that, in relation to the scope of its right to intervene, it presents its views on issues of interpretation relevant to the determination of the case, in particular questions of the construction of the Convention, especially its Article VIII. New Zealand emphasizes that it does not seek to be a party to the proceedings, but it accepts that, in intervening under Article 63, it will be equally bound by the construction given to the Convention by the Judgment of the Court[3].

6. New Zealand then goes on to review the relevant provisions of the Convention in the present case. It states that the key legal issue in dispute between Australia and Japan is "the legality of large-scale 'special permit' whaling under JARPA II [which] is conducted under a special permit issued by the Japanese Government by reference to Article VIII of the Convention"[4]. It claims that the construction of Article VIII of the Convention (in particular, its paragraph 1) is directly relevant to the resolution of the dispute[5]. New Zealand next reviews its construction of the provisions at issue[6]. It submits that "parties to the Convention can engage in whaling only in accordance with the provisions of the Convention and its Schedule"[7].

7. New Zealand further argues that the Convention provides "a comprehensive legal regime" whose "central objective" is *"to replace unilateral State action with an effective system of collective regulation for the*

[2] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 15, para. 26.

[3] Declaration of Intervention, pp. 4-8, paras. 1-13. New Zealand further claims that, in accordance with Article 82 (1) of the Rules of Court, its Declaration of Intervention has been filed at the "earliest opportunity reasonably open to New Zealand". It then reviews the basis for its status as party to the Convention, recalling its instrument of ratification and the notice of its accession to the Convention, on 15 June 1976, with effect as from that date (*ibid.*, pp. 6-8, paras. 10-11, 14).

[4] It refers in this regard to Australia's Application instituting proceedings, pp. 14, 16, paras. 29 and 35-37; it also refers to the website of the International Whaling Commission, "Recent Special Permits: Japan".

[5] Declaration of Intervention, pp. 8-10, paras. 14-17.

[6] It bases its interpretation of the Convention on Articles 31-32 of the 1969 Vienna Convention on the Law of Treaties.

[7] In this regard, New Zealand claims that, by becoming parties to the Convention, "Contracting Governments have agreed not to permit their nationals to carry out any whaling activity except in accordance with the provisions of the Convention and its Schedule"; cf. Declaration of Intervention, pp. 10-14, paras. 18-23.

proper conservation and management of whales"[8]. New Zealand claims that States parties to the Convention have a collective interest in scientific research and information, so as to enable the International Whaling Commission (IWC) — the authority to adopt binding regulations "with respect to the conservation and utilization of whale resources" — to perform its function properly under the Convention[9].

8. New Zealand also claims that, according to regulations adopted by the IWC, parties to the Convention are prohibited from engaging in commercial whaling, by way of the imposition by the IWC of a zero catch limit. It adds that the killing, taking or treating of whales (other than minke whales) by factory ships is also prohibited and that all commercial whaling is prohibited in the Indian and Southern Oceans. It further submits that such regulations are binding on all parties to the Convention unless they objected to them pursuant to the procedures provided for under Article V (3) of the Convention[10].

9. New Zealand argues that parties to the Convention may engage in "special permit" whaling only in accordance with Article VIII, and explains that the killing of whales under special permit is permitted only for the limited purposes of "scientific research". Thus, the issue of special permits is subject to distinct procedural requirements for notification, prior review and comment, and the reporting of results through the IWC and Scientific Committee. New Zealand contends that "whaling under a special permit issued without meeting the requirements of Article VIII is subject to the other provisions of the Convention and Schedule, including the prohibitions on commercial whaling"[11].

10. New Zealand then reviews the requirements of a special permit under Article VIII, and states that whaling for purposes other than scientific research is not permitted under Article VIII, even if it involves the collection of scientific data. It adds that the requirement that whaling be for scientific research is an essential element of Article VIII, and that the purpose of scientific research of the whaling programme in question must be established on the basis of an objective assessment. It further contends that, according to Article VIII, the State party concerned must attach "restrictions as to number" and "other conditions" to any special permit issued, and, in setting those restrictions, it must show that it has limited

[8] Declaration of Intervention, p. 12, para. 21 [emphasis added].
[9] *Ibid.*, pp. 10-14, paras. 18-23.
[10] *Ibid.*, p. 14, para. 24.
[11] *Ibid.*, pp. 14-16, paras. 25-26.

the number of whales caught under special permit to the minimum which is both necessary for, and proportionate to, the objectives of the research, and which will have no adverse effect on the conservation of the stock. New Zealand claims that paragraph 30 of the Schedule of the Convention mandates States parties to submit proposed special permits to the Scientific Committee and that such obligation gives rise to a duty of meaningful co-operation. New Zealand claims that these requirements are reflected in the practice of the IWC and its Committees since the adoption of the Convention[12].

11. At the end of its Declaration of Intervention, New Zealand provides the following summary of its interpretation of Article VIII of the Convention:

"*(a)* Article VIII forms an integral part of the system of collective regulation established by the Convention.

(b) Parties to the Convention may engage in whaling by special permit only in accordance with Article VIII.

(c) Article VIII permits the killing of whales under special permit only if:

i. an objective assessment of the methodology, design and characteristics of the programme demonstrates that the killing is only 'for purposes of scientific research'; and

ii. the killing is necessary for, and proportionate to, the objectives of that research and will have no adverse effect on the conservation of stocks; and

iii. the Contracting Government issuing the special permit has discharged its duty of meaningful co-operation with the Scientific Committee and the IWC.

(d) Whaling under special permit that does not meet these requirements of Article VIII, and not otherwise permitted under the Convention, is prohibited."[13]

III. Written Observations of Australia and Japan on New Zealand's Declaration of Intervention

12. In its written observations of 18 December 2012, Australia sustains that New Zealand's Declaration meets "all of the requirements" under Article 63 of the Statute (para. 5). There is no reason, in its view, why a third State (in this case New Zealand) cannot intervene over the construc-

[12] Declaration of Intervention, pp. 16-18, paras. 27-32.

[13] *Ibid.*, p. 18, para. 33. New Zealand submits documents in support of its Declaration of Intervention; cf. *ibid.*, pp. 18-20, para. 34.

tion of Article VIII of the International Convention for the Regulation of Whaling, to which New Zealand is a party (para. 7). Furthermore, New Zealand does not seek to be a party to the proceedings (para. 8). New Zealand's Declaration of Intervention — Australia adds — is specifically focused on a point of interpretation, without extending to "general intervention" in the case, nor to other aspects of the dispute between Australia and Japan. Given such limited reach of an intervention under Article 63, the intervening State cannot be considered a party (para. 9), Australia concludes, in its support, in this understanding, of New Zealand's intervention.

13. For its part, on 21 December 2012 Japan filed its written observations on New Zealand's Declaration of Intervention of 20 November 2012[14], wherein it argues that "certain serious anomalies would arise from the admission of New Zealand as an intervenor" considering the context in which the Declaration of Intervention was filed. Japan refers in this regard to the Joint Media Release, issued on 15 December 2010 in the names of the Australian and New Zealand Ministers for Foreign Affairs, announcing that "Australia and New Zealand agree on strategy for whaling legal case". According to Japan, such a statement explains the rationale behind the choice of Article 63 as the basis for New Zealand's intervention, as it indicates that "New Zealand appears prima facie to fully support Australia's case"[15].

14. Japan then contends that the equality of the parties will be at serious risk if States can pursue a joint case under the rubric of an intervention under Article 63, to curtail some of the safeguards of procedural equality under the Statute and the Rules of Court. Japan further argues that the choice of intervention under Article 63 can be interpreted as a strategy to avoid having to prove an "interest of a legal nature that may be affected by the decision in the case", as required under Article 62, where the circumstances point to such interests and "suggest the taking of carefully orchestrated procedural steps to advance them"[16].

15. Japan expresses "serious doubts" on the equality of the Parties in these proceedings before the Court and its "profound discomfort" resulting from the manner in which New Zealand's intervention has arisen. Thus "Japan respectfully submits in these circumstances that particular care needs to be taken when the Court decides on the further procedural

[14] Doc. AJ 2012/20, of 21 December 2012.

[15] Written Observations of Japan, paras. 1-4.

[16] Japan then refers to Articles 31 (5) of the Statute and Article 36 (1) of the Rules which exclude the possibility of appointing an *ad hoc* judge when two or more parties are in the same interest and thus should be taken as one party only, which it submits to be the case in the present dispute (*ibid.*, paras. 5-6).

steps in this case, in order to ensure the equality of the parties to the dispute"; Japan further claims that this is particularly important in the present case, where submissions on jurisdiction and on the merits are made together, and only one round of written pleadings has been allowed[17].

16. In this regard, Japan first submits that New Zealand's written observations in accordance with Article 86 of the Rules of Court should not be left without a written response from the original Parties, since in the present circumstances, in its view, the intervenor's observations would essentially amount to a second round of written pleadings by the Applicant. Thus, it reiterates its wish to express its views in writing on New Zealand's submission on the "substance" of the intervention, within an appropriate time. Secondly, Japan contends that in the event New Zealand's intervention is admitted, the latter should have only one opportunity to make oral submissions, after the oral pleadings of Australia, and before that of Japan. Furthermore, Japan contends that, because intervention pursuant to Article 63 is confined to "the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case"[18], the time allocated to New Zealand should be significantly less than in a case of intervention under Article 62.

17. Thirdly, Japan further submits that New Zealand's intervention (if admitted), "in collaboration with the Applicant", should not result in "any shortening of the time allocated to the Respondent for the preparation of response to the pleadings by the Applicant and also by the intervening State"; it stresses the need to have adequate time for preparation before the oral proceedings, especially because there has been only one round of written pleadings[19]. The main point to be here retained is that, although Japan does not appear to raise a formal and express objection to the admission of New Zealand's Declaration of Intervention under Article 63[20], it manifests concern mainly with the procedural equality of the Parties in the proceedings.

18. On its turn, in its subsequent written observations (original letter of 10 January 2013), Australia refers to what it regards as Japan's "mischaracterization" (of past events), in its view "wholly irrelevant" to the

[17] Written Observations of Japan, paras. 7-8.

[18] Japan refers to the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 15, para. 26.

[19] Furthermore, Australia has yet to respond to Japan's objection to jurisdiction (Written Observations of Japan, paras. 9-11).

[20] Note in this regard that Article 84 (2) of the Rules of Court provides that:

> "If, within the time-limit fixed under Article 83 of these Rules, an objection is filed to an application for permission to intervene, or to the admissibility of a declaration of intervention, the Court shall hear the State seeking to intervene and the parties before deciding."

matters flowing from New Zealand's Declaration of Intervention (p. 1). Australia objects to Japan being provided with additional time (at its own expense) to get prepared, in the course of the forthcoming oral hearings (when Japan's jurisdictional objections will be dealt with), as a result of the Court's prior decision not to have a second round of briefs with arguments in the written phase (p. 1). Australia adds that New Zealand, as an intervenor, has "a right to be heard" by the Court, and there is no reason for it to be allowed less time (p. 2).

IV. Comments of New Zealand on Japan's Written Observations

19. Five days ago, New Zealand filed in the Court its letter of 1 February 2013, containing its comments on Japan's written observations *(supra)*. New Zealand indicates that it "does not accept that its intervention affects the equality of the Parties"; as a State party to the International Convention for the Regulation of Whaling, it is "exercising its right to intervene in order to place its interpretation of the relevant provisions of the Convention before the Court, as the Statute of the Court [Article 63] entitles it to do" (p. 1). New Zealand added that the ICJ should not be invited to speculate as to the implications of its intervention for the proceedings before the Court (pp. 1-2).

20. New Zealand further contended that the equality of the parties to the dispute "cannot be imperilled" when a third State exercises its right to intervene — as a non-party — under Article 63 of the Statute. It recalled that the procedural rights of the parties and the intervening State are set out in Article 86 of the Rules of Court, it being for the ICJ to decide on "the extent of procedural rights" of the intervening State (p. 2). New Zealand then concluded that the right to intervene, under Article 63 of the Statute, is "an integral part" of the framework of operation of the ICJ, as a forum for the settlement of disputes "under multilateral treaties"; in this context — it added — the exercise by New Zealand of such right of intervention "does not affect the equality of the parties to the dispute" (p. 2).

V. Beyond State Consent

21. Having reviewed all the documents conforming the dossier of the present case of relevance for the decision taken today, 6 February 2013, by the Court, I can now move on to the next point of my separate opinion. May I, at this stage, observe, as to the consent of the parties in the main case, which is not strictly or formally at issue in the present case — that such consent does not play a role in the proceedings conducive to the

Court's decision whether or not to grant intervention. In a joint declaration appended to a recent Judgment of the Court (in the case of the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 420), it was pointed out that consent by the parties in the main case[21] is irrelevant, and cannot be perceived as a prerequisite for intervention as a non-party[22].

22. As master of its own jurisdiction, the Court does not need to keep on searching for State consent in deciding on an Application for permission to intervene in international legal proceedings. And the aforementioned joint declaration added that

> "In effect, third party intervention under the Statute of the Court transcends individual State consent. What matters is the consent originally expressed by States in becoming parties to the Court's Statute, or in recognizing the Court's jurisdiction by other instrumentalities, such as compromissory clauses. (. . .) There is no need for the Court to keep on searching instinctively for individual State consent *in the course* of the international legal proceedings. After all, the consent of contending States is alien to the institution of intervention (. . .)."[23]

23. This is so — may I add herein — in respect of interventions under Article 62 as well as Article 63 of the Court's Statute. In the present case of *Whaling in the Antarctic*, opposing Australia to Japan, there has been, anyway, no *formal* objection to New Zealand's Application for permission to intervene. Nor was there any *formal* objection to Greece's recent Application for permission to intervene in the case concerning the *Juris-*

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[21] In that case, the Court was before an Application for permission to intervene under Article 62 of its Statute, whilst in the present case the Application to that end is under Article 63 of its Statute.

[22] This is generally acknowledged nowadays; cf., *inter alia*, e.g., S. Rosenne, *Intervention in the International Court of Justice*, Dordrecht, Nijhoff, 1993, pp. 79 and 104; J. M. Ruda, "Intervention before the International Court of Justice", *Fifty Years of the International Court of Justice — Essays in Honour of R. Jennings* (eds. Vaughan Lowe and M. Fitzmaurice), Cambridge University Press, 1996, p. 495; K. Mbaye, "L'intérêt pour agir devant la Cour internationale de Justice", 209 *RCADI* (1988), pp. 340-341. And as to jurisdictional links, cf. also, e.g., J. G. Starke, "*Locus Standi* of a Third State to Intervene in Contentious Proceedings before the International Court of Justice", 58 *Australian Law Journal* (1984), p. 358.

[23] *I.C.J. Reports 2011 (II)*, joint declaration of Judges Cançado Trindade and Yusuf, pp. 469-470, paras. 14-15. Earlier on — it may be recalled — the ICJ Chamber itself rightly pointed out, in the Judgment of 1990 in the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (Application by Nicaragua for permission to intervene), that the competence of the Court, in the particular matter of intervention, "is not like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 133, para. 96).

dictional Immunities of the State (Germany v. *Italy)*, wherein the ICJ granted Greece permission to intervene as a non-party in the case (Order of 4 July 2011). In my separate opinion appended to the Court's Order on Greece's intervention in this case, I pondered that

> "even if there were any such objection, it would have been immaterial for the purpose of the Court's assessment of the Application at issue for permission to intervene. State consent indeed has its limits; the ICJ is not always restrained by State consent, in relation not only to intervention, but also in respect of other aspects of the procedure before the Court, as I sought to demonstrate in my extensive dissenting opinion (paras. 45-118, 136-144 and 156-214) in the Court's Judgment of 1 April 2011 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* (*I.C.J. Reports 2011 (I)*, pp. 239-322); the ICJ is not an arbitral tribunal." (*Jurisdictional Immunities of the State (Germany* v. *Italy), Application by Greece for Permission to Intervene, Order of 4 July 2011, I.C.J. Reports 2011 (II)*, pp. 508-509. para. 7.)

VI. Discretionary Intervention and Intervention as of Right

24. One and a half years after the permission granted by the Court to Greece's intervention in the case concerning the *Jurisdictional Immunities of the State (Germany* v. *Italy)*, Order of 4 July 2011, the Court has again granted permission to New Zealand's intervention in the present case *Whaling in the Antarctic (Australia* v. *Japan)*, Order of 6 February 2013. There is one point of distinction between these two Court decisions, with regard to the typology of interventions under the ICJ Statute: the first decision, of one and a half years ago, concerns *discretionary intervention*, whilst the decision taken today concerns *intervention as of right*.

1. Historical Origins

25. It is known that, in its origins, the historical antecedents of the institute of intervention in legal proceedings can be found in the old practice of international arbitrations, in the chapter of peaceful settlement of international disputes. Although there were endeavours for the enlargement and enhancement of its domain *(infra)*, and even to render the basis of arbitration permanent, those antecedents of arbitral practice show that arbitration notwithstanding kept its essentially bilateralized outlook, and maintained its focus on the consent of the contending parties. It was necessary to wait for the systematization of the whole chapter of peaceful

settlement of international disputes, encompassing the *judicial solution* as well (as distinguished from the arbitral solution), for the express provision on intervention to come to the fore and to see the light of day.

26. That systematization took place in the course of the two Hague Peace Conferences, in 1899 and 1907, respectively[24]. One of the significant outcomes of the First Hague Peace Conference was the 1899 Convention for the Pacific Settlement of International Disputes, Article 56 of which provided that:

> "The award is binding only on the Parties who concluded the *compromis*. When there is a question as to the interpretation of a convention to which Powers other than those in dispute are Parties, the latter notify to the former the *compromis* they have concluded. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them."

27. The draftsmen of this provision had in mind intervention as of right, of the kind of the one which, some years later, found its place in Article 63 of the Statute of the Permanent Court of International Justice (PCIJ) *(infra)*. The Conference Report (Third Commission) on this 1899 Convention states that Article 56 derived from a proposal presented by the delegate of the Netherlands (T. M. C. Asser)[25]. The matter was retaken, and further worked upon, at the Second Hague Peace Conference of 1907, which, after its revision, adopted the 1907 Convention for the Pacific Settlement of International Disputes, containing a similar provision in the (new) Article 84. The Conference Report (First Commission) on this 1907 Convention comments that former Article 56 "was not modified essentially; it was only slightly changed in matters of form"[26]. In fact, Article 84 of the 1907 Convention provided that:

> "The award is binding only on the Parties in dispute. When there is a question as to the interpretation of a convention to which Powers other than those in dispute are Parties, the latter inform all the signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them."

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[24] Earlier on, in 1875, the Institut de droit international had adopted a code for arbitral procedure, one of its first achievements after its establishment in 1873. Later on, in 1877, the Institut adopted a resolution strongly recommending the insertion of compromissory clauses in future treaties.

[25] Permanent Court of Arbitration (PCA), *The Hague Peace Conferences of 1899 and 1907 and International Arbitration — Reports and Documents* (org. S. Rosenne), The Hague, T. M. C. Asser Press, 2001, p. 74.

[26] *Ibid.*, p. 265.

28. Once again, the draftsmen of this new and slightly modified provision had in mind intervention as of right, of the kind of the one which later on was enshrined into Article 63 of the PCIJ Statute. By the end of the two Hague Peace Conferences, which set up the basic pattern for forthcoming multilateral conferences, the universal juridical conscience seemed to have captured the idea that international law had to conform a true international *system*, endowed with obligatory arbitration (even though the Permanent Court of Arbitration had already come into existence on 19 September 1900).

29. After all, State voluntarism remained an obstacle to respect for international law and an undue limitation of the rule of law in international litigation[27]. The hope of the creation of a Court of arbitral justice (before the days of a true international tribunal, the PCIJ) was largely prompted by the fears that, in the absence of international justice, States would keep on doing whatever they wished, and the increase in armaments (naval and military) would keep on going on[28]. There was a premonitory reaction, on the part of the lucid jurists of those threatening times, against that state of affairs, and against State voluntarism.

30. In fact, the discussions, throughout the work of the two Hague Peace Conferences (of 1899 and 1907), on the future creation of international courts, engaging renowned jurists of those days (such as, e.g., T. M. C. Asser, Rui Barbosa, L. Bourgeois, J. H. Choate, F. de Martens, C. E. Descamps, F. Hagerup, F. W. Holls, among others), contained, already at that time, references to: *(a)* the juridical conscience of peoples; *(b)* the need of obligatory arbitration; *(c)* the needed establishment or constitution of permanent tribunals; *(d)* the determination of fundamental rules of procedure; *(e)* the access of individuals to international justice; *(f)* the development of an international jurisprudence; and *(g)* the progressive development of international law[29]. This — as I can perceive it — showed the awareness, of the importance of such issues, already present in the minds of jurists of that time.

31. At the Second Hague Peace Conference, the topic of compulsory arbitration was extensively discussed, on the basis of five propositions (tabled by Brazil, Portugal, Serbia, Sweden and the United States, respectively); the very fact that the Second Hague Peace Conference took place marked an epoch in the development of international law[30]. As aptly remarked by James Brown Scott in those days, the holding of that Conference demonstrated "the oneness of mankind", having "brought nations

[27] J. Allain, *A Century of International Adjudication: The Rule of Law and Its Limits*, The Hague, T. M. C. Asser Press, 2000, pp. 2 and 7, and cf. pp. 15 and 18.

[28] Cf. PCA, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration . . .*, *op. cit. supra* note 25, pp. xvii-xix, 9 and 179.

[29] W. I. Hull, *The Two Hague Conferences and Their Contributions to International Law*, Boston, International School of Peace/Ginn & Co., 1908, pp. 370-448.

[30] J. Brown Scott, *The Hague Peace Conferences of 1899 and 1907*, Vol. I, Baltimore, Johns Hopkins Press, 1909, pp. 335 and 738.

together as never before"; yet, it left unfinished the task of the establishment of "an international and permanent judiciary"[31].

32. The projected Third Hague Peace Conference was never convened, and the disaster of the following years left scars that were not healed for generations, as stressed by some of the greatest thinkers and writers of the twentieth century (which is not my intention herein to recall, within the confines of this separate opinion). But the lessons left mainly by the Second Hague Peace Conference[32] were duly captured by the draftsmen of the Statute of the PCIJ (and later of the ICJ). Some of the participants of the Second Hague Peace Conference had the intuition of the need of international tribunals, to relieve the world in knowing that it would enter an "orderly process", given the fact that "the development of international law only proceeds step by step very gradually"[33].

33. Before turning to the work undertaken by the Advisory Committee of Jurists, entrusted by the League of Nations with the task of drafting (in 1920) the Statute of the PCIJ, may I just point out that the work of the two Hague Peace Conferences was lately reassessed in the centennial commemorations of the two of them[34]. The centennial work on the second of these contains two contributions on the endeavours towards the universalization of international law by means of securing the presence, in a multilateral conference such as the Second Hague Peace Conference, not only of great powers, but also of other participating States of the whole of Latin America and of Asia[35]. They provide an overview of the historical context within which the discussions on the matter at issue were conducted.

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[31] J. Brown Scott, *The Hague Peace Conferences of 1899 and 1907, op. cit. supra* note 30, pp. 739 and 751. By the end of the Second Hague Peace Conference, the foundations seemed to have been established for further development of international law, striving for compulsory arbitration, the establishment of the judicial settlement of international disputes, and the limitation or reduction of armaments; R. Ferreira de Mello (org.), *Textos de Direito Internacional e de História Diplomática de 1815 a 1949*, Rio de Janeiro, Edit. A. Coelho Branco, 1950, pp. 65, 115 and 117.

[32] Unlike the First Hague Peace Conference (with 26 participating States, mainly European), the Second Hague Peace Conference counted on participating States from distinct continents and parts of the world (a total of 44), having been the first of the kind in world diplomatic history.

[33] J. H. Choate, *The Two Hague Conferences*, Princeton/London/Oxford, Princeton University Press/H. Frowde/Oxford University Press, 1913, pp. 58 and 87, and cf. pp. 6-7, 10, 19, 32-33, 42, 51, 57, 61 and 91.

[34] Cf. [Various authors,] *The Centennial of the First International Peace Conference — Reports and Conclusions* [1999] (ed. F. Kalshoven), The Hague, UNITAR/Kluwer, 2000, pp. 1-515; [Various authors,] *Actualité de la conférence de La Haye de 1907, deuxième conférence de la paix/Topicality of the 1907 Hague Conference, the Second Peace Conference* [2007] (ed. Y. Daudet), The Hague/Leiden, Hague Academy of International Law/Nijhoff, 2008, pp. 1-490.

[35] Cf. A. A. Cançado Trindade, "The Presence and Participation of Latin America at the Second Hague Peace Conference of 1907", *Actualité de la conférence de La Haye de 1907, deuxième conférence de la paix…*, *op. cit. supra* note 34, pp. 51-84; S. Murase, "The Presence of Asia at the 1907 Hague Conference", *ibid.*, pp. 85-101.

34. The following moment to address, in the identification of the historical origins and shaping of the concept of intervention in legal proceedings, is that of the work, in mid-1920, of the Advisory Committee of Jurists, appointed by the League of Nations to draft the Statute of the old PCIJ. By then, not only was the way paved for further thinking on compulsory jurisdiction[36], but also, significantly, with the advent of the *judicial* settlement of disputes at world level[37], the concept of intervention fully bloomed. With the advent of the PCIJ (followed over two decades later by the ICJ), two kinds of intervention were envisaged (cf. *infra*), and enshrined into Articles 62 and 63 of the Hague Court's Statute, respectively. Intervention, under the two provisions, was to seek to overcome the bilateralization of the controversy at stake, thus widening dispute-settlement[38], when it could be of direct interest or concern to other States.

2. Discretionary Intervention (Article 62 of the Court's Statute)

35. The Advisory Committee of Jurists nominated by the League of Nations, which drafted the Statute of the PCIJ, at the end of its work (which lasted from 16 June to 24 July 1920), deemed it fit to include therein two provisions, Articles 62 and 63, on two kinds of intervention in legal proceedings. Article 62 of the Statute of the ICJ (derived from that of the PCIJ), as adopted by that Committee, set forth that:

> "1. Should a State consider that it has an interest of a legal nature, which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
> 2. It will be for the Court to decide upon this request."[39]

36. This was discretionary intervention, distinct from the aforementioned antecedents *(supra)*. It was a formula proposed by the Committee's President (Baron E. Descamps). On the occasion, it was decided that

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[36] Cf., e.g., *inter alia*, B. C. J. Loder, "The Permanent Court of International Justice and Compulsory Jurisdiction", 2 *British Yearbook of International Law* (1921-1922), pp. 6-26; M. O. Hudson, *The Permanent Court of International Justice — 1920-1942*, N.Y., MacMillan & Co., 1943, pp. 189-193; E. Hambro, "Some Observations on the Compulsory Jurisdiction of the International Court of Justice", 25 *British Yearbook of International Law* (1948), pp. 133-157; and cf., later on, e.g., *inter alia*, C. W. Jenks, *The Prospects of International Adjudication*, London/N.Y., Stevens/Oceana, 1964, pp. 101, 110, 113-117, 757, 760-762 and 770; R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1993, pp. 31-32, 48, 83, 86, 90 and 94-95.

[37] It may be here recalled that the first modern international tribunal, in operation for one decade (1907-1917) in Latin America, was the Central American Court of Justice, which historically preceded the PCIJ.

[38] Cf., e.g., G. Morelli, "Note sull'Intervento nel Processo Internazionale", 65 *Rivista di Diritto Internazionale* (1982), pp. 805-806, 808, 811 and 814.

[39] League of Nations/PCIJ — Advisory Committee of Jurists, *Procès-verbaux des séances du comité avec annexes/Procès-verbaux of the Proceedings of the Committee with Annexes* (16 June-24 July 1920), The Hague, Van Langenhuysen Brothers, 1920, p. 594.

it "would be a separate article", and that it "would be inserted before the original Article 23"[40], which provided for intervention as of right *(infra)*. Article 62 of the Statute of the PCIJ/ICJ requires a legal standard for intervention which is distinct from that of Article 63: according to Article 62, the State seeking to intervene must consider that "it has an interest of a legal nature which may be affected by the decision in the case", and the Court has the discretion to decide upon this request. We are, thus, here before *discretionary* intervention.

37. Requests for permission to intervene lodged with this Court in distinct cases in recent years, unlike the *cas d'espèce*, have been formulated on the basis of Article 62 of the Statute. Article 62 is not the formula drawn from the two Conventions for the Pacific Settlement of International Disputes (of 1899 and 1907), adopted by the First and Second Hague Peace Conferences, respectively[41]. The scope of Article 62 is stricter than that of Article 63, in that the permission for intervention will depend on the exercise by the Court of its discretion, its decision being taken in the light of the particular circumstances of each case. This kind of discretionary intervention is drawn from that provided for in the domestic legal system of several States[42], i.e., in comparative domestic law.

3. Intervention as of Right (Article 63 of the Court's Statute)

38. In the present case, however, New Zealand's Declaration of Intervention is grounded on Article 63 of the Statute of the ICJ, which provides, for its part, that a State party to a Convention which the Court is requested to interpret has a "right to intervene in the proceedings". We are no longer before discretionary intervention *(supra)*, but rather before intervention as of right. The Court has clarified that this "right" concerns intervention on "the point of interpretation which is in issue in the proceedings". We are here before intervention *as of right*. Article 63 of the Statute of the ICJ (derived from that of the PCIJ, as originally adopted by the Advisory Committee of Jurists in 1920)[43], provides that:

> "1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.
> 2. Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it."

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[40] League of Nations/PCIJ — Advisory Committee of Jurists, *Procès-verbaux des séances du comité avec annexes…, op. cit. supra* note 39, p. 594.

[41] Shigeru Oda, "Intervention in the International Court of Justice — Articles 62 and 63 of the Statute", *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte – Festschrift für H. Mosler* (eds. R. Bernhard *et alii*), Berlin/Heidelberg, 1983, p. 644.

[42] *Ibid.*, pp. 640-641 and 647.

[43] Cf. League of Nations/PCIJ — Advisory Committee of Jurists, *Procès-verbaux des séances du comité avec annexes…, op. cit. supra* note 39, p. 594.

39. It is relevant to keep this distinction in mind, for the purposes of the consideration of the present Declaration of Intervention. It is to be noted that New Zealand does not seek to be a party in the proceedings of the *cas d'espèce*, and that, in accordance with Article 63 (2) of the Court's Statute, by availing itself of its right to intervene, it accepts that the construction to be given by the forthcoming Judgment [as to the merits] in the present case will be binding upon itself. Furthermore, it seems that New Zealand's intention to intervene pertains to issues of interpretation of the Convention at issue, which appears to be in line with the text of Article 63 (2) of the Statute. I shall turn to this issue later on, in this separate opinion.

40. At this stage, may I observe that, throughout the years, the point has been made, in expert writing, that the use of intervention under Article 63 of the Statute has been rather infrequent, but this does not mean that it would or should remain so, as all States parties to multilateral treaties are committed to contribute to their proper interpretation[44]. If such interventions increased, uncertainties could diminish, as the ICJ could have more occasions to clarify the application and scope of Article 63[45]. In one of the earlier studies on the subject, Edvard Hambro wrote sympathetically in favour of "an extensive use of Article 63", acknowledging the needed "teleological interpretation" of certain multilateral treaties, to enable the parties to defend the rights that such treaties purported to protect. In any case — he added — Article 63 "has widened the jurisdiction" of the Court, as States which are parties to the Conventions at issue "must be deemed to have a right to intervene" thereunder, even if the last word as to whether there is room for a possible intervention belongs ultimately to the Court[46].

4. Precedents in the Court's History (PCIJ and ICJ)

41. This would be a proper point to turn attention to the precedents on the matter at issue, in the history of the Hague Court (PCIJ and ICJ). The sole legacy of the old PCIJ, on the matter at issue, lies in its Judgment (on Poland's request for intervention) of 28 June 1923 in the case of the vessel *S.S. "Wimbledon"*, wherein the PCIJ accepted Poland's intervention under Article 63 of its Statute. The Court at first compared the two distinct kinds of intervention, i.e., intervention under Article 62 of the

[44] E. Hambro, *op. cit. infra* note 46, pp. 389 and 400; C. Chinkin, "Article 63", *The Statute of the International Court of Justice — A Commentary* (eds. A. Zimmermann *et alii*), 2nd ed., Oxford University Press, 2012, pp. 1595 and 1597.

[45] C. Chinkin, *op. cit. supra* note 44, p. 1582.

[46] E. Hambro, "Intervention under Article 63 of the Statute of the International Court of Justice", *Il Processo Internazionale — Studi in Onore di G. Morelli, Comunicazioni e Studi* (1975), Vol. 14, pp. 400, 391, 397 and 399.

Statute, based on the existence of an interest of a legal nature on the part of the intervening party, and the right to intervene under Article 63, pertaining to the interpretation of an international (multilateral) convention. The PCIJ then recalled the object of the Application instituting proceedings in the case at issue, and its task to decide whether German authorities were within their rights in refusing to the vessel *S.S. "Wimbledon"* free access to the Kiel Canal and, if necessary, to determine the damages due for the prejudice caused to that vessel.

42. The PCIJ then recalled that Poland had requested, in its Note of 22 May 1923, permission to intervene on the basis of Article 62 of the Statute[47], and explained that, although Article 63 had not been expressly referred to in Poland's Note, the latter cited Poland's participation in the Treaty of Versailles, and, more specifically, the violation of the rights and interests guaranteed to Poland under Article 380 of that Treaty. The PCIJ then noted that, from a further communication by the Agent of Poland, it appeared that Poland would have adopted the right conferred upon it by Article 63, as a party to the Treaty of Versailles.

43. As Poland's Agent did not insist on its request for intervention under Article 62, and further indicated that it did not intend to ask for compensation from Germany, the PCIJ thus found it unnecessary to consider Poland's request for intervention under Article 62. The PCIJ added that, as Poland intended to avail itself of the right to intervene under Article 63, the case at issue thus involved the interpretation of certain clauses of the Treaty of Versailles, to which Poland was one of the States Parties; the PCIJ, accordingly, accepted the request for intervention by Poland.

44. As for the ICJ, the first case it dealt with a Declaration of Intervention under Article 63 of its Statute was in a Latin American case. In its Judgment of 13 June 1951 in the case of *Haya de la Torre (Colombia* v. *Peru)*[48], pertaining to the admissibility of Cuba's intervention under Article 63 of the Statute and questions on the merits of the case, the ICJ started by recalling that Cuba, in availing itself of the right which the Statute confers on States parties to a convention, the interpretation of which is in issue, filed a Declaration of Intervention under Article 63 of the Statute concerning the construction of the Havana Convention on Asylum of 20 February 1928, and its general attitude regarding asylum. The Court also recalled that, while Colombia did not object to the intervention, Peru requested the Court to decide that the intervention was inadmissible, as it was, in its view, an attempt by a third State to appeal against the previous Judgment of the ICJ of 20 November 1950 in the *cas d'espèce*[49].

[47] On the side of the four applicant States in the main case, namely, United Kingdom, France, Italy and Japan. The PCIJ's judgment as to the merits of the case at issue was delivered on 17 August 1923.

[48] *Haya de la Torre (Colombia* v. *Peru), Judgment, I.C.J. Reports 1951*, p. 71.

[49] *Ibid.*, pp. 74-76.

45. Against this background, the Court first observed that every intervention is incidental to the proceedings in a given case and thus a declaration filed as an intervention only acquires that character in the event that it actually relates to the subject-matter of the pending proceedings. The Court stated that the subject-matter of the case at issue was different from that of the case terminated by the Judgment of 20 November 1950, as it concerned the surrender of Haya de la Torre to the Peruvian authorities, a question which was outside the submission of the Parties in the previous case, and was thus not decided in the previous Judgment.

46. The Court was thus of the view that, under these circumstances, the question before itself was whether the object of Cuba's intervention was indeed the interpretation of the Havana Convention in connection with the question whether Colombia is under an obligation to surrender the individual concerned to Peru. The Court noted that, during the public hearing, Cuba explained that its intervention was based on the fact that the Court had to interpret a new aspect of the Havana Convention, which had not been considered in the previous Judgment of 20 November 1950. This being so, the Court decided, on 16 May 1951, that, within these limits, Cuba's purported intervention was in conformity with the conditions of Article 63 of the Statute, and thus admitted the intervention on this basis[50].

47. In this Latin American case, the *célèbre Haya de la Torre* case, Cuba's request for intervention (under Article 63) was successful, in the terms of the Court's decision. The two subsequent cases of interventions under Article 63 of the ICJ Statute did not have the same outcome; in both of them the requests for intervention were dismissed as inadmissible. Such precedents (before the recent *Germany* v. *Italy* case (2012) and the present case opposing Australia to Japan) were the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1984*, p. 392) and the *Nuclear Tests (New Zealand* v. *France)* case (*I.C.J. Reports 1995*, p. 288).

48. In the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (Order of 4 October 1984), El Salvador filed a Declaration of Intervention under Article 63 of the Statute, citing various multilateral conventions to which it was a party and on the basis of which Nicaragua's jurisdictional and substantive claims were based; El Salvador argued that its intervention had the "sole and limited purpose" of claiming that the Court did not have jurisdiction to hear Nicaragua's Application (pp. 1-2). The Court decided that the Declaration of Intervention of El Salvador was inadmissible "inasmuch as it relates to the current phase of the proceedings" (p. 216). The decision was surrounded by much discussion among the judges, as can be inferred from the various individual opinions they filed; there was no doubt, how-

[50] *Haya de la Torre (Colombia* v. *Peru), Judgment, I.C.J. Reports 1951*, pp. 76-77.

ever, that it is for the Court to decide in each case whether the conditions for intervention are fulfilled.

49. In the other precedent, that of the *Nuclear Tests* case *(New Zealand* v. *France)*, the Court dealt with the "Request for an Examination of the Situation" in accordance with paragraph 63 of the Court's prior Judgment of 20 December 1974 in the *Nuclear Tests* case, opposing New Zealand to France. In its Order of 22 September 1995, the Court decided that such "Request for an Examination of the Situation" did not fall within the provisions of the said paragraph 63 and must thus be dismissed. Consequently, as to the Applications for permission to intervene (Article 62) of Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia, as well as the Declarations of Intervention (Article 63) made by the latter four States, since they were all proceedings incidental to New Zealand's main request, they had likewise to be dismissed.

50. This Order of the Court was likewise surrounded by much discussion, as can be inferred from the various individual (separate and dissenting) opinions filed by some of the Judges. There were, in that case, Applications for permission to intervene under Article 62, and Declarations of Intervention under Article 63 of the Statute; pursuant to a rather formalistic outlook, the Court's majority dismissed them, despite the importance and seriousness of the matter at issue, concerning the protection of the environment against the danger of radioactive contamination in the South Pacific region, to the benefit of the Polynesian, Melanesian and Micronesian peoples.

51. There is, thus, in my perception, a case for a more proactive attitude of the ICJ towards intervention, on the distinct grounds of Article 63 as well as Article 62 of its Statute. One and a half years ago the ICJ rightly granted intervention to Greece under Article 62, in the case concerning the *Jurisdictional Immunities of the State* (cf. *supra*), and now it has rightly granted it to New Zealand under Article 63, in the present case of the *Whaling in the Antarctic*. In another recent case wherein it was likewise requested (under Article 62), but not granted, concern was expressed, within the Court, as to the need to keep such a proactive attitude as to the institute of intervention in international judicial proceedings[51].

52. In my separate opinion appended to the Court's Order of 4 July 2011, in the case concerning the *Jurisdictional Immunities of the State (Germany* v. *Italy)*, whereby it granted intervention to Greece (under Article 62 of its Statute), I deemed it fit to observe that

> "Twice before, permission to intervene was granted by the ICJ: by its Chamber, in the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (Application by

[51] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, joint dissenting opinion by Judges Cançado Trindade and Yusuf, pp. 401-413, paras. 1-29.

Nicaragua for permission to intervene, Judgment of 13 September 1990) (*I.C.J. Reports 1990*, p. 92) and by the full Court itself, in the case concerning the *Land and Maritime Boundary* between Cameroon and Nigeria, wherein, by its Order of 21 October 1999 (*I.C.J. Reports 1999 (II)*, p. 1029), it authorized Equatorial Guinea to intervene. Both cases concerned land and maritime boundaries. This time, with the Order it adopts today, 4 July 2011, the ICJ grants to Greece permission to intervene in the case concerning the *Jurisdictional Immunities of the State*, a domain of great importance in and for the development of contemporary international law. The Court has so decided at the height of its responsibilities as the principal judicial organ of the United Nations (Article 92 of the UN Charter).

Unlike land and maritime delimitation cases, or other cases concerning predominantly bilateralized issues, the present case is of interest to third States — such as Greece, other than the two contending Parties before the Court. The subject-matter is closely related to the evolution of international law itself in our times, being of relevance, ultimately, to all States, to the international community as a whole, and, in my perception, pointing towards an evolution into a true *universal* international law.

. . . . . .

By granting to Greece permission to intervene, the present Order of the Court gives a proper expression to the principle of the *la bonne administration de la justice* in the context of the *cas d'espèce.*" (*I.C.J. Reports 2011 (II)*, pp. 529-530, paras. 57-59 and cf. *infra.*)

VII. Collective Interest and Collective Guarantee

53. This leads me to my next point of consideration in the present separate opinion. As I have already pointed out, consent of the parties in the main case does not play a role in proceedings conducive to the Court's decision (under Article 63 or else under Article 62 of its Statute) whether or not to grant intervention; the Court is master of its own jurisdiction, and one is here beyond State consent (Part V, *supra*). I have furthermore pondered, earlier on, that States parties to multilateral treaties are committed to contribute to their proper interpretation (para. 27, *supra*). This is, in my perception, even more compelling when such treaties embody matters of *collective interest*, and are endowed with *collective guarantee* of the observance of the obligations contracted by the States parties.

54. In any case, in my understanding, the *nature* of the treaty at issue is to be kept in mind. Furthermore, one is also to keep in mind the elements which compose the general rule of interpretation of treaties, formulated in Article 31 of the two Vienna Conventions on the Law of Treaties

(of 1969 and 1986) — namely, good faith, text, context, and object and purpose of the treaty; they are the ones that most often mark presence in treaty interpretation[52]. Underlying the general rule set forth in Article 31 (1) of the two aforementioned Vienna Conventions lies the principle *ut res magis valeat quam pereat*, widely supported in case law, and which corresponds to the so-called *effet utile* (at times referred to as principle of effectiveness), whereby one is to secure to the conventional provisions their *proper effects*[53].

55. The evolution of international law itself can have an effect upon the interpretation of the treaty at issue. The object and purpose of a treaty can be given precision, and be developed, by the parties themselves (as in classic treaties) under the effect of certain precepts of law, or else by organs of international supervision established by the treaties themselves (in distinct domains of protection). When it comes to *protection* (of the human person, of the environment, or of matters of general interest), the principle of *effet utile* assumes particular importance in the determination of the (enlarged) scope of the conventional obligations of protection.

56. The corresponding obligations of the States parties assume an essentially *objective character*: they are implemented collectively, singling out the predominance of considerations of general interest (or even *ordre public*), transcending the individual interests of States parties. The nature of treaties addressing matters of general or common interest and counting on *collective guarantee* (by States parties) for their implementation has an incidence on their process of interpretation. And it could not be otherwise.

57. There is no space, under treaties of the kind, for unilateral State action, or even for bilateral reciprocal concessions: States parties to such treaties are bound by the contracted obligations to seek jointly the realization or fulfilment of the object and purpose of the treaties at issue. State parties are bound by *positive obligations* enshrined therein. The preambles themselves of treaties of the kind contain important elements for their interpretation, to be necessarily taken into account.

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[52] Cf., generally, e.g., Maarten Bos, "Theory and Practice of Treaty Interpretation", 27 *Netherlands International Law Review* (1980), pp. 3-38 and 135-170; W. Lang, "Les règles d'interprétation codifiées par la convention de Vienne sur le droit des traités et les divers types de traités", 24 *Österreichische Zeitschrift für öffentliches Recht* (1973), pp. 113-173; Ch. De Visscher, *Problèmes d'interprétation judiciaire en droit international public*, Paris, Pedone, 1963, pp. 9-264; among others.

[53] Cf., e.g., M. K. Yasseen, "L'interprétation des traités d'après la convention de Vienne sur le droit des traités", 151 *RCADI* (1976), p. 74; G. E. do Nascimento e Silva, *Conferência de Viena sobre o Direito dos Tratados*, Rio de Janeiro, MRE, 1971, pp. 34-35 and 73-74; I. M. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press/Oceana, 1973, pp. 73-75; F. Capotorti, "Il Diritto dei Trattati Secondo la Convenzione di Vienna", *Convenzione di Vienna sul Diritto dei Tratatti*, Padua, Cedam, 1984, pp. 35-39; among others.

58. As to the 1946 International Convention for the Regulation of Whaling (ICRW), and in particular its "objectives and purposes"[54], namely, the proper conservation of the whale stocks and the orderly development of the whaling industry, it is clear that the former stands higher, as without the proper *conservation* of whale stocks there can be no *orderly* development of the whaling industry. The basic foundation of the ICRW is thus the *conservation* of all whale species at issue. The principle of *effet utile* points in this direction, discarding the mere profitability of the whaling industry.

59. There is a concern for *orderly* development in the ICRW, which uses the expression "common interest"[55], and, moreover, identifies its beneficiaries, in expressly recognizing "the interest of the nations of the world in safeguarding for *future generations* the great natural resources represented by the whale stocks"[56]. The regulatory scheme is set out in detail in the Schedule. It should not pass unnoticed that the notion of public or good order had already found expression in the international community at the time of the adoption of the ICRW.

60. The general policy objectives under the ICRW were thus — and remain — the protection of all whale species from overfishing, to the benefit of *future generations in all nations*, and the orderly development of the whaling industry was to abide by that. Conflicts or disputes were thus to be avoided on that basis, and that (orderly) industrial development was not to undermine the public or good order of the oceans. The objectives of the ICRW disclose the *nature* of the treaty, to be implemented well beyond the scope of bilateral relations between States parties. The *nature* of the ICRW is, in my understanding, to be kept in mind, in the present decision of the Court concerning intervention for the purposes of interpretation of Article VIII of the Convention.

VIII. The Preventive Dimension

61. A proactive posture of the ICJ as to the institute of intervention in international judicial proceedings, under Article 63 of its Statute, appears in principle justified, in cases like the present one, concerning the interpretation or construction of a provision of a multilateral treaty like the ICRW, aiming above all at the *conservation* of all whales species, to the benefit of future generations in all nations. The notion of inter-generational equity is present herein. I have devoted much attention to the long-term temporal dimension and the notion of inter-generational equity in my separate opinion (Part IX, pp. 177-184, paras. 114-131) in the case

[54] Expression utilized in Articles V (2) and VI of the Convention.
[55] Fourth preambular paragraph.
[56] First preambular paragraph [emphasis added].

concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, and I here limit myself to refer to my reflections developed therein. In the present case, the ICRW's *preventive* dimension should not pass unnoticed. States parties are here to act with due care, under the ICRW, so as to avoid a harm which may project itself in time.

62. The uncertainties still surrounding the institute of intervention in legal proceedings are proper to the persisting and new challenges faced by international justice in our times[57], in the enlargement of its scope both *ratione materiae* and *ratione personae*. International tribunals are to face such uncertainties, approaching the institute of intervention with due attention to the contemporary evolution of international legal procedure at conceptual level, and to the nature of the multilateral treaties at stake.

63. Article 63 of the Court's Statute provides for intervention *as of right (supra)* — as the ICJ itself has pointed out — when the State seeking to intervene confines its intervention to "the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case"[58]. On the basis of its Declaration of Intervention, it does not seem that New Zealand is seeking a "general intervention" in the present case. It purports to inform the Court of its view, focused on a specific point of interpretation or construction of Article VIII of the 1946 Convention for the Regulation of Whaling. New Zealand's submission is thus duly circumscribed, and the Court is right in holding it admissible.

IX. The *Resurrectio* of Intervention in Contemporary Judicial Proceedings before the ICJ

64. The ICJ's decision contained in the present Order in the case concerning *Whaling in the Antarctic* is significant: looking back in time, we may well be witnessing lately the *resurrectio* of intervention in contemporary judicial proceedings before the ICJ. I have made this point in my separate opinion in the Court's previous Order of 4 July 2011 permitting Greece's intervention in the case concerning the *Jurisdictional Immunities of the State (Germany* v. *Italy)*. In a rather short lapse of time, the Court has taken its position on granting intervention, on the basis of both Article 62 (in 2011) and Article 63 (the present Order) of its Statute.

[57] E. Jouannet, "Quelques perspectives théoriques: incertitudes sur le tiers et désordres de la justice internationale", *Le tiers à l'instance devant les juridictions internationales* (eds. H. Ruiz Fabri and J.-M. Sorel), Paris, Pedone, 2005, pp. 260-263.

[58] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 15, para. 26.

65. I have deemed it fit to dwell further upon this issue, in the present Order of the Court, declaring admissible New Zealand's intervention in the case *Whaling in the Antarctic (Australia* v. *Japan)*. Twice before, in two cases concerning land and maritime boundaries in the nineties, the ICJ also authorized two other Applications to intervene, namely, in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (*Application by Nicaragua for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 92) and in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (*Application by Equatorial Guinea for Permission to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II)*, p. 1029).

66. On the two more recent occasions, namely, in the case concerning the *Jurisdictional Immunities of the State* and in the present case of *Whaling in the Antarctic*, the Court has adopted two Orders granting the requested interventions in two domains of great importance in and for the development of contemporary international law, namely, that of the tension between the right of access to justice and the invocation of State immunities, and that of marine life and resources and international protection of the environment. In the ambit of the circumstances surrounding these two more recent cases, in domains of concern to the international community as a whole, intervention has at last seen the light of the day.

67. Although intervention, throughout the history of the ICJ, laid dormant in the Peace Palace for most of the Court's history until recently, it has never died, and it appears now to have been resurrected, in a revitalized way. In deciding as it has done, to grant intervention in the two aforementioned cases, in such relevant contexts, the ICJ has so decided at the height of its responsibilities as the main judicial organ of the United Nations (Article 92 of the UN Charter). Unlike land and maritime delimitation cases, or other cases concerning predominantly bilateralized issues, these last two cases concern third States as well, other than the respective contending Parties before the Court.

68. The subject-matters at issue in those two cases *(supra)* are, in my perception, closely and decisively related to the evolution of contemporary international law as a truly *universal* international law, being thus of relevance ultimately to all States. The *resurgere* of intervention is thus most welcome, propitiating the sound administration of justice *(la bonne administration de la justice)*, attentive to the needs not only of all States concerned but of the international community as a whole, in the conceptual universe of the *jus gentium* of our times.

X. Concluding Observations

69. In the present case, in my view, a proper expression to the principle of the sound administration of justice *(la bonne administration de la jus-*

tice) can be found precisely in the declaration of admissibility by the Court of the Declaration of Intervention by New Zealand in the *cas d'espèce*. I have made precisely this point, one and a half years ago, in my separate opinion (para. 59) appended to the Court's Order of 4 July 2011, in the case concerning the *Jurisdictional Immunities of the State (Germany* v. *Italy)*. This is a point which, in my view, should not pass unnoticed herein.

70. It so happens that, in the present Order, the Court considered the principle of the sound administration of justice *(la bonne administration de la justice)* in relation to other arguments put to it (paras. 17-19 of the Order), which are rather tangential to the institute of intervention (under Article 63) itself, and do not have a direct bearing on its essence. It is true, as the Court states (para. 18), that intervention, in the terms of Article 63 of the Statute, cannot — does not — affect the procedural equality of the contending Parties. The Court rightly acknowledges (para. 19) that New Zealand's Declaration of Intervention falls within the provisions of Article 63 of the Statute and the requirements of Article 82 of the Rules of Court, and is thus admissible. It is so — I would add — irrespective of whether the contending Parties object to it or not.

71. In circumstances like those of the *cas d'espèce*, it is necessary to surmount the old bilateralist bias that permeates dispute-settlement under the procedure before this Court. It so happens that such bias has for a long time impregnated expert writing on the subject[59] as well. It is about time to overcome such dogmatisms of the past, with their characteristic immobilization, remnant of the old arbitral practice. The present case concerning *Whaling in the Antarctic*, unlike land and maritime delimitation cases, or other cases concerning predominantly bilateralized issues, concerns third States as well, parties to the 1946 Convention for the International Regulation of Whaling, other than the respective contending Parties before the Court. The Convention concerns a matter of general or common interest, and is to be implemented collectively by States parties, thus contributing to the public order of the oceans.

72. In the present Order, the Court has limited itself to address the points raised by the three States concerned, in the terms in which they were raised. Under the self-imposed pressure of time, it has abstained from dwelling upon the substantive aspects concerning the essence of intervention under

[59] To quote one example:

> "International law in its historical evolution has shown a general reticence towards third-party interference in the judicial (or arbitral) settlement of bilateral disputes. Indeed, such third-party intervention has always been presented as an exception to the general principle of *res judicata inter alios acta*, and there is nothing in modern international judicial experience or practice to warrant any far-reaching departure from that approach." (S. Rosenne, *Intervention in the International Court of Justice*, *op. cit. supra* note 22, p. 190.)

Article 63 of its Statute. For my part, I have struggled against the constraints of time, in order to take care of dwelling upon them in the present separate opinion. Throughout the years the hope has been expressed, in expert writing, that further clarification be given as to the meaning and scope of intervention under Article 63 of the Statute of the ICJ.

73. This is what I have been attempting to do in this separate opinion, to the extent possible. The insufficient clarification provided so far has been attributed to the rather infrequent use of intervention as of right under Article 63. But even in the cases wherein intervention under Article 63 has been put to the Court, like the present one, this latter has not provided sufficient or entirely satisfactory clarification, though it has fortunately reached the right decision in today's Order.

74. It may well occur that, in the future, whichever clarification is provided, it comes to appear, after all, not entirely satisfactory. One point seems, however, clear. The rhythm of progressive development of international law, whichever path is taken, is particularly slow; so slow that any advance achieved seems to be due to a constructive reasoning in a rare moment, or glimpse, of lucidity. In any case, and to be fair to jurists (my colleagues), it so happens that law is not an "exact science", and perhaps fortunately so. After all, what is thought of as "exact" today, with the passing of time comes to appear as not being so "exact" as one thought or assumed it to be earlier on. In the domain of law, we are faced with *Sollen*/*devoir être* (so necessary to human beings), and dissatisfaction seems often to be ineluctable herein.

75. After all, *Sollen*/*devoir être* (or at least the tension between *Sein* and *Sollen*) requires thinking, rather than applying mechanically pre-existing norms. As for mechanical application, nowadays computers would do it just as well. Thinking (which requires much greater effort) cannot always be presumed; this is why one ought to be satisfied when a certain advance is achieved, moved by thinking with an awareness of the imperatives of justice. Today, 6 February 2013, is one such occasion, with the Court's Order of admissibility of New Zealand's Declaration of Intervention under Article 63 of its Statute, just as one and a half years ago (Order of 4 July 2011) there was another such occasion, with the Court's permission of Greece's intervention under Article 62 of its Statute, in the case concerning the *Jurisdictional Immunities of the State*.

76. So, we do not — fortunately — work always surrounded by dissatisfaction. After all, there are, in its course, moments or glimpses of enlightenment as well, which should satisfy those engaged in the progressive development of international law and the realization of justice at international level. The aforementioned last two grants of intervention by

this Court, under Articles 62 and 63 of its Statute (Orders of 4 July 2011 and 6 February 2013, respectively), are good examples in this direction. The gradual *resurrectio* of intervention in contemporary judicial proceedings before the World Court can, in my perception, render a valuable service towards a more cohesive international legal order in our days. After all, intervention in legal proceedings, by providing additional elements to the Court for its consideration and reasoning, can contribute to the progressive development of international law itself, especially when matters of collective or common interest and collective guarantee are at stake.

(*Signed*) Antônio Augusto CANÇADO TRINDADE.