

## DECLARATION OF JUDGE GAJA

It may be regretted that the Court, facing for the first time in several decades a declaration of intervention under Article 63 of the Statute, has not seized the opportunity for clarifying certain aspects of the procedure relating to this type of intervention.

While one may understand that the Court does not wish to address questions that are not immediately relevant for the purpose of deciding whether New Zealand's intervention is admissible, it is less understandable that the conditions for the admissibility of an intervention are only the object of a general reference to Article 63 of the Statute and of an analysis of the formal requirements set forth by Article 82 of the Rules (para. 8).

One of the conditions which should have been spelled out and ascertained by the Court relates to the relevance of the suggested construction of the convention for the decision of the case. In the *Haya de la Torre (Colombia v. Peru)* Judgment the Court had noted that "every intervention is incidental to the proceedings in a case" and that "a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings" (*I.C.J. Reports 1951*, p. 76). On that basis, the Court found that Cuba's intervention was admissible only in part (*ibid.*, p. 77). The Court made this assessment in the Judgment that decided the case on the merits. When confronted with the same issue at an earlier stage, as in the present case, the Court should not go further than a prima facie analysis of the relevance of the suggested construction for the decision of the case. The Court could have outlined this criterion and assessed New Zealand's declaration accordingly. No doubt, the Court would have reached the conclusion that in this regard the intervention is admissible, given the extensive references in New Zealand's declaration to the construction of Article VIII of the International Convention for the Regulation of Whaling which is at the core of the present case.

While the Court fails to analyse specifically the conditions for admissibility of New Zealand's intervention, it includes in its Order some remarks that do not concern that admissibility. This concerns in particular the assertion that New Zealand as an intervener will be bound, according to paragraph 2 of Article 63 of the Statute, by the construction to be given by the Court. This statement may be taken as a simple reminder of the relevant paragraph in the Statute on the legal effects of an intervention. However, the provision in the Statute actually says that "the construction . . . will be equally binding upon" the intervener. This cannot mean that only the intervener will be bound. The provision would be

unbalanced, and unduly penalize the intervener. By saying that the intervener will be “equally” bound, paragraph 2 of Article 62 points to the conclusion that, with regard to the construction of the convention, the intervener will be bound towards the parties and that the parties will also be bound towards the intervener.

Should the question of the effects of the construction arise, the Court may well reach the same conclusion. However, by focusing only on the future obligations of the intervener, the Court may regrettably suggest that it holds a different view.

*(Signed)* Giorgio GAJA.

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