

## DISSENTING OPINION OF JUDGES CANÇADO TRINDADE AND YUSUF

*Disagreement with Court's decision not to grant permission to intervene — We consider decision to be based on simple policy grounds — Disagreement with the Court's affirmation that third party's interest will be protected by Court without affording it a hearing — This closes the door to future applications for interventions — Application of Costa Rica is classic example of where non-party intervention should be granted — Object of non-party intervention is to alert the Court to third State interest of a legal nature — It is not proper for the Court to substitute itself to would-be intervenors without affording them a hearing — Standard of proof for demonstrating existence of interest less demanding than that for rights — No requirement to show that protection by Article 59 might be insufficient — Mischaracterization of Applicant's "interest of a legal nature" — Disagreement with introduction of new standard of proof in application of Article 62 — Costa Rica has fully satisfied the criteria for intervention — Court appears to exercise general discretionary powers which it does not possess under Article 62 — The purported special relationship between Articles 62 and 59 neither persuasive nor well-founded — Court's practice appears reminiscent of traditional arbitral proceedings where third party intervention not considered desirable.*

### I. INTRODUCTION

1. We regret that we are unable to join the Court's majority in the present case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia (Application by Costa Rica for Permission to Intervene))*, since we believe that the conditions under Article 62 of the ICJ Statute have been met by the Applicant. We are of the view that the Court's decision is based on policy grounds, and not on a determination of the fulfilment of the requisites of Article 62. Instead of assessing whether the Applicant has succeeded to demonstrate the existence of an interest of a legal nature which may be affected by the decision of the Court in the main proceedings, and coming to a clear conclusion on that, the Court has decided not to grant permission to intervene on the simple policy ground that "a third party's interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play" (paragraph 86 of the Judgment).

2. Moreover, we cannot agree with the view of the Court that the aims which Article 62 of the Statute was established to achieve can be attained through the exercise of some kind of "judicial due diligence" with respect to third-party interests of a legal nature, without affording a hearing to the would-be intervenor in the proceedings on the merits (paragraph 89 of the Judgment). Such an approach voids Article 62 of its object and substance, which is to enable the intervenor, if granted permission, to inform the Court of what it considers as its interests of a legal nature so that they may not be affected without a hearing. By affirming that it is able to protect the interests of a legal nature of would-be intervenors without affording them a hearing in the proceedings on the merits, the Court is closing the door to future applications for intervention, especially in territorial and maritime delimitations, and depriving Article 62 of its purpose. Therein lies the essence of our Joint Dissenting Opinion. We shall elaborate it below by successively dealing with: (a) the scope and object of Article 62; (b) the need to identify an "interest of a legal nature"; (c) the need to demonstrate that such interest "may be affected by a decision in the case"; (d) the purported special "relationship" between Articles 62 and 59 of the Court's Statute. We shall then present our conclusion.

## II. THE SCOPE AND OBJECT OF ARTICLE 62 OF THE STATUTE

3. By dismissing the application of Costa Rica for permission to intervene, which we believe is a classic example of where non-party intervention should be granted, the Court appears to have misconstrued the scope and object of Article 62 of the Statute. There is no doubt that the subject of intervention is a difficult one for an international judicial body whose jurisdiction is based on the consent of the main parties. Moreover, Article 62 has always been considered as one of the most difficult provisions to apply to concrete cases. It is not, however, so much the difficulty of the application *in concreto* of the provision itself, but rather the restrictive manner in which it has been interpreted and applied by the Court over the years, including in the present instance, that has substantially reduced its role in the case law of the Court and risks pushing it progressively into irrelevance.

4. Although Article 62 itself does not specify it, a State applying for permission to intervene may do so either as a party or as a non-party in the main proceedings. Intervention as a party has many legal implications for the adjudication of the case on the merits and is much wider in scope than intervention as a non-party. Conversely, the purpose of the limited intervention as a non-party is to permit a State which considers that it has “an interest of a legal nature which may be affected by the decision in the case” to alert the Court of the manner in which the decision in the main proceedings may affect such interest in order to protect it without becoming a party to those proceedings. Thus, if granted permission to intervene, the opportunity given to such a non-party is meant to have an effect in the main proceedings through the substantive information provided by the intervenor to the Court.

5. In the present Judgment, the Court has decided that there is no need to grant the applicant permission to provide such information to the Court in the main proceedings on the grounds that:

“The Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved” (paragraph 89 of the Judgment).

This reasoning suffers from several fundamental flaws. First, it is based on the assumption that the delimitation of all maritime areas in contention between two parties can be somewhat mechanically effected in the same manner without taking into account all the circumstances of a particular case or the facts specific to each case. Secondly, even in the only Judgment of the Court cited in support of this proposition (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 100, paragraph 112), the reference to “interests of third parties” is contained in the reasoning; while in the operative clause it is stated that: “From Point 5 the maritime boundary line shall continue along the line equidistant from the opposite coasts of Romania and Ukraine in a southerly direction starting at a geodetic azimuth of 185° 23' 54.5" until it reaches *the area where the rights of third States may be affected.*”<sup>1</sup> (*ibid.*, p. 131, paragraph 219). In delimiting maritime boundaries between contending parties, the Court can of course take cognizance of the areas where the rights of third States may be involved. It is not, however, clear how it would know about areas where third State interests of a legal nature may exist, without affording a hearing to such States in the main proceedings. Thirdly, the Judgment fails to address this issue and to clarify how, and by whom, the Court will be informed of the extent of such third State interests in the relevant maritime area. In order to end a delimitation line before it reaches an area where third State interests of a legal nature may exist, is the Court to base its decision on the merits on the main parties’ conception of what constitutes third States interests of a legal nature or

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<sup>1</sup>Emphasis added.

is it to determine by itself, without the requisite information, where such interests may lie? This question remains unanswered in the Judgment.

6. We find it very surprising that the Court wishes to take upon itself a task for which non-party intervention under Article 62 of the Statute was specifically conceived. Indeed, it is the function of such non-party intervention, when granted by the Court, to inform the Court of the intervenor's specific interest of a legal nature in the maritime areas on which there is a dispute between the main parties in order to ensure that such interest is protected. It is not, therefore, proper for the Court, in our view, to portray itself as a potential substitute to would-be non-party intervenors in the main proceedings to justify its refusal to grant permission to the applicant to intervene. Such refusal should be based on a clear determination of the failure of the applicant to show in the specific case at hand that it has an interest of a legal nature which may be affected by the decision on the merits of the case.

7. Article 81, paragraph 2(b) of the Rules of Court requires a State applying for permission to intervene to set out "the precise object of the intervention". In the present case, Costa Rica has indicated in its application that the object of its request for permission to intervene is two-fold: (a) to inform the Court of what it regards as its interest of a legal nature in the adjacent maritime spaces on which there is a dispute between Nicaragua and Colombia; and (b) to protect its rights and interests by all legal means available. The Court recognizes that "the object of the intervention, as indicated by Costa Rica, is in conformity with the requirements of the Statute and the Rules of Court" (paragraph 35 of the Judgment). Yet, the Court concludes that "a third party's interest will, as a matter of principle, be protected by the Court without it defining with specificity the geographical limits of an area where that interest may come into play" (paragraph 86 of the Judgment). If the Court is to claim, as it does in this case, that it can always protect by itself and on its own wisdom the interests of would-be non-party intervenors, without affording such parties a hearing in the main proceedings, then the object of intervention of any State applying to intervene loses all significance, despite recognition by the Court that such object of intervention is in conformity with the Statute.

### III. THE NEED TO IDENTIFY AN "INTEREST OF A LEGAL NATURE"

8. Looking back at the case law of the Court in respect of applications for intervention, we find that, in most cases, the Court did not recognise an interest of a legal nature which may be affected by the decision in the case pursuant to Article 62 of the Statute, and thus rejected the Applicants' requests for permission to intervene<sup>2</sup>. Yet, on two occasions so far, the Court found that the respective Applicants (one from Latin America (Nicaragua in 1990) and one from Africa (Equatorial Guinea in 1999)) had demonstrated an interest of a legal nature which may be affected

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<sup>2</sup>Cf. ICJ, cases of *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981*, pp. 3 *et seq.* (Application by Malta); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, pp. 575 *et seq.*, paras. 81-83, 93 (Application by the Philippines). Cf. also ICJ, case of *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984* pp. 3 *et seq.* (Application by Italy — note, however, that in this case the Court dismissed Italy's claim, *inter alia*, because to have granted it would involve the Court pronouncing upon Italy's "sovereign rights"). — It also occurred, in previous cases, that requests for permission to intervene were dismissed when the main case was found inadmissible. Cf. ICJ, cases of *Nuclear Tests (Australia vs. France), Application to Intervene, Order of 20 December 1974, I.C.J. Reports 1974*, pp. 530 *et seq.*; *Nuclear Tests (New Zealand vs. France), Application to Intervene, Order of 20 December 1974, I.C.J. Reports 1974*, pp. 535 *et seq.*; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand vs. France) Case, I.C.J. Reports 1995*, pp. 288 *et seq.*

by the decision in the case pursuant to Article 62 of the Statute and, accordingly, granted the application for permission to intervene<sup>3</sup>.

9. For the first time in its history, the Court attempts, in the present Judgment, to bring some clarification to the concept of an “interest of a legal nature” (paragraph 26). This is a welcome development. Yet, the Court does not make full use of this clarification in assessing whether the requirements of Article 62 have been met by the Applicant. It might therefore be useful to say a few words about the origins, meaning and scope of that concept.

10. The origins of the expression “interest of a legal nature” lie in the work of the Advisory Committee of Jurists, appointed by the League of Nations, which drafted the PCIJ Statute in 1920. The Advisory Committee of Jurists, drawing on domestic law principles, considered and combined various elements which led to the adoption of that concept<sup>4</sup>. It appears from the *travaux préparatoires* that the choice of the formulation of an “interest of a legal nature”, as opposed to “rights” or general “interest” was reached as somewhat of a “hybrid” compromise between distinct proposals by some of the members of the Advisory Committee of Jurists. The final choice of words prompted the comment that “the desire to accommodate opposing views prevailed over the need for clarity and precision”<sup>5</sup>. In fact, the resulting formulation has been criticized as “un monstre presque indéfinissable”<sup>6</sup>.

11. In his thematic course delivered at The Hague Academy of International Law in 1988, Judge Kéba Mbaye pointed out, as to the aforementioned formulation, that:

“Il s’agissait manifestement d’une sorte de compromis par lequel les deux notions (intérêt et droit) étaient réunies dans une formule unique. Pour certains, ce compromis n’est guère satisfaisant car ils estiment que, si l’on sait ce que veulent dire ‘intérêt’ et ‘droit’ séparément, on sait bien moins ce que signifie un ‘intérêt juridique’”<sup>7</sup>.

Judge Mbaye then clarified an interest of a legal nature as meaning “celui qui peut se justifier par référence à une règle de droit”<sup>8</sup>. And, in his projection of this matter into the future, he ventured to

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<sup>3</sup>Cf. ICJ, case of *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *Application to Intervene, Judgment*, I.C.J. Reports 1990, pp. 92 *et seq.* Note, however, that it was held that Nicaragua had an “interest of a legal nature which may be affected” by part of the Chamber’s Judgment on the merits and thus the Chamber decided that Nicaragua was accordingly permitted to intervene *in certain respects* in the case (concerning the status of the Gulf); and cf. ICJ, case of *Land and Maritime Boundary between Cameroon and Nigeria, Application to Intervene, Order of 21 October 1999*, I.C.J. Reports 1999, pp. 1029 *et seq.* (Application by Equatorial Guinea).

<sup>4</sup>For a detailed account of distinct proposals made within the Advisory Committee of Jurists, cf. S. Oda, “Intervention in the International Court of Justice – Articles 62 and 63 of the Statute”, in *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte – Festschrift für H. Mosler* (eds. R. Bernhardt *et alii*), Berlin/ Heidelberg, Springer-Verlag, 1983, pp. 630-635; S. Torres Bernárdez, “L’intervention dans la procédure de la Cour Internationale de Justice”, 256 *Recueil des Cours de l’Académie de Droit International de La Haye* (1995), pp. 238-245.

<sup>5</sup>T. Licari, “Intervention under Article 62 of the Statute of the I.C.J.”, 8 *Brooklyn Journal of International Law* (1982), p. 271.

<sup>6</sup>W. M. Farag, *L’Intervention devant la Cour Permanente de Justice Internationale*, Paris, LGDJ, 1927, p. 59; he added that “le désir de contenter tout le monde l’a emporté sur la précision et la clarté scientifique” (*ibid.*, p. 60).

<sup>7</sup>K. Mbaye, “L’Intérêt pour agir devant la Cour Internationale de Justice”, 209 *Recueil des Cours de l’Académie de Droit International de La Haye* (1988), p. 290.

<sup>8</sup>*Ibid.*, p. 263.

state that “l’intérêt pour agir se développera au rythme de l’évolution de la société internationale condamné à la solidarité et donc à l’interdépendance”<sup>9</sup>.

12. In a similar line of reasoning, in his Dissenting Opinion in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta, Italy’s Application for permission to intervene, Judgment of 21 March 1984)*, Judge Sette-Câmara argued that “there is a considerable difference between the object of a principal case (...) and an incidental procedure of intervention, which is intended only to seek the protection of interests of a legal nature” (paragraph 64). To him, “intervention is an important device of procedural law in all legal systems of the world without exception (...). It is an instrument indispensable for good administration of justice” (*la bonne administration de la justice*) (paragraph 85). And Judge Sette-Câmara added that

“When the founding fathers of the Statute of the old Court decided to find a place in the draft prepared by the Hague Advisory Committee of Jurists for the institution of intervention, they were not innovating in any way. They did nothing but introduce in the basic document of the Court a procedural remedy known and recognized by all the legal systems of the world as a legitimate means by which third parties, extraneous to a legal dispute, have the right to come into the proceedings to defend their legal rights or interests which might be impaired or threatened by the course of the contentious proceedings” (paragraph 2).

13. The clarification put forward by the Court in the present case does not substantially differ from the above descriptions of the concept of an interest of a legal nature (paragraph 26 of the Judgment). It also recognizes that “an interest of a legal nature within the meaning of Article 62 does not benefit from the same protection as an established right and is not subject to the same requirements in terms of proof”. We are in agreement with this conclusion; but we find it regrettable that it has not been applied in the Court’s assessment of whether the requirements of Article 62 have been met by Costa Rica. Indeed, this less demanding standard of proof should have been applied by the Court in assessing whether the Application meets the requisites of Article 62 of the Statute.

14. An “interest of a legal nature” constitutes a legitimate means whereby a third party may request permission to intervene in contentious proceedings to seek protection from a future judgment which may, in the absence of such intervention, affect its claims. As a matter of fact, Article 59 of the Statute has no relevance for the assessment of the requirements of a request for permission to intervene under Article 62, whose purpose is for the applicant to seek the permission of the Court so as to be able to provide substantive information to the Court in the course of the main proceedings and prior to the issuance of a judgment by the Court. Thus, it is our view that the standard of proof applied in the assessment of such requirements should neither be as demanding as that applicable to the establishment of the existence of a right, nor should it be made dependent, as the Court does in this Judgment, on showing that the “protection” afforded by Article 59 might be insufficient. We shall return to the analysis of this point in Section V below.

#### **IV. THE NEED TO DEMONSTRATE THAT SUCH INTEREST “MAY BE AFFECTED BY THE DECISION IN THE CASE”**

15. The Court recognizes in paragraph 66 of the Judgment that Costa Rica “has indicated the maritime area in which it considers it has an interest of a legal nature which may be affected by the decision of the Court in the main proceedings”. It does not however assess, on the basis of the

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<sup>9</sup>*Ibid.*, p. 340.

facts specific to this case and the evidence placed before it by the Applicant, whether or not Costa Rica has an interest of a legal nature which may be affected by the decision of the Court in that maritime area. Instead, the Court appears to have decided not to grant Costa Rica permission to intervene on the basis of general considerations, which, in our view, are neither well-founded nor persuasive. First, the Court, in paragraphs 71-72 of the Judgment, sets aside one of the main arguments of Costa Rica aimed at showing how its interest of a legal nature may be affected by a decision of the Court on the factually erroneous ground that Costa Rica had initially claimed its 1977 Facio-Fernandez Treaty with Colombia, and the assumptions underlying it, as an interest of a legal nature, but later retracted that claim. Secondly, the Court introduces a new standard of proof based on the adequacy of the protection provided under Article 59 of the Statute by stating that “Costa Rica must show that its interest of a legal nature (...) needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute”. Thirdly, by observing, in paragraph 86, that “a third State’s interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play”, the Court resorts to policy grounds and to the exercise of a general discretionary power, instead of determining on the basis of the evidence placed before it, whether Costa Rica has fulfilled the conditions required for intervention under Article 62(1). Our views on these issues are elaborated in the paragraphs that follow.

**(a) *The mischaracterization of Costa Rica’s “interest of a legal nature”***

16. It is stated in paragraph 71 of the Judgment that “Costa Rica has acknowledged that the 1977 Treaty does not itself constitute an interest of a legal nature that may be affected by the decision in this case and that it does not seek any particular outcome from this case in relation to this Treaty”. The Court then concludes, on the basis of this statement, that “there is no need for the Court to consider Costa Rica’s arguments contained in [the preceding paragraph 70] or the contentions set forth by Nicaragua and Colombia in response to those arguments” (paragraph 72). It should, however, be pointed out that Costa Rica had never claimed that the 1977 Treaty represented an interest of a legal nature for it.

17. In its application, as quoted under paragraph 54 of the Judgment, Costa Rica states that its:

“interest of a legal nature which may be affected by the decision of the Court is Costa Rica’s interest in the exercise of its sovereign rights and jurisdiction in the maritime area in the Caribbean Sea to which it is entitled under international law by virtue of its coast facing on that sea”.

It is clear from the above quotation that Costa Rica had clearly specified in its application what it considered to constitute its interest of a legal nature in the maritime area disputed by the main Parties to the case, and that the 1977 Treaty, between itself and Colombia, was not claimed to constitute for it “an interest of a legal nature that may be affected by the decision in this case”. Thus, in its reply to the question put to it by a member of the Court, it reiterated this position by stating that neither the assumptions underlying the 1977 Treaty nor the treaty itself constitute an interest of a legal nature that may be affected by the decision in the case. It is our view that the purpose of the arguments presented by Costa Rica with respect to the 1977 Treaty was to demonstrate the manner in which its interest of a legal nature, as specified in its application, may be affected by a decision of the Court.

18. Indeed, Costa Rica contended, first, that its 1977 delimitation agreement with Colombia is based on giving full weight and effect to Colombia’s San Andres Island, recognizing a notional 200 nautical mile entitlement. This resulted, according to Costa Rica, in the negotiation and

conclusion of a simplified equidistant maritime border by drawing a median line between the islands and the Costa Rican Coast. In the view of Costa Rica, since Nicaragua's claim calls for the enclaving of those islands, the premise on which the 1977 delimitation with Colombia was based would be eliminated, thus necessitating the re-evaluation of Costa Rica's entitlements in the relevant maritime area. Secondly, Costa Rica argued that if Nicaragua's claims prevail in this area, Colombia would no longer be Costa Rica's neighbour in this part of the Caribbean Sea, a situation which would effectively extinguish the essential basis of the 1977 Treaty and require new delimitation between Costa Rica and its new neighbour — Nicaragua.

19. It is unfortunate that the Court decided to exclude Costa Rica's arguments related to the 1977 Treaty and the assumptions underlying it on the erroneous ground that Costa Rica had initially claimed the said treaty as an interest of a legal nature, but later retracted that claim, instead of assessing whether the arguments of Costa Rica relating to the maritime area in which it considers to have an interest of a legal nature show the possibility that its interests may be affected by such a decision in view of the existence of overlapping interests and claims in that area. An unwarranted and erroneous link appears to have been established between the requirement that Costa Rica's request has to satisfy in terms of demonstrating the manner in which its interest of a legal nature may be affected by a decision and the fact that the 1977 Treaty is not its legal interest *per se*. We find it also surprising, to say the least, that the Court has decided to base its conclusions on a misunderstanding of the manner in which Costa Rica characterized its interest of a legal nature.

**(b) *A decision that introduces a new standard of proof***

20. Although the burden of proof of the existence of an interest of a legal nature which may be affected by a decision in the case clearly lies with the Applicant, this does not imply that the standard of proof is a very demanding one. As pointed out by the Chamber of the Court in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*:

“[I]t is clear, first, that it is for a State seeking to intervene to demonstrate convincingly what it asserts, and thus to bear the burden of proof; and, second, that it has only to show that its interest ‘may’ be affected, not that it will or must be affected.” (p. 117, paragraph 61).

Article 62 cannot however be interpreted to require, as stated in paragraph 87 of the Judgment, that “to succeed with its request, Costa Rica must show that its interest of a legal nature in the maritime area bordering the area in dispute between Nicaragua and Colombia needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute”.

21. While the purported existence of a special relationship between Article 62 and Article 59 of the Statute will be examined below (Section V), we consider it important to emphasize here that the requirement of a standard of proof based on the adequacy of the protection provided by “the relative effect of decisions of the Court under Article 59 of the Statute” cannot be founded in the wording of Article 62(1) of the Statute. This does not only constitute a new, and hitherto unheard of, requirement under Article 62(1) of the Statute or Article 81(2) of the Rules, but it also appears to contradict the statement by the Court in paragraph 27 of the Judgment that “[t]he decision of the Court granting permission to intervene can be understood as a preventive one, since it is aimed at allowing the intervening State to take part in the main proceedings in order to protect an interest of a legal nature which risks being affected in those proceedings”.

**(c) A decision apparently based on policy grounds**

22. It is our view that Article 62(2) does not confer a discretionary power on the Court so as to allow it to refuse an application for intervention even though the applicant has satisfied all criteria for intervention established under Article 62(1). The Court itself recognized this in *Tunisia/Libya* and observed that it had no discretion “to accept or reject a request for permission to intervene for reasons simply of policy” (*Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, paragraph 17). This appears however to be the case in the present instance although the policy underlying the Court’s decision has not been clearly enunciated in the present Judgment. We believe that Costa Rica has fully satisfied the criteria for intervention and clearly shown that it has an interest of a legal nature which may be affected by the decision of the Court in the proceedings. Nevertheless, the Court appears to exercise general discretionary powers with respect to the application for intervention without assessing whether or not the requirements for intervention under that paragraph have been met by Costa Rica. This is confirmed by the fact that the Court observes in paragraph 86 that “a third party’s interest will, as a matter of principle, be protected by the Court”.

23. In determining whether or not the conditions for intervention established under Article 62(1) have been met by the Applicant, the Court has to assess whether the grounds invoked by the Applicant are sufficiently convincing. This does not however give it unfettered latitude. As observed by Judge Jennings, in his Dissenting Opinion on Italy’s application for intervention in the *Continental Shelf case between Libya and Malta*:

“This is far from saying the Court has a complete discretion. What it has to do is to decide whether the requirements of intervention under Article 62 are complied with or not: that is to say it has to decide in this case whether there are sufficiently cogent and convincing grounds upon which Italy might reasonably “consider” that it does indeed have interests of a legal nature which “may” be affected by the decision in the case between Libya and Malta. And that is all” (p. 151, paragraph 9).

Instead of examining and assessing whether the arguments and evidence presented by Costa Rica convincingly show that its interest of a legal nature may be affected by the decision in the case between Nicaragua and Colombia, the Court appears to have taken a short cut and opted for a policy decision, although the grounds of the policy itself have not been clearly specified.

**V. THE PURPORTED SPECIAL “RELATIONSHIP” BETWEEN ARTICLES 62 AND 59 OF THE STATUTE**

24. Article 59 of the ICJ Statute determines that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”. For its part, Article 62 provides that

“1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request”.

The view that Article 59 of the Statute extends protection to third States’ interests of a legal nature remains, in our perception, to be demonstrated. Article 59 limits the binding force of a Court’s decision to the contending parties in the concrete case. It does not, however, ensure the protection to third States’ interests of a legal nature, unless such States are granted permission to intervene under Article 62 so that they can inform the Court of their interest of a legal nature before a final

decision is adopted. Moreover, Article 59 has a specific and narrow focus and applies to all decisions of the Court, and not in any particular way those relating to Article 62.

25. Distinctly from the provision of Article 59, third States are entitled, by means of intervention under Article 62, to submit arguments to the Court in order to fully defend their interests of a legal nature, so that the Court's decision does not impinge on them. The provision of Article 59, on its part, does not have a direct bearing on the aforementioned procedure of intervention under Article 62, which, if granted, actually takes place prior to the issuance of the final decision on the merits.

26. The question of the purported "relationship" between Articles 62 and 59 was the object of much discussion in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta, Application to Intervene, Judgment of 21 March 1984)*. In his Dissenting Opinion, Judge Jennings argued that the idea that Article 59 was protective of third States' interests was rather illusory. We fully agree with this assessment.

27. The institution of intervention was conceived in a broader perspective, which should be kept in mind in our days, even more so with the growing complexity of issues in contemporary international disputes. As aptly pointed out a few years ago,

"the ever-increasing complexity and multilateralization of international relations (...) must give rise to doubts whether a dispute settlement mechanism based on the single assumption that disputes exist only between two parties is adequate or even appropriate for modern needs"<sup>10</sup>.

28. To conclude this section, it is important to emphasize that Article 62 does not say anything about the necessity for a State applying for permission to intervene to show that an interest of a legal nature needs a protection that is not provided by the relative effect of decisions of the Court under Article 59. Intervention under Article 62 was conceived, for the purposes of the sound administration of justice, to operate prior to the issuance of a final decision by the Court, and thus before Article 59 comes into operation, to enable a third party which considers to have an interest of a legal nature to make its case to the Court, so that the Court may take such an interest into account before reaching its decision on the main proceedings. It therefore constitutes a means whereby the Court can be alerted to the broader interests of a legal nature which may be involved in the case besides the positions of the main Parties to the dispute. It is regrettable that the Court, by focusing on an unproven special "relationship" between Article 59 and Article 62, has ignored these important characteristics of the institution of intervention.

## VI. CONCLUSION

29. The ICJ has not developed to date a consistent jurisprudence on the institution of intervention in international proceedings, established in Article 62 of the Statute, despite the fact that it has had successive occasions to clarify the legal issues involved<sup>11</sup>. There appears, however, to be a hardly visible thread of avoidance of the concrete application of intervention, running through the majority of the Court's Judgments relating to Applications for permission to intervene.

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<sup>10</sup>S. Rosenne, "Article 59 of the Statute of the International Court of Justice Revisited", in *El Derecho Internacional en un Mundo en Transformación – Liber Amicorum en Homenaje al Profesor E. Jiménez de Aréchaga* (ed. M. Rama-Montaldo), vol. II, Montevideo, Fundación de Cultura Universitaria, 1994, p. 1157.

<sup>11</sup>Cf. notes (2) and (3), *supra*.

In his Dissenting Opinion in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta, Application to Intervene, Judgment of 21 March 1984)*, Judge Roberto Ago went as far as to suggest that the Court's decision in the *cas d'espèce* might "well sound the [death] knell of the institution of intervention in international legal proceedings" (paragraph 22). Somewhat distinctly, we are of the view that the institution of intervention has not yet passed away; it remains alive in 2011, in spite of the fact that the Court's practice to date seems to amount to a slow-motion asphyxiation of the institution of intervention, to which we cannot at all subscribe, as such practice appears reminiscent of traditional bilateral arbitral proceedings where a barrier against third party intervention may be considered desirable. It is our view that such practice is not in line with contemporary demands of the judicial settlement of disputes, nor with challenges faced by present-day international law within the framework of a universalist outlook.

(Signed) Antônio Augusto CANÇADO TRINDADE.

(Signed) Abdulqawi A. YUSUF.

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