

SEPARATE OPINION OF JUDGE CHARLESWORTH

The Court imports some unnecessary complexities into the application of Article 62 of the Statute of the Court.

The relevance of Article 59 of the Statute — Articles 59 and 62 have no overlapping application.

The requirement of setting out the “precise object” of the intervention, and the Judgment’s apparent introduction of additional criteria — Whether a non-party intervener is capable of introducing a “new dispute” — Whether the “precise object” requirement is a “mere formality” — The redundancy of establishing a connection between the “precise object” of the intervention and the subject-matter of the dispute.

Whether the Court may limit the scope of the intervention — The inherent limitation in the procedural role of a non-party intervener.

1. This is the first occasion on which the full Court has allowed a State to intervene under Article 62 of the Court’s Statute over the objection of one (or both) of the parties to the dispute¹. Given the Court’s longstanding reluctance to authorize an intervention in such circumstances², this is a significant decision and one that I support.

2. Article 62 provides:

“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.”

Article 62 enables a State that is not party to the main proceedings to alert the Court to any legal interest that may be affected by the Court’s decision, ensuring that the Court has a fuller picture of the legal situation beyond the positions of the main parties³.

3. The Court’s history of hesitation in admitting a State’s intervention under Article 62 has met strong criticism from inside and outside the Court, including the charge that its practice led to

¹ In *Jurisdictional Immunities of the State (Germany v. Italy), Application for Permission to Intervene, Order of 4 July 2011, I.C.J. Reports 2011 (II)*, p. 494, the parties did not object to Greece’s intervention. Similarly, in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Application for Permission to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II)*, p. 1029, the parties did not object to Equatorial Guinea’s intervention.

² See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 3; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 3; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 575; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 348; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 420.

³ See *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, joint dissenting opinion of Judges Cançado Trindade and Yusuf, p. 413, para. 28.

the “slow-motion asphyxiation of the institution of intervention”⁴. While today’s decision restores some life to the institution of intervention, it still contains remnants of the former restrictive approach. In my respectful view, the Court’s analysis imports some unnecessary complexities into the application of Article 62; in this separate opinion I discuss three of them.

I. THE RELEVANCE OF ARTICLE 59 OF THE COURT’S STATUTE

4. One issue that has emerged in the Court’s jurisprudence is the relationship between Articles 62 and 59 of the Court’s Statute. Article 59 provides that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”. It thus sets the limits of the *res judicata* power of the Court’s judgments. By contrast, Article 62 offers a mechanism for third States to protect their legal interests *before* the judgment is rendered.

5. Despite the differing spheres of application of the two provisions, the Court has in the past invoked Article 59 as one basis to reject a request for intervention under Article 62. For example, in *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene*, the Court stated that 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”⁵. This statement implies that Article 59 may in some circumstances adequately protect the legal interests of an aspiring intervener, precluding the need for an intervention under Article 62⁶.

6. I welcome the Court’s clarification in these proceedings that “[t]o hold that Article 59 shields a third State from the effect of a decision in a case to which it is not a party would eliminate the need for interventions altogether, thus rendering Article 62 superfluous” (Judgment, para. 44). But I am puzzled that, in the same paragraph, the Court states that Article 59 “does not *necessarily* insulate third States from the effects of any decision which the Court may render” (emphasis added). The use of the word “necessarily” implies that there may be instances where Article 59 could serve as sufficient protection for potential interveners. To me, this is a category mistake because the provisions operate on different planes. As Judge Al-Khasawneh explained in his dissenting opinion in *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene*,

“the protection under Article 59 cannot substitute for protection under Article 62. The protection under Article 62 is not just quantitatively different from that afforded by Article 59: it is of a different nature and operates in a different manner, giving the Court powers of an essentially procedural and preventative nature.”⁷

⁴ *Ibid.*, p. 414, para. 29; see also *ibid.*, dissenting opinion of Judge Abraham, p. 392, para. 27 (“we may ask ourselves whether the intervention procedure itself is not rendered meaningless by the extremely restrictive reasoning applied in this case”).

⁵ *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 372, para. 87.

⁶ See also the criticism of this approach in *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, dissenting opinion of Vice-President Sette-Camara, p. 87, para. 81; *ibid.*, dissenting opinion of Judge Oda, pp. 102-104, para. 27; *ibid.*, dissenting opinion of Sir Robert Jennings, p. 157, para. 27 and p. 159, para. 34; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, dissenting opinion of Judge Al-Khasawneh, p. 378, para. 14; and *ibid.*, joint dissenting opinion of Judges Cançado Trindade and Yusuf, p. 413, paras. 26-27.

⁷ *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, dissenting opinion of Judge Al-Khasawneh, p. 377, para. 11.

7. In my view, Article 59, as properly interpreted, can never “insulate” third States in a way that extinguishes an otherwise existing legal interest to intervene. This is because the two provisions regulate different legal relationships, with no overlapping application.

II. THE “PRECISE OBJECT” CONDITION

8. Article 81, paragraph 2 (b), of the Rules of Court⁸ requires that an application for permission to intervene under Article 62 must set out (among other things) “the precise object of the intervention”. This condition played a prominent role in the Court’s early jurisprudence under Article 62. For example, the Court’s decisions to reject Malta’s request to intervene in *Tunisia/Libya*⁹ and Italy’s request in *Libya/Malta*¹⁰ rested partly on the applicants’ failures to identify appropriate precise objects for their respective interventions.

9. The Court’s demanding approach to identifying the precise object of an intervention was modified by a Chamber of the Court in considering Nicaragua’s request to intervene under Article 62 in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*. The Chamber confirmed that the two rather generally phrased objects of the intervention identified by Nicaragua under Article 81, paragraph 2 (b), of the Rules of Court — the protection of its legal rights by all legal means available and informing the Court of the nature of the legal rights which were in dispute — met that condition¹¹. Since then, every potential intervener under Article 62 has relied on one or both of these “precise objects” to support their intervention¹².

10. The Court in this case observes that “Guatemala has formulated the objects of its intervention using language that is broadly similar to that used in previous applications for permission to intervene” (Judgment, para. 52). It duly finds that the two objects of intervention identified by Guatemala — the protection of its rights and interests over the Sapodilla Cayes/Cayos Zapotillos and informing the Court of the nature and extent of those rights — are “proper objects of intervention” (*ibid.*). I support this finding.

11. This straightforward conclusion is however complicated by the Court’s response to Honduras’s argument that admitting Guatemala’s intervention would amount to the introduction of a new dispute. The Judgment states that

⁸ Now Article 81, para. 5 (b). Paragraph 24 of the Judgment notes that, “[w]hile Article 81 has since been amended, the Court refers to the version of Article 81 that was in force at the time Guatemala’s Application for permission to intervene was filed, that is, on 1 December 2023”.

⁹ See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application for Permission to Intervene, Judgment, I.C.J. Reports 1981, pp. 19-20, paras. 33-34.

¹⁰ See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application for Permission to Intervene, Judgment, I.C.J. Reports 1984, pp. 21-22, paras. 33-34.

¹¹ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application for Permission to Intervene, Judgment, I.C.J. Reports 1990, pp. 111-112, para. 45 and pp. 130-131, paras. 89-92.

¹² See *Jurisdictional Immunities of the State (Germany v. Italy)*, Application for Permission to Intervene, Order of 4 July 2011, I.C.J. Reports 2011 (II), p. 502, para. 29; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II), p. 360, para. 35; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II), p. 435, para. 41; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene, Judgment, I.C.J. Reports 2001, p. 606, paras. 87-89; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Application for Permission to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II), p. 1034, para. 14.

“a State requesting permission to intervene cannot seek to introduce a new case alongside the main proceedings under the guise of intervention; nor can it alter the nature of the main proceedings, transforming the case into a different one with different parties” (para. 54).

The Court goes on to find that “[i]n so far as Guatemala’s intervention does not seek to establish its sovereignty vis-à-vis Belize and Honduras, it cannot be taken as an attempt to introduce a new dispute under the guise of intervention” (Judgment, para. 55) and that

“as regards Honduras’s concern that Guatemala may introduce a new dispute into the proceedings as a non-party, the Court has noted above that the dispute over sovereignty is not altered by a non-party intervening State seeking to inform the Court of, and to protect, its legal interests with regard to the contested claim” (*ibid.*, para. 62).

12. These observations cloud the Court’s reasoning as they contemplate the possibility that a non-party intervener is capable of introducing a “new dispute”. The Court’s jurisprudence has, however, confirmed that a legal dispute may only exist between parties. Thus, in the preliminary objections Judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, the Court stated:

“The existence of a dispute between the parties is a requirement for the Court’s jurisdiction under Article IX of the Genocide Convention. According to the established case law of the Court, a dispute is ‘a disagreement on a point of law or fact, a conflict of legal views or of interests’ between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In order for a dispute to exist, ‘[i]t must be shown that the claim of one party is positively opposed by the other’ (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).”¹³

13. The implication that a non-party intervener is capable of introducing a new dispute is also inconsistent with the policy goals of intervention. The principle of equality of arms exists between disputing parties, which have equal procedural status and rights. By contrast, there is an asymmetry between the situation of an intervener vis-à-vis the two disputing parties in terms of the scope of procedural rights. As the Court’s Chamber stated in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (hereinafter “*Gulf of Fonseca*”), a non-party intervener “does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute”¹⁴. On this analysis, it is difficult to see how an intervener could be considered a party to a “dispute”, given that its opportunity to present its arguments is much more constrained than that of the parties.

14. A further complexity introduced by the Court’s account of the requirement for an applicant to specify the “precise object” of its intervention is the statement that the requirement is “not a mere formality” (Judgment, para. 54). This suggests that there may be some further (unidentified) hoops for an applicant to jump through in identifying the object of its intervention. However, as noted above, in practice, since the *Gulf of Fonseca* case, the Court has invariably accepted the formula “the

¹³ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 502, para. 63.

¹⁴ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 136, para. 102.

protection of its rights and informing the Court of the nature of the legal rights which are in dispute” as fulfilling the condition.

15. The Court adds, rather cryptically, to its analysis of the “precise object” condition in Article 81, paragraph 2 (*b*), of the Rules of Court that it “must . . . assess the connection between the precise object of the intervention and the subject-matter of the dispute in the present case” (Judgment, para. 55). This test has no basis in the Statute or the Rules of the Court. I note further that the “precise object” requirement — as all conditions for intervention set out in the Rules of Court — is primarily procedural in nature. The Rules of Court are adopted by the Court itself under Article 30 of the Statute and are not capable of determining substantive rights¹⁵. For this reason, the “precise object” requirement should not be interpreted as generating obligations extending beyond the scope of Article 62.

16. In any event, it is difficult to envisage a scenario in which the precise object of an intervention would fail to relate to the subject-matter of the dispute. The very core of an intervention lies in the intervening State’s legal interest, which must itself be connected to the subject-matter of the dispute to satisfy Article 62.

III. THE COURT’S POWER TO LIMIT THE SCOPE OF AN INTERVENTION

17. In paragraph 62 of the Judgment, the Court states that it “may limit the scope of intervention and authorize only certain aspects of an application for permission to intervene”. The Judgment justifies this proposition in paragraph 76 by relying on the *Gulf of Fonseca* case. In that case, the Chamber observed that intervention as a non-party, “in relation to the scope of the case as a whole, necessarily involves limitations of the right of the intervener to be heard”¹⁶. This statement merely acknowledges the inherent limitations arising from the procedural status of a non-party intervener¹⁷. It is not an indication that the Court may further curtail the scope of an intervention.

18. In any event, the statement in paragraph 62 is unnecessary because the Court does not in fact limit Guatemala’s intervention in any meaningful way. Instead, the Court merely restates the scope of the intervention as defined by Guatemala, then affirms that Guatemala’s intervention should be limited to the specific issues that Guatemala itself identified (Judgment, para. 76).

19. Moreover, the appropriate time to deal with any issue of an intervener going beyond the limits of its permitted intervention is the merits phase. In the *Gulf of Fonseca* case, in the Judgment on the merits, the Chamber considered that

“no useful purpose would be served by endeavouring to single out in the present Judgment which of the contentions of Nicaragua were squarely within the limits of its permitted intervention, and which might be said to have gone beyond those limits. The

¹⁵ *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Preliminary Objections, Judgment, I.C.J. Reports 1964, separate opinion of Judge Bustamante, p. 78.

¹⁶ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene*, Judgment, I.C.J. Reports 1990, p. 136, para. 103.

¹⁷ As noted in paragraph 13 above.

Chamber has taken account of the arguments of Nicaragua only where they appeared to it to be relevant in its consideration of the legal régime of the waters of the Gulf of Fonseca.”¹⁸

Thus, if Guatemala’s intervention were to go beyond the scope set out in the present Judgment, the Court may take note of Guatemala’s arguments only “to the extent that they relate to the permitted object of the intervention”¹⁹.

(Signed) Hilary CHARLESWORTH.

¹⁸ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 581, para. 371.

¹⁹ *Ibid.*, p. 582, para. 371.