SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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1. I have accompanied the Court's majority, in voting in favour of the adoption of the present Judgment in the case *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*. Yet, I would have wished certain points to be further developed by the Court. I feel thus obliged to leave on the records, in the present separate opinion, the foundations of my personal position thereon. To this effect, I shall address the following points: *(a)* the object and purpose of the International Convention on the Regulation of Whaling (the teleological approach); *(b)* collective guarantee and collective regulation; *(c)* the limited scope of Article VIII (1) of the ICRW; *(d)* the evolving law relating to conservation: interactions between systems; *(e)* the ICRW as a "living instrument": the evolving *opinio juris communis*; *(f)* inter-generational equity; *(g)* conservation of living species (marine mammals); *(h)* principle of prevention and the precautionary principle; *(i)* remaining uncertainties around "scientific research" (under the JARPA II programme). The way will then be paved for my concluding observations, on the JARPA II programme and the requirements of the ICRW and its Schedule.

I. The Object and Purpose of the ICRW

2. I find it necessary, to start with, to dwell upon *the object and purpose* of the International Convention on Regulation of Whaling (hereinafter the "ICRW"), so as to set the context for the consideration of the interpretation of Article VIII of the ICRW, and of the question whether Japan complied with its obligations under the ICRW and its Schedule (cf. *infra*). Both contending Parties, Australia and Japan, and the intervenor, New Zealand, have in fact dedicated some attention to the object and purpose of the ICRW. The adoption of a Convention like the ICRW, endowed with a supervisory organ of its own, evidences that the goal of conservation integrates its object and purpose, certainly not limited to the development of the whaling industry.

3. To try to reduce the object and purpose of the ICRW to the protection or development of the whaling industry would be at odds with the rationale and structure of the ICRW as a whole. If the main goal of the ICRW were only to protect and develop the whaling industry, the entire framework of the ICRW would have been structured differently. Moreover, the fact that the ICRW is a multilateral treaty, encompassing member States that do not practice whaling, also speaks to the understanding that the ICRW's object and purpose cannot be limited to the development of the whaling industry. Furthermore, in the same line of reasoning, the adoption of a moratorium on commercial whaling within the framework of the ICRW also seems to indicate that the conservation of whale

stocks is an important component of the object and purpose of the ICRW.

1. The Teleological Approach

4. May I turn briefly to the Preamble of the ICRW, which contains indications as to the object and purpose of the Convention. First, the Preamble recognizes "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks"; this seems, in my view, to be in line with the purpose of conserving and protecting whales. Secondly, other preambular paragraphs mention "regulation" of whaling to ensure conservation and development of whale stocks. Then, the Preamble also posits that the States parties "decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry".

5. It appears that the primary object and purpose of the ICRW can be found in the conservation and recovery of whale populations. The ICRW provides for a mechanism to ensure its own evolution in face of changing conditions and new challenges. The International Whaling Commission (IWC) has a specific role (under Article VI) to make recommendations to States parties, in the form of resolutions, to which they are to give consideration in good faith. The practice of the IWC, conformed by its successive resolutions, seems to indicate that conservation of whale stocks is an important objective of the ICRW: for example, in a number of resolutions, the IWC has focused on non-lethal methods of research concerning whales, disclosing a concern with the conservation of whale stocks[1]. Thus, in my perception, the use of whales cannot take place to the detriment of the conservation of whale stocks.

6. The Schedule of regulations annexed to the ICRW is an integral part of it, with equal legal force; amendments have regularly been made to the Schedule, so as to cope with international environmental developments. States parties thus count on a scheme to act together in the common interest, setting a proper balance between conservation and the use of whale resources. The ICRW, adopted in 1946 to stop the overexploitation of whales, presented thus two novelties in comparison with the first treaties on whaling: the creation of the IWC (under Article III), and the inclusion of the Schedule, controlling whaling so as to achieve conserva-

[1] E.g., resolution 2007-3 (Resolution on the Non-Lethal Use of Cetaceans); resolution 2007-1 (Resolution on JARPA).

tion and recovery of whale stocks. It became a multilateral scheme, seeking to avoid unilateral action so as to foster conservation.

7. The object and purpose of the ICRW are to be construed in light of its text, its supervisory mechanism, and its nature as a multilateral treaty encompassing both whaling and non-whaling States. The object and purpose of the Convention point to, as a guiding principle, the conservation and recovery of whale stocks; not to be seen on an equal footing with the sustainable development of the whaling industry or the protection of commercial whaling. A State party — Japan or any other — cannot act unilaterally to decide whether its programme is fulfilling the object and purpose of the ICRW, or the objective of conservation.

2. Response of New Zealand to Questions from the Bench

8. In this connection, in the course of the oral pleadings before the Court (on 8 July 2013), I deemed it fit to put the following questions to the intervenor, New Zealand:

> "1. In your view, does the fact that the International Convention for the Regulation of Whaling is a multilateral treaty, with a supervisory organ of its own, have an impact on the interpretation of its object and purpose?
>
> 2. You have stated in your written observations (of 4 April 2013) that the object and purpose of the International Convention for the Regulation of Whaling is: 'to replace unregulated, unilateral whaling by States with collective regulation as a mechanism to provide for the interests of the parties in the proper conservation and management of whales' (p. 16, para. 33). In your view, is this a widely accepted interpretation nowadays of the object and purpose of the International Convention for the Regulation of Whaling?"[2]

9. As to these questions, New Zealand at first recalled that, distinctly from the 1937 International Agreement for the Regulation of Whaling, the 1946 ICRW counts on a permanent Commission (the IWC) endowed with a supervisory role, evidencing a "collective enterprise", and acknowledging that whale conservation "must be an international endeavour". In sum, in New Zealand's view, the object and purpose of the ICRW ought to be approached in the light of the *collective interest* of States parties in

[2] CR 2013/17, of 8 July 2013, pp. 49-50.

the conservation and management of whale stocks[3]. Secondly, New Zealand argued that the IWC had recognizedly become the appropriate organ for the conservation and management of whales. Such role of collective regulation of the IWC — New Zealand added — was in the line of the United Nations Convention on the Law of the Sea, which requires States (Art. 65) to co-operate with a view to the conservation of marine mammals and to work through the appropriate international organs. Such endeavours of conservation have become a "collective responsibility", and the IWC — New Zealand added — would "work co-operatively to improve the conservation and management of whale populations and stocks on a scientific basis and through agreed policy measures"[4].

II. Collective Guarantee and Collective Regulation

1. Collective Decision-Making under the ICRW

10. The collective system established by the ICRW is crucial to the understanding and proper handling of the present case of *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*. In my view, the system created by the Convention aims at replacing a system of unilateral unregulated whaling, with a system of collective guarantee and regulation so as to provide for the interests of the States parties in the proper conservation and management of whales. To my mind, the structure of the Convention evidences that one of its aims is to achieve collective guarantee through collective regulation, in relation to all activities associated with whaling. This collective regulation is achieved through a process of collective decision-making by the IWC, which adopts regulations and resolutions *(supra)*.

11. In addition, it may be recalled that the IWC may also adopt recommendations addressed to any or all of the States parties on any matters which relate to whales or whaling and to the objective and purpose of the Convention. These recommendations and resolutions, in my understanding, express the collective views of the parties under the Convention concerning the protection of their interests in the proper conservation and management of whales. Furthermore, membership of the IWC has grown along the years, with many members having no whaling industry or history of whaling activities; their common interest would arguably be the conservation and management of whales themselves, rather than solely the preservation of the whaling industry.

[3] Written Responses of New Zealand to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 8 July 2013 at 10 a.m., of 12 July 2013, pp. 6-7, paras. 1-3.

[4] *Ibid.*, pp. 8-9, paras. 1-4.

12. Thus, the nature and structure of the ICRW, the fact that it is a multilateral Convention (comprising both whaling and non-whaling States) with a supervisory organ of its own, which adopts resolutions and recommendations, highlights the collective decision-making process under the Convention and the collective guarantee provided thereunder. In the light of the object and purpose of the ICRW, clearly a system of collective guarantee and collective regulation operates thereunder.

2. Review of Proposed Special Permits under the Schedule

13. In fact, in numerous resolutions, the IWC has provided guidance to the Scientific Committee for its review of special permits under paragraph 30 of the Schedule. This is aimed at amending proposed special permit programmes that do not meet the conditions. The expectation ensues therefrom that, e.g., non-lethal methods will be used whenever possible, on the basis of successive resolutions of the IWC stressing the relevance of obtaining scientific information without needing to kill whales for "scientific research". In accordance with the IWC resolutions, the Scientific Committee has, for its part, elaborated a series of Guidelines to enable it to undertake its function of review of special permits (under paragraph 30 of the Schedule).

14. In the present proceedings before the ICJ, this practice has been brought to the attention of the Court, in particular by New Zealand[5], who has further pointed out that over 25 resolutions of the IWC, issued after the Scientific Committee's review of proposed special permits (under Article VIII of the ICRW), have been consistently requesting the States parties concerned "not to proceed where the Scientific Committee had determined that the proposed activity did not satisfy the Scientific Committee's criteria"[6]. Such is the case of IWC resolutions 1987-1, 1987-2, 1987-3, 1987-4, 1989-1, 1989-2, 1989-3, 1990-1, 1990-2, 1991-2, 1991-3, 1993-7, 1993-8, 1994-9, 1994-10, 1994-11, 1995-9, 1996-7, 1997-5, 1997-6, 2000-4, 2000-5, 2001-7, 2001-8, 2003-2, 2003-3, 2005-1, and 2007-1[7]. Hence, it is clear that one counts nowadays on a system of collective guarantee and collective regulation under the ICRW (cf. also *infra*).

15. Bearing the IWC resolutions in mind, the Scientific Committee's Guidelines have endeavoured to assist it in undertaking adequately its function of review of special permit proposals and of research results from existing and completed special permits. In its most recent Guidelines, adopted in 2008 (Annex P), the Scientific Committee's review pro-

[5] Both in its written observations, of 4 April 2013, and in its oral arguments; cf. written observations of New Zealand, of 4 April 2013, pp. 30-33, paras. 55-60; and CR 2013/17, of 8 July 2013, pp. 30-31 and 39, paras. 50-54 and 14.

[6] Written observations of New Zealand, of 4 April 2013, p. 56, para. 98.

[7] *Ibid.*, p. 56, para. 98, note 195.

cess focuses on, *inter alia*, the possibility of using non-lethal research methods, the aims and the methodology and the sample size, the point whether the catches will have an adverse effect on the stocks (paras. 2-3). Moreover, the proposed activity is to be subject to periodic and final reviews. It is clear that there is here not much room for State unilateral action and free will.

16. It clearly appears, from paragraph 30 of the Schedule[8], that a State party issuing a special permit is under the obligation to provide the IWC Secretary with proposed scientific permits *before* they are issued, and in sufficient time so as to allow the Scientific Committee to review and comment on them. Paragraph 30 of the Schedule thus plays an important role in the overall structure of the ICRW and in the pursuit of the fulfilment of its object and purpose. It establishes a review procedure that must be followed in relation to the granting of special permits, and that serves as a mechanism through which the granting of special permits may be monitored by the IWC. Accordingly, States granting special permits do not have an unfettered freedom to issue such permits.

17. It follows therefrom that, even if the recommendations of the Scientific Committee and the IWC are not *per se* legally binding on States, States willing to issue special permits should consider the comments of the IWC and the recommendations of the Scientific Committee in good faith (principle of *bona fide*). The terms of paragraph 30 make it clear that the particular duty to provide proposed special permits in advance to the IWC is set forth so as to enable the Scientific Committee to "review and comment" on them. It seems that, if States were to decide, at their free will, whether or not to take into account the comments and recommendations of the IWC and the Scientific Committee, that provision would be rendered meaningless, dead letter; the review procedure would then become a sort of unacceptable "rubber stamp" mechanism, whereby States issuing permits would be able to disregard completely the comments and recommendations whenever they wished.

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[8] Paragraph 30 of the Schedule states that a State party shall provide the IWC Secretary with proposed scientific permits

> "before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them. The proposed permits should specify: *(a)* objectives of the research; *(b)* number, sex, size and stock of the animals to be taken; *(c)* opportunities for participation in the research by scientists of other nations; and *(d)* possible effect on conservation of stock."

Paragraph 30 adds that proposed permits

> "shall be reviewed and commented on by the Scientific Committee at Annual Meetings when possible. When permits would be granted prior to the next Annual Meeting, the Secretary shall send the proposed permits to members of the Scientific Committee by mail for their comment and review. Preliminary results of any research resulting from the permits should be made available at the next Annual Meeting of the Scientific Committee."

18. Paragraph 30 thus creates a *positive* (procedural) obligation[9] of the State willing to issue a special permit to co-operate with the IWC and the Scientific Committee. It would seem inconsistent with the purpose of paragraph 30 if a State party would feel entitled to issue a special permit without having co-operated with the IWC and the Scientific Committee, or without having given any consideration whatsoever to the views of other States parties expressed through the comments of the IWC and the recommendations of the Scientific Committee.

19. In its 2006 Report (p. 50), the Scientific Committee was of the view that the JARPA II proposed programme provided the specifications required by paragraph 30 of the Schedule. One has here, as already indicated, a system of collective guarantee and collective regulation under the ICRW. In the framework of this latter, the Court has determined, on distinct points, that the respondent State has not acted in conformity with paragraph 10 *(d)* and *(e)*, and paragraph 7 *(b)*, of the Schedule[10] to the ICRW (resolutory points 3-5).

III. The Limited Scope of Article VIII (1) of the ICRW

20. Keeping the review system in mind, and given the arguments of the contending Parties and of the intervenor as to the scope of Article VIII[11] within the ICRW as a whole, a point to be addressed is that of the requirements for a whaling programme to be considered "for purposes of scientific research". The key point seems to be whether a whaling programme carried out under a special permit must be exclusively for scientific

[9] On the conceptualization of positive obligations in a distinct context, cf., e.g., D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights*, London/N.Y., Routledge, 2012, pp. 57-141.

[10] Paragraph 10 *(d)* of the Schedule establishes a moratorium on the taking, killing or treating of (sperm, killer and baleen) whales, except minke whales, by factory ships or whale catchers attached to factory ships. And paragraph 10 *(e)* provides in addition for a "comprehensive assessment" of the effects of catches on whale stocks and the establishment of new catch limits. And paragraph 7 *(b)* of the Schedule prohibits commercial whaling in the Southern Ocean Sanctuary (a prohibition to be reviewed every ten years).

[11] Article VIII (1) of the ICRW reads as follows:

> "Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted."

research and not for any other purpose. In other words, the question is whether the same programme may be carried out under a special permit for the purpose of "scientific research" and, e.g., for purpose of selling the whale meat.

21. In my understanding, Article VIII (1) of the ICRW is not to be interpreted broadly, so as to go against the object and purpose of the normative framework of the Convention as a whole. Article VIII (1) appears as an *exception* to the normative framework of the ICRW, to be thus interpreted restrictively. The purpose, in particular, of granting special permits, is, to my mind, to allow for scientific research to be undertaken; other purposes do not seem to be allowed under Article VIII, and should not fall under the exception of Article VIII (1), which, in my understanding, applies solely and specifically to scientific research programmes. If a programme with multiple purposes (including a "scientific research" purpose) could be qualified for a special permit under Article VIII (1), the provision would not have been drafted in the way it was. Article VIII (1) is phrased in terms ("for purposes of") which seem to make it clear that the sole purpose for which a special permit shall be granted is the conduct of scientific research. Otherwise, it could be expected that the expression "or other purposes" would also have been included.

22. The Court has determined that the special permits granted by Japan in connection with JARPA II "do not fall within the provisions of Article VIII (1)" of the ICRW (resolutory point 2). As to whether a State issuing a special permit under Article VIII (1) has the discretion to determine whether a whaling programme is "for purposes of scientific research", such a question can only be properly considered within the whole framework of the ICRW as a multilateral treaty, nowadays endowed with a supervisory mechanism of its own. Accordingly, a State issuing a permit does not have *carte blanche* to dictate that a given programme is "for purposes of scientific research". It is not sufficient for a State party to describe its whaling programme as "for purposes of scientific research", without demonstrating it.

23. In my view, such an unfettered discretion would not be in line with the object and purpose of the ICRW, nor with the idea of multilateral regulation. The State issuing a special permit should take into consideration the resolutions of the IWC which provide the views of other States parties as to what constitutes "scientific research". There is no point in seeking to define "scientific research" for all purposes. When deciding whether a programme is "for purposes of scientific research" so as to issue a special permit under Article VIII (1), the State party concerned

has, in my understanding, a duty to abide by the principle of prevention and the precautionary principle (cf. *infra*).

24. In my perception, Article VIII, part and parcel of the ICRW as a whole, is to be interpreted taking into account its object and purpose. This discards any pretence of devising in it a so-called "self-contained" regime or system, which would go unduly against the ICRW's object and purpose. In sum, in my understanding, in line with the object and purpose of the ICRW *(supra)*, a State party does not have an unfettered discretion to decide the meaning of "scientific research" and whether a given whaling programme is "for purposes of scientific research". The interpretation and application of the ICRW in recent decades bear witness of a gradual move away from unilateralism and towards multilateral conservation of living marine resources, thus clarifying the limited scope of Article VIII (1) of the ICRW.

IV. The Evolving Law relating to Conservation: Interactions between Systems

25. With the growth in recent decades of international instruments related to conservation, not a single one of them is approached in isolation from the others; not surprisingly, the co-existence of international treaties of the kind has called for a *systemic outlook*, which has been pursued in recent years. Reference can here be made to e.g., the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention), the 1979 Convention on Migratory Species of Wild Animals, the 1980 Convention on the Conservation of Antarctic Marine Living Resources, the 1982 United Nations Convention on the Law of the Sea, the 1992 United Nations Convention on Biological Diversity (CBD Convention).

26. The systemic outlook seems to be flourishing in recent years. For example, at its fifth meeting, in 2000, the Conference of States parties to the CBD Convention referred to "the interactions between climate change and the conservation and sustainable use of biological diversity in a number of thematic and cross-cutting areas", including, *inter alia*, marine and coastal biodiversity[12]. As for the ICRW, the most complete academic work produced to date, on its legal regime, that of Patricia W. Birnie, supports the teleological interpretation of the ICRW, stressing the growing importance of *conservation* in the evolving interpretation and application of the ICRW; she further points out that related treaties (e.g., the CITES Convention) have helped to identify the wide range of matters of concern to the inter-

[12] CBD, *Scientific Assessments — Note by the Executive Secretary*, doc. UNEP/CBD/SBSTTA/10/7, of 5 November 2004, p. 8, para. 29.

national community as a whole, such as, e.g., *inter alia*, the protection of wild fauna and flora [13].

V. The ICRW as a "Living Instrument": The Evolving *Opinio Juris Communis*

27. The interpretation and application of the aforementioned treaties, in the light of the systemic outlook, have been contributing to the gradual formation of an *opinio juris communis* in the present domain of contemporary international law. The present Judgment of the ICJ in the *Whaling in the Antarctic* case has recalled the establishment, in 1950, by the IWC, of the Scientific Committee to assist it in discharging its functions; as from the mid-1980s, the Scientific Committee has conducted its review of special permits on the basis of Guidelines, issued or endorsed by the IWC (para. 47). Moreover, the IWC is entitled to adopt *recommendations* (under Article VI of the ICRW), which may be relevant (when adopted by consensus or unanimity) for the interpretation of the Convention or its Schedule (para. 46). As the ICJ itself has put it, the functions conferred upon the IWC "have made the Convention an evolving instrument" (para. 45).

28. The present Judgment of the ICJ proceeds to assert that States parties to the ICRW "have a duty to co-operate with the IWC and the Scientific Committee" and to "give due regard to recommendations calling for an assessment of the feasibility of non-lethal" research methods (para. 83). In this respect, it further recalls, *inter alia*, that "the two experts called by Australia referred to significant advances in a wide range of non-lethal research techniques over the past 20 years" (para. 137). The Judgment the Court has just adopted today, 31 March 2014, is likely to be of importance to the future of the IWC, and to secure the survival of the ICRW itself, as a "living instrument" capable of keeping on responding to needs of the international community and new challenges that it faces in the present domain.

29. This is not the first time that the Court acknowledges that international treaties and conventions are "living instruments". In its *célèbre* Advisory Opinion (of 21 June 1971) on *Namibia*, for example, the ICJ referring to the mandates system of the League of Nations era, stated that

[13] P. W. Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale Watching*, Vol. II, N.Y./London/Rome, Oceana Publs., 1985, pp. 583 and 635. She further singles out the continuing work of the IWC, with several resolutions addressing "a wide variety of new issues", such as, *inter alia*, criteria for aboriginal subsistence whaling, small cetaceans, creation of sanctuary areas, preservation of habitats, "humane killing", discouragement of whaling, among others; cf. *ibid.*, Vol. II, p. 641.

> "the concepts embodied in Article 22 of the Covenant (. . .) were not static, but were by definition evolutionary (. . .). [V]iewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations or by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. (. . .) In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, para. 53.)

30. Subsequently, in its Judgment (of 25 September 1997) in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the ICJ pondered that "newly developed norms of environmental law are relevant for the implementation of the [1977] Treaty" in force between Hungary and Slovakia, that was the object of the dispute. The Court proceeded that the contending Parties are required, "in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration". Accordingly, the Court added, the 1977 Treaty "is not static, and is open to adapt to emerging norms of international law" (*I.C.J. Reports 1997*, pp. 67-68, para. 112).

31. Other contemporary international tribunals have pursued the same evolutionary interpretation. For example, the European Court of Human Rights, in its judgment (of 25 April 1978) in the *Tyrer* v. *The United Kingdom* case, asserted that the European Convention on Human Rights "is a living instrument", to be "interpreted in the light of present-day conditions" (para. 31). Subsequently, the European Court reiterated, *expressis verbis*, this *obiter dictum*, in its judgment (on preliminary objections, of 23 March 1995) in the case of *Loizidou* v. *Turkey*, wherein it added that, accordingly, the provisions of the European Convention, as a "living instrument",

> "cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago. (. . .) In addition, the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective." (Application No. 5856/72, paras. 71-72.)

32. Likewise, the Inter-American Court of Human Rights, in its Judgment (of 31 August 2001) in the case of the *Mayagna (Sumo) Awas*

Tingni Community v. *Nicaragua*, stated that "human rights treaties are living instruments, the interpretation of which ought to adapt to the evolution of times, and, in particular, to current living conditions" (para. 146). In the same line of thinking, in its earlier Advisory Opinion (of 1 October 1999) on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, the Inter-American Court observed that the International Law of Human Rights

> "has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. (. . .) [H]uman rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions." (Para. 114.)

33. The experience of supervisory organs of various international treaties and conventions points to this direction as well. Not seldom they have been faced with new challenges, requiring new responses from them, which could never have been anticipated, not even imagined, by the draftsmen of the respective treaties and conventions. In sum, international treaties and conventions are a product of their time, being also *living instruments*. They evolve with time; otherwise, they fall into *desuetude*. The ICRW is no exception to that. Those treaties endowed with supervisory organs of their own (like the ICRW) disclose more aptitude to face changing circumstances.

34. Moreover, in distinct domains of international law, treaties endowed with a supervisory mechanism of their own have pursued a hermeneutics of their own[14], facing the corresponding treaties and conventions as *living instruments*. International treaties and conventions are products of their time, and their interpretation and application *in time*, with a temporal dimension, bears witness that they are indeed living instruments. This happens not only in the present domain of conservation and management of living marine resources, but likewise in other areas of international law[15].

35. By the time of the adoption of the 1946 ICRW, in the mid-twentieth century, there did not yet exist an awareness that the living marine resources were not inexhaustible. Three and a half decades later, the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) — a major international law achievement in the nine-

[14] Cf., for example, in the domain of the international protection of the rights of the human person, A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre/Brazil, S. A. Fabris Ed., 1999, Chap. XI, pp. 23-200.

[15] Cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 2nd rev. ed., Leiden/The Hague, Nijhoff, 2013, Chap. II ("Time and Law Revisited: International Law and the Temporal Dimension"), pp. 31-51.

teenth century — contributed to the public order of the oceans, and to the growing awareness that their living resources were not inexhaustible. Unilateralism gradually yielded to collective regulation towards conservation. An example to this effect is provided, under the 1946 ICRW, by the 1982 general moratorium on commercial whaling.

36. Another example can be found in the establishment by the IWC of whale sanctuaries (under Article V (1) of the ICRW) *(infra)*. The IWC has so far adopted three whale sanctuaries: first, the Southern Ocean Sanctuary (1948-1955); secondly, the Indian Ocean Sanctuary (1979, renewed in 1989, and indefinitely as from 1992); thirdly, the new Southern Ocean Sanctuary (from 1994 onwards). Moreover, in its meetings of 2001-2004, the IWC was lodged with a proposal (revised in 2005) of a new sanctuary, the South Atlantic Sanctuary[16], so as to reassert the need of conservation of whales.

37. Over the last three decades, the IWC has repeatedly made clear that lethal research methods are not in line with the aforementioned moratorium. In its resolution 2003-2, for example, the IWC calls for a limitation of "scientific research" to "non-lethal methods only", and expresses its opposition to commercial whaling, "contrary to the spirit of the moratorium", and presents an annotated compilation of its "Conservation Work", with a systematization of resolutions to this effect (Anns. I-II). It is nowadays reckoned that States parties to the ICRW that wish to issue special permits are bound to co-operate with the IWC and the Scientific Committee, and to give consideration to the views of other States parties expressed through the comments of the IWC and the recommendations of the Scientific Committee.

38. Parallel to this, multilateral conventions (such as UNCLOS and CBD) have established a framework for the conservation and management of living marine resources. The UNCLOS Convention contains a series of provisions to that effect[17]. As to the CBD Convention, the Conference of the parties held in Jakarta in 1995, for example, adopted the Jakarta Mandate on Coastal and Marine Biodiversity, reasserting the relevance of conservation and ecologically sustainable use of coastal and marine biodiversity, and, in particular, linking conservation, sustainable use of biodiversity and fishing activities.

39. Furthermore, in its meeting of 2002, the States parties to the Convention on Migratory Species (CMS) pointed out the need to give greater protection to six species of whales (including the Antarctic minke whales)

[16] Propounded mainly by Brazil, Argentina, South Africa and Uruguay in the ambit of the IWC. On the proposal, cf. "Chair's Report of the 57th Annual Meeting of the International Whaling Commission", pp. 33-34.

[17] Such as Articles 61, 64-67, 192, 194 and 204 (2).

and their habitats, breeding grounds and migratory routes. These are clear illustrations of the evolving *opinio juris communis* on the matter. In its 2010 meeting, held in Agadir, Morocco, the "Buenos Aires Group"[18] reiterated support for the creation of a new South Atlantic Sanctuary for whales, and positioned itself in favour of conservation and non-lethal use of whales[19], and against so-called "scientific whaling" (in particular in the cases of endangered or severely depleted species).

40. The "Buenos Aires Group" stressed the needed implementation of the moratorium, and recalled the achievements of the IWC since the early 1980s. It further called for a reform of Articles V (whaling under objection) and VIII (scientific whaling) of the ICRW, so that their interpretation and application do not go against the principle of conservation of whales underlying the Convention. More recently, on 4 February 2013, the same "Buenos Aires Group" expressed its "strongest rejection" of the ongoing whale hunting (including species classified as endangered) in the Southern Ocean Sanctuary (para. 1), with catches pointing to "an operation of a commercial nature which lacks any scientific justification" (para. 2). After calling for non-lethal methods and "the maintenance of the commercial moratorium in place since 1986", the "Buenos Aires Group" stated that the ongoing whale hunting was in breach of "the spirit and the text" of the 1946 ICRW, and failed to respect "the integrity of the whale sanctuaries recognized by the IWC" (paras. 3-4).

VI. Inter-Generational Equity

41. The 1946 ICRW was indeed pioneering, in acknowledging, in its Preamble, "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks". At that time, shortly after World War II, its draftsmen could hardly have anticipated that this concern would achieve the dimension it did, in the international agenda and in international law-making (in particular in the domain of international environmental law) in the decades that followed. The long-term temporal dimension, underlying the inter-generational equity, was properly acknowledged. And the conceptual construction of *inter-generational equity* (in the process of which I

[18] Formed by Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, Peru and Uruguay.

[19] Cf. Chair's Report of the 62nd Annual Meeting of the International Whaling Commission, pp. 7-8.

had the privilege to take part) was to take place, in international legal doctrine, four decades later, from the mid-1980s onwards.

42. Within this Court, I had in fact the occasion to address the long-term temporal dimension, in relation to *inter-generational equity*, in my separate opinion in the case of the *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)* (*Judgment, I.C.J. Reports 2010 (I)*, p. 14). I pondered therein that

> "The long-term temporal dimension marks its presence, in a notorious way, in the domain of environmental protection. The concern for the prevalence of the element of *conservation* (over the simple exploitation of natural resources) reflects a cultural manifestation of the integration of the human being with nature and the world wherein he or she lives. Such understanding is, in my view, projected both in space and in time, as human beings relate themselves, in space, with the natural system of which they form part (and ought to treat with diligence and care), and, in time, with other generations (past and future)[20], in respect of which they have obligations. (. . .)
>
> In fact, concern with future generations underlies some environmental law conventions[21]. In addition, in the same line of reasoning, the 1997 UNESCO Declaration on the Responsibilities of Present Generations Towards Future Generations, after invoking, *inter alia*, the 1948 Universal Declaration of Human Rights and the two 1966 United Nations Covenants on Human Rights, recalls the responsibilities of present generations to ensure that 'the needs and interests of present and future generations are fully safeguarded' (Article 1 and Preamble). The 1997 Declaration added, *inter alia*, that 'the present generations should strive to ensure the maintenance and perpetuation

[20] Future generations promptly began to attract the attention of the contemporary doctrine of international law: cf., e.g., A.-Ch. Kiss, "La notion de patrimoine commun de l'humanité", 175 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1982), pp. 109-253; E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, Tokyo/Dobbs Ferry N.Y., United Nations University/Transnational Publs., 1989, pp. 1-351; A.-Ch. Kiss, "The Rights and Interests of Future Generations and the Precautionary Principle", *The Precautionary Principle and International Law — The Challenge of Implementation* (eds. D. Freestone and E. Hey), The Hague, Kluwer, 1996, pp. 19-28; [Various Authors], *Future Generations and International Law* (eds. E. Agius and S. Busuttil *et al.*), London, Earthscan, 1998, pp. 3-197; [Various Authors], *Human Rights: New Dimensions and Challenges* (J. Symonides, ed.), Paris/Aldershot, UNESCO/Dartmouth, 1998, pp. 1-153; [Various Authors], *Handbook of Intergenerational Justice* (J. C. Tremmel, ed.), Cheltenham, E. Elgar Publ., 2006, pp. 23-332.

[21] E.g., the 1992 United Nations Framework Convention on Climate Change, the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, among others.

of humankind with due respect for the dignity of the human person' (Art. 3). Almost two decades earlier, the United Nations General Assembly adopted, on 30 October 1980, its resolution proclaiming 'the historical responsibility of States for the preservation of nature for present and future generations' (para. 1); it further called upon States, in 'the interests of present and future generations', to take 'measures (. . .) necessary for preserving nature' (para. 3). (. . .)

May I recall that the subject at issue was originally taken up by the Advisory Committee to the United Nations University (UNU) on a project on the matter, in early 1988, so as to provide an innovative response to rising and growing concerns over the depletion of natural resources and the degradation of environmental quality and the recognition of the need to conserve the natural and cultural heritage (at all levels, national, regional and international; and governmental as well as non-governmental). The Advisory Committee, composed of professors from distinct continents[22], met in Goa, India[23], and issued, on 15 February 1988, a final document titled 'Goa Guidelines on Intergenerational Equity'[24], which stated:

> 'Th[e] temporal dimension is articulated through the formulation of the theory of 'intergenerational equity'; all members of each generation of human beings, as a species, inherit a natural and cultural patrimony from past generations, both as beneficiaries and as custodians under the duty to pass on this heritage to future generations. As a central point of this theory the right of each generation to benefit from this natural and cultural heritage is inseparably coupled with the obligation to use this heritage in such a manner that it can be passed on to future generations in no worse condition than it was received from past generations. This requires conservation and, as appropriate, enhancement of the quality and of the diversity of this heritage. The conservation of cultural diversity is as important as the conservation of environmental diversity to ensure options for future generations.

[22] Namely, Professors E. Brown Weiss, A. A. Cançado Trindade, A.-Ch. Kiss, R. S. Pathak, Lai Peng Cheng and E. W. Ploman.

[23] In the meeting held in Goa, India, convened by the United Nations University (UNU), the members of the UNU Advisory Committee acted in their own personal capacity.

[24] These Guidelines, adopted on 15 February 1988, were the outcome of prolonged discussions, which formed part of a major study sponsored by the UNU. It is not my intention to recall, in the present separate opinion, the points raised in those discussions, annotated in the unpublished UNU dossiers and working documents, on file with me since February 1988.

> Specifically, the principle of intergenerational equity requires conserving the diversity and the quality of biological resources. (. . .)
>
> The principles of equity governing the relationship between generations (. . .) pertain to valued interests of past, present and future generations, covering natural and cultural resources. (. . .) There is a complementarity between recognized human rights and the proposed intergenerational rights. (. . .)'[25]
>
> And the aforementioned UNU document moved on to propose strategies to implement inter-generational rights and obligations. From then onwards, the first studies on this specific topic of inter-generational equity, in the framework of the conceptual universe of International Environmental Law, began to flourish[26]. From the late 1980s onwards, inter-generational equity has been articulated amidst the growing awareness of the vulnerability of the environment, of the threat and gravity of sudden and global changes, and, ultimately, of one's own mortality."[27]

43. Inter-generational equity comes again to the fore in the present case of *Whaling in the Antarctic*. The factual context of the *cas d'espèce* is of course quite distinct from that of the *Pulp Mills* case; yet, significantly, in one and the other, *inter-generational equity* (with its long-term temporal dimension) marks its presence. It does so in distinct international instruments of international environmental law, and in its domain as a whole. And this cannot pass unnoticed here.

44. In this respect, the 1973 CITES Convention, e.g., states in its Preamble that wild fauna and flora "must be protected for this and the generations to come", and adds that "peoples and States are and should be the best protectors of their own wild fauna and flora". The CITES Convention provides for control of trade, and prevention or restriction of exploitation of species (Art. II). The 1979 Convention on the Conservation of Migratory Species of Wild Animals asserts in its Preamble the awareness that each generation "holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely". Furthermore, it recognizes in

[25] The full text of the "Goa Guidelines on Intergenerational Equity" is reproduced in Annexes to the two following books, whose authors participated in the elaboration of the document: E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, *op. cit. supra* note 20, Appendix A, pp. 293-295; A. A. Cançado Trindade, *Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre/Brazil, S. A. Fabris Ed., 1993, Ann. IX, pp. 296-298.

[26] Cf., *inter alia*, *supra* note 20.

[27] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 177-180, paras. 114, 118, 120 and 121 of my aforementioned separate opinion.

the Preamble that "wild animals in their innumerable forms are an irreplaceable part of the earth's natural system which must be conserved for the good of mankind".

45. The 1992 CBD Convention expresses, in its Preamble, the determination "to conserve and sustainably use biological diversity for the benefit of present and future generations". It further asserts in its Preamble that "the conservation of biological diversity is a common concern of humankind", and calls for "the conservation of biological diversity and the sustainable use of its components", also to "contribute to peace for humankind". In its operative part, the CBD Convention then proceeds, in detail, to provide for conservation of biological diversity and its sustainable use (Arts. 1, 6-10, 11-13, and 17-18).

46. In the course of a meeting of a UNEP Group of Legal Experts — of which I keep a good memory — which took place in Malta before the holding of the 1992 UNCED Conference in Rio de Janeiro in the period of the *travaux préparatoires* of the CBD Convention — the need was stressed of relating "preventive with corrective measures, with preventive measures seeming "to lend themselves more easily to an inter-generational perspective"[28]. The Group of Legal Experts then identified "the constitutive elements" of common concern of humankind, namely:

> "involvement of all countries, all societies, and all classes of people within countries and societies; long-term temporal dimension, encompassing present as well as future generations; and some sort of sharing of burdens of environmental protection"[29].

47. In effect, inter-generational equity marks presence nowadays in a wide range of instruments of international environmental law, and indeed of contemporary public international law. It goes beyond the scope of the present separate opinion to dwell extensively upon them. Suffice it here to refer to yet another illustration. The 2001 UNESCO Universal Declaration on Cultural Diversity, e.g., after expressing, in its Preamble, the aspiration to "greater solidarity" on the basis of "recognition of cultural diversity, of awareness of the unity of humankind, and of the development of intercultural exchanges", adds, in Article 1, that "cultural diversity is as necessary for humankind as biodiversity is for nature"; in this

[28] UNEP, "Report on the Proceedings of the Meeting Prepared by the Co-Rapporteurs, Profs. A. A. Cançado Trindade and D. J. Attard", *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (D. J. Attard, ed. — Malta, University of Malta, 13-15 December 1990), Nairobi, UNEP, 1991, p. 22, para. 6.

[29] *Ibid.*, p. 21, para. 4.

sense, "it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations".

VII. Conservation of Living Species (Marine Mammals)

1. The Tension between Conservation and Exploitation: Arguments of the Parties

48. In the course of the proceedings (written phase) of the present case *Whaling in the Antarctic*, both Australia and Japan referred, in distinct terms to the conservation of marine mammals. To start with, Australia's Memorial devoted some attention to the development, from the mid-1970s onwards, of a treaty-based regime for the conservation of marine mammals. It observed that, from then onwards, "the international community has adopted an increasingly conservation-oriented approach in the development of treaty regimes, including those covering marine mammals" (para. 4.84). This, in its view, has led to "significant developments in the law relating to conservation" (para. 4.85).

49. In Australia's view, those international instruments recognize "the intrinsic value" of all living species, and "the importance of conservation of migratory species and biological diversity as common concerns of mankind". They are directly relevant to the conservation and management of whales, and support an interpretation of Article VIII of the ICRW that "contributes to, rather than undermines, the conservation of whales" (para. 4.86). Australia then advances "a restrictive interpretation of the Article VIII exception, and a stringent limitation on the use of lethal methods of scientific research if non-lethal means are available" (para. 4.86). Australia further refers to the recognition of the "precautionary approach" in several "international environmental agreements, concerning both broader environmental matters, and, more particularly, the conservation and protection of marine mammals" (para. 4.89).

50. For its part, Japan, in its Counter-Memorial, argued that, in its view, there is "no contradiction" between the conservation and the exploitation of whales, not even under the ICRW (para. 6.15). In the same line of thinking — Japan added — the United Nations Convention on Biological Diversity (CBD) "permits the use of biological resources" in a manner that avoids or minimizes "adverse impacts" on biological diversity (para. 6.17). In Japan's view, the term "use" includes "both commercial exploitation and use for the purposes of scientific research" (para. 6.18). Japan then recalled that the concept of "sustainable use" has been further developed by the Conference of the States parties to the

CBD, which, in 2004, adopted the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, recognizing that:

> "Sustainable use is a valuable tool to promote conservation of biological diversity, since in many instances it provides incentives for conservation and restoration because of social, cultural and economic benefits that people derive from that use. In turn, sustainable use cannot be achieved without effective conservation measures. In this context, and as recognized in the Plan of Implementation of the World Summit on Sustainable Development, sustainable use is an effective tool to combat poverty, and consequently, to achieve sustainable development." (Memorial of Australia, para. 6.19.)

51. Japan further argued that the policy of "combination of conservation and sustainable use" under the CBD has been a "matter of practical necessity", and "what types and levels of utilization are sustainable will depend on the status of the species and the demands upon it at any particular time" (*ibid.*, para. 6.20). As the "level of exploitation" would depend on "the conservation status of the species in question" — Japan added — it followed that "the measures adopted to promote sustainable use of biological resources should be adjusted according to the information available about a species, bearing in mind the precautionary approach" (*ibid.*, para. 6.22).

2. Whale Stocks — Conservation and Development: Responses of the Parties and the Intervenor to Questions from the Bench

52. There has been growing awareness in recent years that the ICRW does not allow the use of whales to take place to the detriment of the conservation of whale stocks. The general membership of the ICRW (encompassing both whaling and non-whaling States) has been attentive to the growing emphasis on conservation, with more protective measures (by the IWC), and the gradual crystallization of the precautionary principle (cf. *infra*). In the present case of *Whaling in the Antarctic*, in the course of the oral pleadings before the Court (on 8 July 2013), I deemed it fit to put the following questions to Japan, Australia and New Zealand together:

> "[1.] How do you interpret the terms 'conservation and development' of whale stocks under the International Convention for the Regulation of Whaling?
> [2.] In your view, can a programme that utilizes lethal methods be considered 'scientific research', in line with the object and purpose of the International Convention for the Regulation of Whaling?"[30]

[30] CR 2013/17, of 8 July 2013, p. 49.

And then, I addressed the following additional questions only to Japan:

"1. To what extent would the use of alternative non-lethal methods affect the objectives of the JARPA II programme?

2. What would happen to whale stocks if many, or even all States parties to the International Convention for the Regulation of Whaling, decide to undertake 'scientific research' using lethal methods, upon their own initiative, similarly to the *modus operandi* of JARPA II?"[31]

53. The questions I put to Australia, Japan and New Zealand together pertained to the interpretation of the terms "conservation and development" of whale stocks under the ICRW, and to the methods to be used in "scientific research" in the light of the object and purpose of the ICRW. In its answer, Australia drew attention to quotas for "aboriginal subsistence whaling", and to measures for purposes other than consumption (e.g., whale watching)[32]. For its part, Japan referred to the co-existence between "conservationist measures" (e.g., moratorium and sanctuaries) and "scientific whaling" under Article VIII of the ICRW[33].

54. In its response, the intervenor, New Zealand, warned against the excesses of commercial whaling (also referring to the sustainable use of whale stocks), invoking the Preamble of the ICRW's provision, to the effect that whale capture cannot endanger those "natural resources". New Zealand further referred to the duty of co-operation and "the needs of conservation for the benefit of all". Invoking the precautionary approach, New Zealand ascribed a limited role to Article VIII for the conduct of scientific research, adding that lethal methods could only be used when they created no risk of an adverse effect on the whales stock[34].

55. As to one of the questions I addressed to Japan, pertaining to the objectives of a programme *(supra)*, the argument advanced by Japan was that the research objectives (of JARPA II) dictated the methods, and not vice versa. If certain data could only be collected by using lethal methods, in its view there would be no alternative non-lethal methods. Japan then added that there were limitations to the use of non-lethal methods of biopsy sampling and satellite tagging[35].

[31] CR 2013/17, of 8 July 2013, p. 49.
[32] CR 2013/19, of 10 July 2013, p. 54, para. 79.
[33] CR 2013/21, of 15 July 2013, pp. 40-41, paras. 20-21.
[34] Written Responses of New Zealand, *op. cit. supra* note 3, pp. 4-5, paras. 1-4.

[35] CR 2013/22, of 15 July 2013, p. 48, para. 20.

56. Australia retorted that the objectives of JARPA II were, in its view, rather vague and general, and seemed to have been adopted and applied so as to allow the killing of whales; thus, the methods (of JARPA II) dictated the objectives, and not vice versa. After criticizing the stated objectives of JARPA II, Australia advocated the use of non-lethal methods under that programme. And it added that, if many of the States parties to the ICRW felt entirely free — as Japan does — to decide for itself to issue special permits under Article VIII for the taking of any number of whales, this would certainly have adverse effects on the fin, humpback and other whale stocks[36]. Australia expressed its concern that, as the situation stands at present, "an unknown and indefinite number of whales will be taken under JARPA II"[37].

3. General Assessment

57. It has been made clear, in recent decades, that the international community has adopted a conservation-oriented approach in treaty regimes, including treaties covering marine mammals. The ICRW is to be properly interpreted in this context; it does not stand alone as a single international Convention aimed at conservation and management of marine mammals. The ICRW is part of a plethora of international instruments adopted in recent years, aiming at conservation with a precautionary approach. Amongst these instruments stands the United Nations Convention on Biological Diversity (CBD), adopted at the United Nations Conference on Environment and Development (UNCED), in Rio de Janeiro, on 5 June 1992, which can here be recalled as an international instrument aiming at conservation of living species.

58. The CBD is directly pertinent to conservation and management of whales. For example, in its Preamble, it asserts *inter alia* its determination "to conserve and sustainably use biological diversity for the benefit of present and future generations". In this respect, the ICRW should be read in the light of other international instruments that follow a conservation-oriented approach and the precautionary principle. The existence of the ICRW in relation to Conventions aimed at conservation of living resources supports a narrow interpretation of Article VIII of the ICRW.

59. Accordingly, Article VIII (1), as already pointed out, cannot be broadly interpreted, and cannot at all be taken as a so-called "self-contained" regime or system. It is not a free-standing platform, not a *carte blanche* given to States to do as they freely wish. It is part and parcel of a system of collective guarantee and collective regulation oriented

[36] Written Comments of Australia on Japan's Responses to Questions Put by Judges during the Oral Proceedings, of 19 July 2013, pp. 8-13.

[37] CR 2013/20, of 10 July 2013, p. 16, para. 37.

towards the conservation of living species. Thus, Article VIII (1) can only be interpreted in a restrictive way; all States parties to the ICRW have recognizedly a common interest in the conservation and in the long-term future of whale stocks.

VIII. Principle of Prevention and the Precautionary Principle: Arguments of the Parties and the Intervenor

60. Although the Court does not dwell upon the precautionary principle or approach in the present Judgment in the case of *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*, I deem it fit to recall and point out herein that, in the course of the proceedings in the present case, the two contending Parties as well as New Zealand addressed the principle of prevention and the precautionary principle as related to the *cas d'espèce*. In its oral arguments, Australia stressed *conservation* under contemporary international environmental law, invoking its "three main legal pillars", namely, "intergenerational equity, the principle of prevention and the precautionary approach", principles that are to "govern the interpretation and the application of the 1946 Convention régime, as they make it possible for its object and purpose to be achieved"[38].

61. In the same line of thinking, in its Memorial Australia upheld the precautionary principle, asserting that, for example, "[t]he establishment of sanctuaries reflects also the increasing importance of the precautionary approach in the IWC's management and conservation of whales" (p. 42, para. 2.80). It has then added that

> "[t]he IWC now pursues conservation of whales as an end itself. In so doing, it places greater reliance on a precautionary approach to conservation and management combined with a focus on non-consumptive use" (p. 52, para. 2.99).

62. Australia, in sum, identified an "increasingly conservation-oriented approach" (p. 172, para. 4.83). This is so in view of the growing pursuance of the precautionary approach. In Australia's perception,

> "This development, which has been recognized by the IWC, must be taken into account in interpreting the Article VIII exception. In practical terms, and in the face of uncertainty as to the status of whale stocks and the effect of any lethal take, precaution directs an interpretation of Article VIII that limits the killing of whales.
>
> The precautionary approach specifically is intended to provide guidance in the development and application of international environ-

[38] CR 2013/7, of 26 June 2013, pp. 56-58, paras. 50, 55 and 57-58.

> mental law where there is scientific uncertainty. The core of this approach is reflected in Principle 15 of the Rio Declaration (. . .). The approach requires caution and vigilance in decision-making in the face of such uncertainty.
>
> The precautionary approach has been recognized in a number of international policy documents and international environmental agreements, concerning both broader environmental matters and, more particularly, the conservation and protection of marine mammals. (. . .)
>
> The Contracting Governments to the ICRW have agreed to the adoption of a precautionary approach in a wide range of matters. As applied to Article VIII, this means that the uncertainty regarding the status of whale stocks requires Contracting Governments to act with prudence and caution by strictly limiting the grant of special permits under Article VIII." (Memorial of Australia, pp. 173-176, paras. 4.87-4.91.)[39]

63. In sum, in Australia's understanding, developments in international law confirm that "Article VIII is to be interpreted as an exception that is only available in limited circumstances"; Article VIII "is not self-judging", and its application is to be "determined by reference to objective criteria, consistent with those adopted by the Commission established under the ICRW". Such an approach — Australia added — is consistent with "the broader international legal framework in which the ICRW now rests", which promotes a "conservation-oriented focus" that is consistent with the precautionary approach (*ibid.*, pp. 173-176, paras. 4.87-4.91). Australia concluded on this point that "the Article VIII exception" had a "strictly limited application", in particular where there is "uncertainty regarding the status of the relevant whale stocks" (*ibid.*, p. 187, paras. 4.118). Also in its oral arguments, Australia insisted that "the aim of the precautionary approach is conservation (. . .)", and this latter applies in particular "where there is scientific uncertainty"[40].

64. For its part, in its arguments (in the written and oral phases) Japan did not elaborate on the principle of prevention. Furthermore, in its Counter-Memorial, it somehow minimized the precautionary approach[41], but it conceded that such an approach entailed "the conduct of further special permit whaling for scientific purposes as a means of improving

[39] Australia recalled, still in its Memorial, not only the incorporation of the precautionary approach (as propounded in Principle 15 of the Rio Declaration on Environment and Development) in "a growing number of international treaties", but also the contemporary case law on the subject, of the International Court of Justice (case of the *Pulp Mills on the River Uruguay*), as well as of the International Tribunal for the Law of the Sea (ITLOS) (the *Southern Bluefin Tuna* cases, and the Advisory Opinion of its Sea-Bed Disputes Chamber, on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*) (pp. 173-176, paras. 4.87-4.91).

[40] CR 2013/7, of 26 June 2013, p. 47, paras. 53-54.

[41] Counter-Memorial of Japan, p. 132, para. 3.92.

understanding of marine ecosystems and the sustainability of whale stocks"; it was on that basis, Japan added, "that JARPA and JARPA II have been designed and carried out", in a "prudent and cautious" way, posing "no risk to the survival of abundant minke whale stocks"[42].

65. In its oral arguments, Japan further stated that it was conducting "scientific research" in such a way that "no harm to stocks" would occur "in full application of the precautionary approach". It added that "[l]ittle is known of the ecosystem in the Antarctic Ocean", and it was "precisely to supply the Scientific Committee with necessary scientific data that Japan is pursuing research whaling", and, together with "other nations' contribution, conservation and management based on science under the IWC has been making progress"[43]. In invoking the precautionary approach (as expressed in Principle 15 of the Rio Declaration on Environment and Development), Japan asserted that the JARPA II programme was "consistent" with its requirements; Japan then called for "a permissive interpretation and application of Article VIII of the ICRW, so as to render it effective"[44].

66. For its part, New Zealand, in its oral arguments, in addressing the *principle of prevention*, stated that "consultations and negotiations" — in pursuance of the duty of co-operation — are to be "meaningful"[45], also taking into account "the views and legitimate interests of others"[46]. Turning to the precautionary principle or approach, New Zealand argued, in its written observations, that States parties to the ICRW do not have full discretion, in the form of a "blank cheque", to "determine the number of whales to be killed under special permit under Article VIII"; they have to proceed reasonably, so as to achieve the object and purpose of the Convention as a whole[47].

67. That number of whales, New Zealand proceeded in its written observations, ought to be "necessary and proportionate to the objectives of the scientific research", pursuant to the precautionary approach as related to "the conservation and management of living marine resources".

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[42] Japan added that "possible effects of JARPA II catches on whale stocks were analysed and submitted to the IWC Scientific Committee in 2005", and those analyses concluded that "there would be no adverse effects on the long-term status of any of the targeted whale species in the Antarctic". Japan concluded that, if there was "scientific uncertainty about the conservation status and population dynamics of whale stocks", then further research would become necessary, and it would keep on "acting prudently in continuing to conduct JARPA II" (Counter-Memorial of Japan, pp. 424-426, paras. 9.33-9.36).

[43] CR 2013/12, of 2 July 2013, pp. 15-16, para. 9.

[44] CR 2013/16, of 4 July 2013, pp. 29-35, para. 19, and cf. also paras. 11-12, 15-16, and 20-21.

[45] CR 2013/17, of 8 July 2013, p. 45, para. 30.

[46] *Ibid.*, p. 46, para. 33.

[47] *Ibid.*, pp. 25-27, paras. 34-38.

New Zealand added in its written observations, that States parties are required to act with "prudence and caution", particularly when "information is uncertain, unreliable or inadequate", so as to avoid "any harm" (CR 2013/17, of 8 July 2013, pp. 40-41, paras. 73-74). In issuing a special permit, a State party to the ICRW is to demonstrate that it "will avoid any adverse effect on the conservation of the stock" (*ibid.*, p. 41, para. 75).

68. Again in its oral arguments, New Zealand sustained that the issue here in contention is the number of whales to be killed, which, in its view, cannot be "entirely self-judging", nor completely without review[48]. In its view, the determination of that number should take into account certain factors, namely:

> "*(a)* first, the number of whales killed must be the lowest necessary for, and proportionate to, the purposes of scientific research;
> *(b)* as a consequence, there is an expectation that non-lethal methods of research will be used;
> *(c)* third, the number of whales to be killed must be set at a level which takes into account the precautionary approach; and
> *(d)* finally, the discretion to set the number of whales to be killed must be exercised reasonably and consistent with the object and purpose of the Convention"[49].

69. Insisting on the relevance of the precautionary approach, New Zealand added that States parties to the ICRW "should act with prudence and caution when applying provisions, such as Article VIII, which may have an effect on the conservation of natural resources". Such "prudence and caution" are even more needed "when the information is uncertain, unreliable or inadequate" (*ibid.*, para. 15). A "prudent and cautious" approach would ensure that the number of whales to be taken "is necessary and proportionate", and would "give preference to the conduct of non-lethal methods of research. (. . .) [U]ncertainty is the very reason for acting with caution."[50]

70. Even if the Court, in the present Judgment in the *Whaling in the Antarctic* case, has not seen it fit to pronounce on the principle of prevention and the precautionary principle, it is, in my view, significant that the contending Parties, Australia and Japan, and the intervenor, New Zealand, have cared to refer to these principles, in general, in their arguments as to whether or not Japan's whaling practices under special permits conform to them. Such principles are to inform and conform any programmes under special permits within the limited scope of Article VIII of the ICRW. Furthermore, the principles of prevention and precaution appear interrelated in the present case of *Whaling in the Antarctic*.

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[48] CR 2013/17, of 8 July 2013, p. 35, para. 3.
[49] *Ibid.*, pp. 35-36, para. 3.
[50] *Ibid.*, p. 40, para. 17.

71. May I add just one final remark in this respect. Despite the hesitation of the ICJ (and of other international tribunals in general) to pronounce and dwell upon the precautionary principle, expert writing increasingly examines it, drawing attention to its incidence when there is need to take protective measures in face of risks, even in the absence of corresponding scientific proof. The precautionary principle, in turn, draws attention to the time factor, the temporal dimension, which marks a noticeable presence in the interpretation and application of treaties and instruments of international environmental law[51]. In this domain in general, and in respect of the ICRW in particular, there has occurred, with the passing of time, a move towards conservation of living marine resources as a common interest, prevailing over State unilateral action in search of commercial profitability[52]. This move has taken place by the operation of the system of collective guarantee, collective decision-making and collective regulation under the ICRW (cf. item II, *supra*).

IX. Responses from the Experts, and Remaining Uncertainties around "Scientific Research" (under JARPA II)

72. During the public sittings of the Court, I deemed it fit to put several questions to the experts of Australia and Japan. In response to my five questions put to him, the expert of Australia (M. Mangel) addressed the availability of non-lethal research techniques to States parties to the 1946 ICRW in the context of conservation and management of whales, pointing out that their use (so as to replace lethal methods) would depend on "having a relevant question", as there is "always a tension in the scientific community about the exact question"[53]. Satellite tagging, e.g., has become a non-lethal tool, with the technological development as from the early 1990s, for the collection of information (e.g., on the movement of whales)[54].

73. In response to my three questions put to him, the expert of Japan (L. Walløe) compared biopsy sampling with lethal sampling. He admitted that he could not determine the total of whales to be killed to attain the objectives of "scientific research" (as under JARPA II), as that, in his view, would depend on the question one would be focusing on; but, "for the time being", he added, and "for some years", it would "be justified to

[51] Cf., generally, e.g., Y. Tanaka, "Reflections on Time Elements in the International Law of the Environment", 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2013), pp. 143-147, 150-156, 165-167 and 170-175.

[52] Cf. M. Bowman, "'Normalizing' the International Convention for the Regulation of Whaling", 29 *Michigan Journal of International Law* (2008), pp. 139, 163, 175-177 and 199.

[53] CR 2013/9, of 27 June 2013, pp. 64-66.

[54] *Ibid.*, pp. 66-67.

kill 850"[55]. He submitted that, for certain purposes, "lethal research" (e.g., on the amount of stomach contents) continued to be necessary[56]. Yet, despite these responses, there remained, in my perception, the impression of a lack of general criteria for the determination of the total whales to be killed, and for how long, for the purposes of so-called "scientific research".

74. "Scientific research" is surrounded by uncertainties; it is undertaken on the basis of uncertainties. Suffice it here to recall the legacy of Karl Popper, who used to ponder wisely that scientific knowledge can only be uncertain or conjectural, while ignorance is infinite. Scientific research is a search for truth, amidst conjectures, and, given one's fallibility, one has to learn with mistakes incurred into. One can hope to be coming closer to truth, but without knowing for sure whether one is distant from, or near it. Without the ineluctable refutations, science would fall into stagnation, losing its empirical character. Conjectures and refutations are needed, for science to keep on advancing in its empirical path[57]. As for the *cas d'espèce*, would this mean that whales could keep on being killed, and increasingly so, for "scientific purposes" and amidst scientific uncertainty? I do not think so; there are also non-lethal methods, and, after all, living marine resources are not inexhaustible.

X. Reiterated Calls under the ICRW for Non-Lethal Use of Cetaceans

75. The reiterated calls for non-lethal use of cetaceans, under the ICRW, cannot pass unnoticed here. In its resolution 1995-9, on whaling under special permit, the IWC recommended that "scientific research" intended to assist the comprehensive assessment of whale stocks should be undertaken by non-lethal means; furthermore, it recalled that the ICRW recognizes the common interest of all "the nations of the world" in safeguarding the "great natural resources" of whale stocks "for future generations". Subsequently, in its resolution 2005-I, on JARPA II, the IWC began by recalling (second preambular paragraph) that

> "since the moratorium on commercial whaling came into force in 1985-1986, the IWC has adopted over 30 resolutions on special

[55] CR 2013/14, of 3 July 2013, pp. 50-51.

[56] *Ibid.*, pp. 51-52.

[57] Cf. Karl R. Popper, *Conjecturas e Refutações — O Progresso do Conhecimento Científico* [*Conjectures and Refutations — The Growth of Scientific Knowledge*], 5th ed., Brasília, Editora Universidade de Brasília, 2008, pp. 255, 257, 260, 269 and 271.

permit whaling in which it has generally expressed its opinion that special permit whaling should: be terminated and scientific research limited to non-lethal methods only (2003-2); refrain from involving the killing of cetaceans in sanctuaries (1998-4); ensure that the recovery of populations is not impeded (1987); and take account of the comments of the Scientific Committee (1987)".

76. Resolution 2005-I of the IWC proceeded to express concern (sixth preambular paragraph) that "more than 6,800 Antarctic minke whales *(Balaenoptera bonaerensis)* have been killed in Antarctic waters under the 18 years of JARPA, compared with a total of 840 whales killed globally by Japan for scientific research in the 31-year period prior to the moratorium". It then noted (tenth preambular paragraph) that "some humpback whales which will be targeted by JARPA II belong to small, vulnerable breeding populations around small island States in the South Pacific", and "even small takes could have a detrimental effect on the recovery and survival of such populations". The IWC further expressed concern (eleventh preambular paragraph) that "JARPA II may have an adverse impact on established long-term whale research projects involving humpback whales". At last, the operative part of resolution 2005-I "strongly" urged Japan to withdraw its JARPA II proposal, or else to revise it to consider using non-lethal means.

77. Two years later, the IWC adopted two new resolutions on the non-lethal use of whale resources. In resolution 2007-1, the IWC recalled that paragraph 7 *(b)* of the Schedule establishes the Southern Ocean Sanctuary; it further recalled its repeated requests to States parties to refrain from issuing special permits for research involving the killing of whales within the Southern Ocean Sanctuary. It then expressed concern at continuing lethal "research" within the Southern Ocean Sanctuary. In relation to JARPA II in particular, the IWC noted that, thereunder, "the take of minke whales has been more than doubled, and fin whales and humpback whales have been added to the list of targeted species" (fourth preambular paragraph). Convinced that "the aims of JARPA II do not address critically important research needs" (six preambular paragraph), resolution 2007-I, in its operative part, called upon Japan 31 recommendations of the Scientific Committee and "to suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Ocean Whale Sanctuary".

78. In addition, the IWC recalled, in resolution 2007-3 (on Non-Lethal Use of Cetaceans), the ICRW's aim to safeguard "the natural resources represented by whale stocks for the benefit of future generations" (first preambular paragraph). It noted that many coastal States adopted poli-

cies of non-lethal use of cetaceans in the waters under their jurisdiction, in the light of relevant provisions of the 1982 United Nations Convention on the Law of the Sea and the 1992 Rio Declaration on Environment and Development (second preambular paragraph). It pondered that "most whale species are highly migratory" and are "thus shared biodiversity resources" (third preambular paragraph). Calling for the non-lethal use of whales, it further noted that "the moratorium on commercial whaling has been in effect since 1986 and has contributed to the recovery of some cetacean populations essential for the promotion of non-lethal uses in many countries" (sixth preambular paragraph).

79. Next, in the same resolution 2007-3, the IWC expressed its concern that whales in the twenty-first century "face a wider range of threats than those envisaged when the ICRW was concluded in 1946" (seventh preambular paragraph). The IWC further notes that the Buenos Aires Declaration states that "high quality and well managed implementation of whale watching tourism promotes economic growth and social and cultural development of local communities, bringing educational and scientific benefits, whilst contributing to the protection of cetacean populations" (eighth preambular paragraph). Accordingly, in the operative part of resolution 2007-3, the IWC recognized, first, the valuable benefits to be derived from "the non-lethal uses of cetaceans as a resource, both in terms of socio-economic and scientific development", and secondly, the non-lethal use as "a legitimate management strategy". Thus, the IWC encouraged member States "to work constructively" towards "the incorporation" of the needs of non-lethal uses of whale resources in "any future decisions and agreements".

XI. Concluding Observations, on the JARPA II Programme and the Requirements of the ICRW and Its Schedule

80. Last but not least, as to the central question of the present case, that is, whether JARPA II is in conformity with the ICRW and its Schedule, — object of the main controversy between Australia and Japan — in my perception JARPA II does not meet the requirements of a programme "for purposes of scientific research" and does not fall under the exception contained in Article VIII of the ICRW. There are a few characteristics of JARPA II which do not allow it to qualify under the exception of Article VIII, to be restrictively interpreted; in effect, the programme at issue does not seem to be genuinely and *solely* motivated by the purpose of conducting scientific research.

81. This is so, keeping in mind the relation between JARPA II's stated objectives and the methods used to achieve these objectives: lethal methods, which JARPA II widely applies in its operations, are, in my view,

only to be used, first, where it is unavoidable to achieve a crucial objective of the scientific research; secondly, where no other methods would be available; and thirdly, where the number of whales killed corresponds to those necessary to conduct the research. In practice, the use of lethal methods by JARPA II in relation to what seems to be a large number of whales does not appear justifiable as "scientific research".

82. Furthermore, the fact that JARPA II runs for an indefinite duration also militates against its professed purpose of "scientific research". To my mind, a scientific programme, when being devised, should have objectives which go along a specific time frame for their achievement. To prolong the killing of whales indefinitely does not seem to be in line with scientific research, nor justifiable. In addition, there subsists the concern with the possible adverse effects of JARPA II on whale stocks. As just indicated, JARPA II utilizes lethal methods and runs for an indefinite time. It is not entirely convincing that, under these parameters, whale stocks subject to the programme will not be adversely affected. This is exacerbated in the hypothesis that other States parties to the ICRW decide to follow the same approach and methodology of Japan, and start likewise killing whales allegedly for similar purposes of "scientific research".

83. There could be an adverse impact on whale stocks if other States parties to the ICRW decided to kill as many whales as Japan, within an unlimited time frame, for purposes of "scientific research". JARPA II, in the manner it is being currently conducted, can have adverse effects on whale stocks. Even if there is a minor scientific purpose in the JARPA II programme, it is clearly not the main purpose of the programme. In my view, given the methodologies used (widely employing lethal methods — cf. *supra*), the structure of the programme and its duration, "scientific research" is not the sole purpose of the programme, nor the main one.

84. As to the question whether commercial aspects are permissible under Article VIII (2) of the Convention[58], the text of this provision seems clear: it does not seem expressly to allow for commercial aspects of a whaling programme under special permit. Article VIII (2) is aimed, in my perception, solely to avoid waste. The commercialization of whale meat does not seem to be in line with the purpose of granting special permits and should not be validated under this provision. Permitting commercial aspects of a special permit whaling programme under this provision would go against Article VIII as a whole, and the object and purpose of the ICRW (cf. *supra*). Commercial whaling, pure and simple, is not permissible under Article VIII (2).

[58] Which reads as follows: "Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted."

85. As to the Schedule, paragraph 30 sets forth a *positive* procedural obligation of States parties to the ICRW, whereby Japan's co-operation with the IWC and the Scientific Committee is expected. The Court has found, in the present Judgment in the *Whaling in the Antarctic* case, that Japan has not acted in conformity with paragraph 10 *(d)* and *(e)* (whaling moratorium, and assessment of effects of whale catches on stocks), and paragraph 7 *(b)* (prohibition of commercial whaling in the Southern Ocean Sanctuary), of the Schedule (resolutory points 3-5). Japan does not appear to have fulfilled this obligation to take into account comments, resolutions and recommendations of the IWC and the Scientific Committee.

86. For example, I note that many resolutions[59] have been issued over the years concerning JARPA II and its use of lethal methods, which Japan does not seem to have fully taken into account, given its continued use of lethal methods. The Court itself has drawn attention, in the present Judgment (para. 144), to the paucity of analysis by Japan of the feasibility of non-lethal methods to achieve JARPA II objectives; and it has added that

> "Given the expanded use of lethal methods in JARPA II, as compared to JARPA, this is difficult to reconcile with Japan's duty to give due regard to IWC resolutions and Guidelines and its statement that JARPA II uses lethal methods only to the extent necessary to meet its scientific objectives." (Judgment, para. 144.)

[59] Cf., e.g., Resolution on Japanese Proposal for Special Permits, App. 4, Chairman's Report of the 39th Annual Meeting, *Report of the International Whaling Commission [Rep. Int. Whal. Commn]* 38, 1988, p. 29 (resolution 1987-4); Resolution on the Proposed Take by Japan of Whales in the Southern Hemisphere under Special Permit, App. 3, Chairman's Report of the 41st Annual Meeting, *Rep. Int. Whal. Commn* 40, 1990, p. 36 (resolution 1989-3); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 2, Chairman's Report of the 42nd Meeting, *Rep. Int. Whal. Commn* 41, 1991, pp. 47-48 (resolution 1990-2); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 2, Chairman's Report of the 43rd Meeting, *Rep. Int. Whal. Commn* 42, 1992, p. 46 (resolution 1991-2); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 5, Chairman's Report of the 44th Meeting, *Rep. Int. Whal. Commn* 43, 1993, 71 (resolution 1992-5); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 7, Chairman's Report of the 45th Annual Meeting, *Rep. Int. Whal. Commn* 44, 1994, p. 33 (resolution 1993-7); Resolution on Special Permit Catches by Japan in the North Pacific, Resolution 1994-9, App. 15, Chairman's Report of the 46th Annual Meeting, *Rep. Int. Whal. Commn* 45, 1995, p. 47 (resolution 1994-9); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, resolution 1994-10, App. 15, Chairman's Report of the 46th Annual Meeting, *Rep. Int. Whal. Commn* 45, 1995, p. 47 (resolution 1994-10); Resolution on Special Permit Catches by Japan, resolution 1996-7, App. 7, Chairman's Report of the 48th Meeting, *Rep. Int. Whal. Commn* 47, 1997, pp. 51-52 (resolution 1996-7); cited in CR 2013/8, of 26 June 2013, pp. 34-35.

87. Moreover, it could hardly be claimed that the sole purpose of the JARPA II programme is "scientific research", as it appears that some commercial aspects permeate the programme. The JARPA II programme does not seem to fall under the exception of Article VIII of the ICRW. In the present Judgment, the Court has found that the special permits granted by Japan in connection with JARPA II do not fall under Article VIII (1) of the ICRW (resolutory point 2). The present case has provided a unique occasion for the Court to pronounce upon a system of collective regulation of the environment for the benefit of future generations. The notion of *collective guarantee* has been developed, and put in practice, to date in distinct domains of contemporary international law. The Court's present Judgment in the *Whaling in the Antarctic* case may have wider implications than solely the peaceful settlement of the present dispute between the contending Parties, to the benefit of all.

88. Last but not least, may I observe that international treaties and conventions are a product of their time; yet, they have an aptitude to face changing conditions, and their interpretation and application in time bears witness that they are *living* instruments. They evolve with time, otherwise they would fall into *desuetude*. The 1946 ICRW is no exception to that, and, endowed with a mechanism of supervision of its own, it has proven to be a *living* instrument. Moreover, in distinct domains of international law, treaties and conventions — especially those setting forth a mechanism of protection — have required the pursuance of a hermeneutics of their own, as *living* instruments. This happens not only in the present domain of conservation and sustainable use of living marine resources, but likewise in other areas of international law.

89. The present case on *Whaling in the Antarctic* has brought to the fore the evolving law on the conservation and sustainable use of living marine resources, which, in turn, has disclosed what I perceive as its contribution to the gradual formation of an *opinio juris communis* in the present domain of contemporary international law. *Opinio juris*, in my conception, becomes a key factor in the formation itself of international law (here, conservation and sustainable use of living marine resources); its incidence is no longer that of only one of the constitutive elements of one of its "formal" sources[60]. The formation of international law in domains of public or common interest, such as that of conservation and sustainable use of living marine resources, is a much wider process than the formulation of its "formal sources", above all in seeking the legitimacy of norms to govern international life[61].

[60] These latter being only means or vehicles for the formation of international legal norms.

[61] For the conceptualization of this outlook, cf. A. A. Cançado Trindade, *International Law for Humankind . . ., op. cit. supra* note 15, pp. 134-138, esp. p. 137.

90. *Opinio juris communis*, in this way, comes to assume a considerably broader dimension than that of the subjective element constitutive of custom, and to exert a key role in the emergence and gradual evolution of international legal norms. After all, juridical conscience of what is necessary *(jus necessarium)* stands above the "free will" of individual States *(jus voluntarium)*, rendering possible the evolution of international law governing conservation and sustainable use of living marine resources. In this domain, State voluntarism yields to the *jus necessarium*, and notably so in the present era of international tribunals, amidst increasing endeavours to secure the long-awaited primacy of the *jus necessarium* over the *jus voluntarium*. Ultimately, this becomes of key importance to the realization of the pursued common good.

(Signed) Antônio Augusto CANÇADO TRINDADE.