SEPARATE OPINION OF JUDGE KOROMA

Doubt about Court's interpretation of "decision" in Article 62 to include "reasoning". Such broader interpretation may prevent Court from performing judicial function with respect to particular case before it — No compelling reason to adopt wider interpretation of Article 62.

1. Although I have voted in favour of the Judgment, I cannot, however, express unqualified adherence to some of the positions taken in the Judgment.

2. Article 59 of the Statute of the Court notwithstanding, under Article 62 of the Statute a State may seek to intervene in a matter before the Court if it considers that it has a legal interest which may be affected by the decision of the Court in a case before it. The raison d'être for a State so seeking to intervene under Article 62 is to ensure that its interest will not be affected or jeopardized by the decision of the Court in the dispute before it.

3. However, in construing "decision" in relation to "interest of a legal nature" in Article 62 of the Statute, the Court stated in paragraph 47 of the Judgment that "[t]he word 'decision' in the English version of this provision could be read in a narrower or a broader sense". The Court adopted the broader reading stating that:

> "the French version clearly has a broader meaning. Given that a broader reading is the one which would be consistent with both language versions and bearing in mind that this Article of the Statute of the Court was originally drafted in French, the Court concludes that this is the interpretation to be given to this provision. Accordingly, the interest of a legal nature to be shown by a State seeking to intervene under Article 62 is not limited to the *dispositif* alone of a judgment."

Also in paragraph 60 of the Judgment, the Court stated that: "In order to make concrete its submission that it has an interest of a legal nature which might be harmed by the *reasoning* of the Court in the forthcoming Judgment as to sovereignty . . ." (emphasis added).

4. With respect, I am afraid that what is at stake is more than just the rendition of the provision in one language or another; the matter is more one of substance, or at least more complex. From my perspective, even if the Court's reading is not wrong, it is however not free from doubts or

difficulties, which may prevent the Court from carrying out its function of declaring the law in adjudicating a concrete dispute by giving due consideration to the issues before it, or may constrain it from giving interpretation to a legal instrument related to a concrete dispute before it for fear that such determination will come to haunt it in a prospective or future dispute yet to be submitted to it. I do not think the Court should impose such burdens or constraints on itself as to prevent it from making a proper determination or judgment of the issues involved in a case before it. As it is the function of the Court to declare the law in a *specific* dispute before it, it should not be deterred from so doing for fear that it might be asked to interpret the same instrument in another dispute that might be brought before it, when the facts and circumstances of that other dispute might be different. In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, where Italy had sought to intervene, the Court stated as follows in rejecting the Italian Application:

> "the rights claimed by Italy would be safeguarded by Article 59 of the Statute . . . *the principles and rules of international law found by the Court to be applicable, . . . and the indications given by the Court as to their application in practice, cannot be relied on by the Parties against any other State.*
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> there can be no doubt that the Court will, in its future judgment in the case, take account, as a fact, of the existence of other States having claims in the region . . . The future judgment will not merely be limited in its effects by Article 59 of the Statute: *it will be expressed, upon its face, to be without prejudice to the rights and titles of third States.*" (*Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 26-27, paras. 42-43; emphasis added.)

Accordingly, every case should be judged on its merits, in the light of the facts and the applicable law. If the judgment (operative clauses) and the applicable principles and rules relied on in a case are limited by Article 59 to the parties to the dispute and will not affect third States, neither should the reasoning supportive of that judgment affect them. The justification (reasoning) of the Court's decision, which may be considered *obiter dicta*, should not be put on the same level as the Court's finding or directive (operative clauses).

5. Furthermore, it should be observed that the scope of the Court's decision is defined by the claims or submissions of the parties before it, and the decision of the Court constitutes an embodiment of its findings in response to the submissions made by parties in a particular case. In the case of an intervention, the would-be intervening State has to define its "interests of a legal nature" and the "object" of that legal nature has to be indicated in order for the Court to be in a position to judge whether the intervention is admissible. It is then for the Court to decide whether or not an application for permission to intervene discloses an interest of

a legal nature which might be affected by a *decision* in the case. It therefore stands to reason that the procedure envisaged under Article 62 is intended to enable a State with a legal interest that may be affected by a *decision* of the Court to be allowed to intervene in a dispute before the Court, in order to preserve its interest. Here too, whether an application to intervene succeeds or not, the decision in that particular case cannot be considered *res judicata* for a State which was not a party to the dispute before the Court, and nor should the reasoning underlying the decision.

6. It is equally important that the fact of permission to intervene being granted or not should not prevent the Court from making a proper determination of the submissions in a specific case before it. The Court's full interpretation or appreciation of the legal issues or instruments involved in a matter before it should not be constrained by virtue of the fact that it will be called upon to decide a similar case in the future involving different parties. While it is a postulate that the decision of the Court must be supported by its reasoning, of more immediate and major concern to a third State is how the Court's "operative decision" in a case before it may impact on its interests. This is not to say that the Court's reasoning should be of no interest or relevance to that State, but to interpret a "decision" as including "reasoning" might somehow stymie the Court in the performance of its judicial function in a particular case and place too onerous a burden on States by requiring them to be extra vigilant for fear of what the Court's reasoning might be in a particular case. As noted earlier, the Court has stated that where a third State has an interest, not even its judgment has an *erga omnes* effect (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 26-27, paras. 42-43). It should also be noted that additional protection for third parties is provided by Article 59 of the Statute of the Court, under which a decision of the Court "has no binding force except between the parties and in respect of that particular case". Article 62, in my considered opinion, should therefore not be interpreted in such a way that it could lead to conceptual confusion or prevent the Court from properly discharging its judicial function in a case before it.

(*Signed*) Abdul G. KOROMA.