JOINT DECLARATION OF JUDGES CANÇADO TRINDADE AND YUSUF

International litigation and dispute-settlement: relevance of intervention in contemporary international litigation — Requisites for intervention under the Court's Statute — Interest of a legal nature which may be affected by a decision of the Court — Requests for permission to intervene: irrelevance of State consent — Incidental proceedings: Court as master of its own jurisdiction — Court's jurisprudential construction.

I. The Starting Point: the Relevance of Intervention in International Litigation and Dispute-Settlement

1. Not unlike the other Judgment of the Court also delivered today, in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (Application by Costa Rica for Permission to Intervene), the Court has not found, in the present Judgment in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (Application by Honduras for Permission to Intervene), that an interest of a legal nature has been established by the Applicant. Even though this finding has led the Court not to grant permission to intervene, the possibility cannot be excluded that the Court's conclusion has been to some extent influenced by its tendency to avoid the application of Article 62 of its Statute, as examined in our joint dissenting opinion in the other case concerning the *Territorial and Maritime Dispute* between Nicaragua and Colombia (Application by Costa Rica for Permission to Intervene).

2. This does not mean that we dissent from the Court's finding in the present case concerning the Application by Honduras for permission to intervene. Yet, our concern is to put on record our position regarding the continued propensity of the Court, disclosed in its inconclusive jurisprudence on the matter to date, to decide on policy grounds against the concrete application of the institution of intervention, which we consider to have an important role to play in contemporary international litigation and dispute-settlement. In order to clarify our position in the present case, we deem it appropriate to explain our position with regard to Honduras's Application for permission to intervene, and the reason why we joined the decision of the Court's majority in not granting it.

II. The Requisites for Intervention

3. It should be here recalled that the requisites for intervention in the proceedings before the Court are laid down in Article 62 of the Statute of the ICJ. 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."

4. In the *cas d'espèce*, the applicant State has not demonstrated that it has an "interest of a legal nature" that may be affected by the decision in the case. As we noted in our joint dissenting opinion in the other case concerning Costa Rica's Application for permission to intervene, a State seeking to intervene needs to demonstrate that it has an "interest of a legal nature that may be affected by the decision in the case". In this regard, it seems irrelevant at this stage, for the purpose of assessing the criteria for intervention laid down in Article 62 of the Statute, whether the applicant third-State wishes to intervene as a party or a non-party in the main proceedings.

5. In any event, the applicant third-State ought to demonstrate that it has "an interest of a legal nature" which "may be affected" by the decision of the Court on the merits of the case. This is precisely where Honduras's Application fell short of meeting the requisites for intervention, not fulfilling these criteria, which led the Court to its decision not to grant the requested intervention. Honduras's situation is very specific: the 2007 Judgment of the Court in the case of the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* bears the status of *res judicata* and has thus settled the maritime delimitation between Honduras and Nicaragua in the Caribbean Sea.

6. Moreover, Honduras has not presented any further maritime features to be considered in the assessment of its Application for permission to intervene. Likewise, Honduras's arguments in relation to the 1986 Treaty have been rightly dismissed by the Court. The 1986 Maritime Delimitation Treaty between Honduras and Colombia has no incidence on the delimitation between Nicaragua and Colombia and is thus not to have any bearing in the assessment of Honduras's Application for permission to intervene in the present case. In our view, Honduras has thus not demonstrated an interest of a legal nature which may be affected by a decision of the Court in the present case. Accordingly, its Application has not prospered.

7. We further note that the Court has devoted some attention to the distinction between "rights" and "legal interests" of third States seeking to intervene. This is, in our view, a positive development in the pursuit of more clarity concerning the foundational bases of the institution of intervention: we herein refer to the treatment of this point in our joint dissent-

ing opinion[1] in the other case resolved by the Court today. Having pointed this out, we turn to the question of the consent of the parties to the main case in relation to an application for permission to intervene.

III. The Irrelevance of State Consent for the Consideration by the Court of Requests for Permission to Intervene

8. We are of the view that Honduras has not fulfilled the criteria for intervention under Article 62 of the Statute, irrespective of whether the Parties to the main case have or have not consented to the application at issue for permission to intervene. In the present joint declaration, we wish to stress the non-existence of a "requirement" of consent by the parties in the main case, in relation to the requisites for applications for permission to intervene set forth in Article 62 of the ICJ Statute. In our view, such consent by the main parties to the proceedings is irrelevant to the assessment of an application for permission to intervene, and cannot be perceived as a requirement under Article 62 of the Statute of the Court.

9. In effect, in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, the Court's Chamber, having found that Nicaragua had "an interest of a legal nature", permitted Nicaragua to intervene; it further made a precision as to consent which should not pass unnoticed here. The Court's Chamber clarified therein that the competence of the Court is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case. The consent required is the consent originally given by them in becoming parties to the Court's Statute, or in recognizing its jurisdiction through other instrumentalities, such as compromissory clauses. The Court does not need to seek for State consent in a recurring way, in the course of the proceedings of a case.

10. State consent also has its limits, in respect of applications for permission to intervene. The Court's Chamber thus upheld the view that the Court was endowed with competence to permit an intervention even though it may be opposed by one or even both of the parties to the case. In the aforementioned case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Honduras considered that Nicaragua had demonstrated a legal interest, but El Salvador had denied that Nicaragua had a case for intervention (paras. 69-70). Yet, the Court's

[1] Cf., on this particular point, our joint dissenting opinion in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*), *Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, pp. 405-407, paras. 9-14).

Chamber, as already indicated, permitted Nicaragua to intervene on the basis of Article 62 of the Statute. It did so, correctly, in our view.

11. Paragraph 28 of the present Judgment in the case concerning the *Territorial and Maritime Dispute* between Nicaragua and Colombia (Application by Honduras for Permission to Intervene) brings clarification to the existence of a common basis of jurisdiction as between the States concerned only for intervention as a party, but this does not apply to non-party intervention. In the same paragraph 28 of the present Judgment, the Court has found that a jurisdictional link between the State seeking to intervene and the parties to the main case "is not a condition for intervention as a non-party".

12. We agree with this conclusion of the Court, and, in this respect, we further recall that, in their respective dissenting opinions in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, I.C.J. Reports 1984*, Judges Sette-Câmara and Oda found that the Italian Application fulfilled the conditions for intervention under Article 62, and questioned the need of a "jurisdictional link" with the parties in the main legal proceedings. Likewise, in his dissenting opinion, Judge Ago discarded the need for the Court to be provided with a title of jurisdiction, and found in favour of the Italian Application as a "typical" example of intervention as an incidental proceeding.

13. In any case, the reasoning of the Court on the aforementioned point — pertaining to intervention in international legal proceedings — sets clearly aside the issue of State consent, a position which we fully share. Our understanding is in the sense that the consent of the parties to the main case is not, in any way, a condition for intervention as a non-party. The Court is, anyway, the master of its own jurisdiction, and does not need to concern itself with the search for State consent in deciding on an application for permission to intervene in international legal proceedings.

14. In effect, third party intervention under the Statute of the Court transcends individual State consent. What matters is the consent originally expressed by States in becoming parties to the Court's Statute, or in recognizing the Court's jurisdiction by other instrumentalities, such as compromissory clauses. The Court's Chamber itself rightly pointed out, in the Judgment of 1990 in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene*, that the competence of the Court, in the particular matter of intervention, "is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case"[2].

[2] Case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 133, para. 96).

15. There is no need for the Court to keep on searching instinctively for individual State consent *in the course* of the international legal proceedings. After all, the consent of contending States is alien to the institution of intervention under Article 62 of the ICJ Statute. We trust that the point we make here, in the present joint declaration, regarding the irrelevance of State consent in the consideration by the Court of applications for permission to intervene, under Article 62 of the Court's Statute, may be helpful to elucidate the positions that the Court may take on the matter in its jurisprudential construction.

(*Signed*) Antônio Augusto CANÇADO TRINDADE.
(*Signed*) Abdulqawi Ahmed YUSUF.