

## SEPARATE OPINION OF JUDGE WEERAMANTRY

*Dearth of judicial authority relating to international intervention procedure — Growing importance of intervention in era of increased interrelationship of international concerns — Necessity for examination of principles underlying exercise of Court's wide discretion under Article 62 — Interaction between procedural and substantive law — Interrelationship between domestic and international law relating to intervention — Comparisons and contrasts between domestic and international law — Policy considerations in favour of intervention — Policy considerations against intervention — The problem of a jurisdictional link — Legislative history of Article 62 — Interest of a legal nature — Object of intervention — Lateness of intervention — Confidentiality of pleadings.*

1. While agreeing with the decision of the Court I would like to take this opportunity to examine the much neglected question of intervention in international law, in the broader context of the objects and range of the international adjudicatory function. I do so because this case raises some important and unsettled issues relating to intervention, a subject which must be expected to assume more importance in the international jurisprudence of the future. The closely interknit global society of tomorrow will see a more immediate impact upon all States of relations or transactions between any of them, thus enhancing the practical importance of this branch of procedural law.

This opinion will first consider some of the broader considerations raised by intervention proceedings, and thereafter examine some particular legal problems raised by this Application.

DEARTH OF JUDICIAL AUTHORITY IN RELATION TO INTERNATIONAL  
INTERVENTION PROCEDURE

2. Unfortunately the decided cases are all too few to offer any coherent body of judicial authority in this important area of procedural law. In fact it needed around 70 years of exercise of jurisdiction by the Permanent Court of International Justice and the International Court of Justice before permission to intervene in any case was granted under Article 62. The only instance where the Permanent Court handed down a decision upon an application lodged under Article 62 of the Statute was the

S.S. "*Wimbledon*"<sup>1</sup> but the applicability of that Article was not considered because the Application was supplemented by the invocation of Article 63, thus rendering unnecessary a consideration of Article 62<sup>2</sup>.

3. The case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (1990) was thus the first case in the history of the two Courts in which a State was accorded permission to intervene (at the instance of Nicaragua) under Article 62 of the Statute<sup>3</sup>. Since then the body of case law on this topic has continued to be extremely slender, with no other application having been successfully maintained until 1999 (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*). Indeed so thin was the line of judicial authority on this topic at one stage in its history that fears were expressed at the highest judicial level regarding its very survival<sup>4</sup>.

4. This picture is rather different from the high expectations entertained regarding intervention in the early days of international adjudications, when a magisterial figure in the law of international arbitration, John Bassett Moore, could write

"The right of intervention given by the Statute may prove to be a means of inducing governments, be they great or small, to come before the Court, thus showing their confidence in it and enlarging its opportunities to perform a service for the world."<sup>5</sup>

What might well have been expected, at the time the Court's Statute was adopted, to grow into a substantial branch of international jurisprudence, has thus turned out to be extremely limited in its growth. This reinforces the need to re-examine its contours and potential at a time when the interlinkages between State activities wherever transacted are

<sup>1</sup> *P.C.I.J., Series C, No. 3* and *Series A/B, No. 5*.

<sup>2</sup> The two other cases where intervention was sought were *Eastern Greenland (P.C.I.J., Series C, No. 67)*, pp. 4081-4082 and 4118-4119 where Iceland's request to intervene was withdrawn, and *Acquisition of Polish Nationality (P.C.I.J., Series B, No. 7)* where Romania, which had submitted a request in advisory proceedings to intervene under Article 62 was advised that Articles 62 and 63 could be invoked only in contentious proceedings.

<sup>3</sup> *I.C.J. Reports 1990*, pp. 135-137.

<sup>4</sup> Judge Ago in *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 130 observed:

"The decision on the present case may well sound the knell of the institution of intervention in international legal proceedings, at any rate of this institution as it was intended and defined by the relevant texts. After this experience which, to say the least, does not suggest a favourable attitude towards this form of incidental procedure . . . this avenue, which was theoretically still open, towards a wider and more liberal conception of international judicial proceedings, will probably fall into oblivion."

<sup>5</sup> John Bassett Moore, "The Organization of the Permanent Court of International Justice", 22 *Columbia Law Review*, 1922, pp. 497-507.

becoming matters of increasing interest and concern to other members of the community of nations.

Against this background it becomes necessary to examine some of the general principles applicable to intervention with a view to extracting guidelines from them which will be of overall utility in the difficult task devolving upon the Court of assessing the merits of each individual application that may come before it.

5. Amidst this paucity of decided cases, even such decisions as there are do not readily yield sufficient general principles to be of material assistance to parties contemplating the possibility of intervention, as the law on the topic has developed thus far on a purely *ad hoc* basis. Since coherent threads of connecting principle are difficult to extract from the decided cases as they stand, the search for guiding principles within the overarching framework of the objects and purposes of the Court's intervention procedure is a matter of high priority in this era of increased interrelatedness of international concerns.

#### THE COURT'S WIDE DISCRETION UNDER ARTICLE 62

6. Such an examination becomes specially important in view of the wide discretion the Court enjoys under Article 62 of its Statute, with no guidelines indicated for the exercise of that discretion. Indeed the subject of intervention has been described as "perhaps the most difficult of all those involved by the Rules"<sup>6</sup> and the judges when considering the matter in 1968 were able to identify no less than seven substantive as opposed to procedural points which were left unresolved under Article 62.

7. Some of these points were so contentious that when the judges of the Permanent Court considered them in 1922<sup>7</sup> the Court "was completely divided into two camps" on some of these issues and it was decided that

"Having regard to these divergent views, there was agreement in the Court not to prejudge the serious questions raised by the right of intervention and to avoid interpreting the Statute; concrete questions could be resolved as and when they presented themselves."

Not much has occurred since then to clarify these issues, the governing principles of which thus remain as unclear now as they were then.

8. Contrary to the expectations of 1922 many questions involving the application of Article 62 remain largely unresolved owing to the lack of decisions upon the subject. Not the least of the areas which subsequent

<sup>6</sup> Rules Revision Committee (1968): Report of the Committee (GEN 68/23*quarter*), p. 306 (hereinafter Rules Revision Committee 1968).

<sup>7</sup> *P.C.I.J., Series D, No. 2*, pp. 86-97.

case law has failed to illuminate is that concerning the problems and principles associated with the exercise of the Court's discretion under Article 62.

9. As Judge Altamira observed in the 1922 discussions<sup>8</sup>, when Article 62 was originally drafted, a régime of universal jurisdiction for all States *ipso facto* and for all disputes of a legal character was envisaged. Hence an intervening State would automatically be subject to the Court's jurisdiction. It was only later that the concept of compulsory jurisdiction was abandoned and the optional clause system took its place, thus leaving the door wide open for different interpretations of Article 62.

"Hence one school of thought in the Permanent Court felt that a jurisdictional condition ought to be read into Article 62; but the other objected that this would involve importing a limitation which Article 62 did not, on its language, require."<sup>9</sup>

The present case is one which highlights this lacuna in the Court's jurisprudence.

10. It is important to our discussion to note however, as Rosenne points out<sup>10</sup>, that the retention of Article 62 despite the abandonment of the principle of compulsory jurisdiction was not due to inadvertence or carelessness as is sometimes supposed, but was a calculated and deliberate decision as indicated by the report of 27 October 1920 by Léon Bourgeois to the Council of the League<sup>11</sup>. Thus full effect must be given to it, as it is an integral statutory provision which cannot be whittled away by interpretation<sup>12</sup>.

#### INTERRELATIONSHIP BETWEEN PROCEDURAL AND SUBSTANTIVE LAW

11. It enhances the importance of this subject to note that although it may on first impression appear to relate to a merely procedural and incidental matter, it is closely intertwined with substantive law and its development. This was well illustrated in the first case to come before the Court under Article 62, the case of Fiji's attempted intervention in the case between Australia and France relating to nuclear testing. Doubts

<sup>8</sup> *P.C.I.J., Series D, No. 2*, p. 89.

<sup>9</sup> Rules Revision Committee 1968, p. 310.

<sup>10</sup> Rosenne, *Intervention in the International Court of Justice*, 1993, pp. 27-28.

<sup>11</sup> Report presented by the French representative, Mr. Léon Bourgeois and adopted by the Council of the League of Nations at its meeting at Brussels on 27 October 1920. Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court, p. 50.

<sup>12</sup> See generally Myres S. McDougal, Harold D. Lasswell and James C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure*, pp. 156 ff.

were expressed at that time on the question whether atmospheric damage through nuclear testing constituted an interest of a legal nature. International environmental law has progressed so far since then as to render incontestable that this is an interest of a legal nature, thus effecting a change in procedural consequences through a change in substantive law. Numerous other areas of international activity can develop similarly in the future.

12. Just as substantive law can thus interact with procedural law, so also can procedural law affect substantive law, as we increasingly see in the field of human rights, where procedures such as due process cross the border between substance and procedure to become substantive rights themselves. So also, among States such phenomena as transborder data flow, international terrorism and environmental protection easily cross over from the realm of procedure to that of substance and the lack of clarity on matters of procedure can adversely affect substantial State rights and their enjoyment.

Indeed intervention affords an example par excellence of the celebrated observation that substantive law is often secreted in the interstices of procedure. The subject is therefore one of special importance, not merely in the sphere of procedure but in the sphere of substantive law as well.

#### INTERRELATIONSHIP BETWEEN DOMESTIC AND INTERNATIONAL LAW RELATING TO INTERVENTION

13. In the context of the paucity of international legal decisions on the subject, any search for governing principles must draw heavily upon comparisons and contrasts with intervention principles in domestic legal systems. My contact with the latter leads me to conclude that this process of comparison and contrast can throw much light on the jurisprudence relating to international intervention procedures especially as they reveal some important lacunae in the international arena which need attention as indeed this case demonstrates. Among the areas where this process could prove useful are the determination of what constitutes a legal interest, the considerations that operate in favour of permitting intervention, the object of the intervention and the exercise of the discretionary power of the Court. It is important to seek out the reasons why a branch of vigorous activity in domestic law, which has contributed substantially to the development of domestic jurisprudence, should be so cramped and ineffectual in international jurisprudence. The process of comparison may well yield some insights which might reinvigorate this important procedural mechanism in the field of international adjudication.

14. There is indeed much to be said for the view that intervention plays an even more significant role in international than in domestic litigation.

“It is obvious that the intervening State has a strong interest in influencing the outcome of a judicial precedent which would be likely to have a favourable or unfavourable impact upon its claims. And it is exactly this strong interest and the particularity of the I.C.J. as the World Court which give to the institution of intervention in International Law a different and larger dimension than that in Internal Law.”<sup>13</sup>

One must of course constantly bear in mind the consensual framework of international litigation, which is a considerable distinguishing factor so far as questions of jurisdiction are involved<sup>14</sup>.

#### COMPARISONS AND CONTRASTS BETWEEN DOMESTIC AND INTERNATIONAL INTERVENTION

15. There are, as is to be expected, noteworthy differences between intervention in domestic and international legal procedures but the rationale underlying domestic systems offers some important overarching perspectives. In recognition of the importance of this process of comparison, a comprehensive compilation by Professor Walter J. Habscheid of the principles of intervention in various domestic systems was tendered to the Court in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*<sup>15</sup> case. That compilation can still be consulted with profit, for it surveys intervention procedure in the Romanist, Germanic, Anglo-Saxon and socialist families of legal systems in a wide variety of national jurisdictions. On the basis of this survey it draws certain general conclusions relating to the philosophy and underlying rationale of intervention procedure which cannot be without value in international intervention jurisprudence. The *ratio legis* of intervention as summarized in this study covers several aspects, some of which are included in the analyses which follow.

16. These considerations need to be taken into account, *mutatis mutandis*, in deciding intervention in international law as well. They are intensely relevant to the Court's exercise of its discretion in this case and

<sup>13</sup> Anna Madakou, *Intervention before the International Court of Justice*, Mémoire présenté en vue de l'obtention du diplôme, Institut universitaire des hautes études internationales, Geneva, 1988, p. 14.

<sup>14</sup> See Rosenne's note to this effect in *Law and Practice of the International Court of Justice*, 1964, p. 216.

<sup>15</sup> See Volume III of the *Pleadings* in that case, pp. 459-484. The compilation is titled Walter J. Habscheid, *Les conditions de l'intervention volontaire dans un procès civil* (hereinafter Habscheid), pp. 50-51.

to the wide powers the Court enjoys under Article 62 of the Statute and Article 84 of the Rules of Court.

The observations that follow are limited to intervention under Article 62 of the Statute. Intervention under Article 63 involves many other considerations not pertinent to applications under Article 62.

17. Intervention procedure both in domestic and international law is based, *inter alia*, on the need for the avoidance of repetitive litigation as well as the need for harmony of principle, for a multiplicity of cases involving the same subject-matter could result in contradictory determinations which obscure rather than clarify the applicable law.

18. It is an interesting question whether the principles relating to intervention, *mutatis mutandis*, are part of the general principles imported into the corpus of international law by Article 38 (i) (*c*) of the Statute. If so, those general principles can be invoked for clarifying the terms of Article 62, which by common agreement is neither a comprehensive nor a clearly formulated provision. Such considerations constitute an additional reason for a study of the principles of intervention in domestic law. International law would disregard the insights obtainable from domestic law in this sphere only at cost to itself.

19. The various aspects of comparison and contrast set out below have much relevance to the exercise of the Court's discretion in the present case. They involve, *inter alia*, considerations of judicial policy. It is true, as the Court observed in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene (Judgment, I.C.J. Reports 1981, p. 12, para. 17)*, that Article 62, paragraph 2, of the Statute does not confer on the Court "any general discretion to accept or reject a request for permission to intervene for reasons simply of policy". Yet such factors, when considered along with the particular circumstances of the case, can still assume relevance and importance. Indeed, Judge Schwebel indicated that the Court might reach a certain conclusion for "significant considerations of judicial policy" (p. 35) and Judge Oda likewise referred to "the viewpoint of future judicial policy" and "the viewpoint of the economy of international justice" (p. 31). These considerations of matters of policy were viewed by Judge Jessup in a note in the *American Journal of International Law* as "important indications" of a judicial approach to these questions<sup>16</sup>. An examination of such policy considerations is thus not only legitimate but necessary for understanding the operation of Article 62, paragraph 2, of the Statute.

<sup>16</sup> 75 *AJIL*, 1981, p. 904.

*A. Policy Considerations in Favour of Intervention*

20. There are several factors which would incline the Court towards permitting an intervention if a party should be able to demonstrate an "interest of a legal nature" in terms of Article 62.

(a) *Factors common to domestic and international litigation*

- From the Court's point of view there is economy of justice, enabling the Court to dispose in one case of disputes that might otherwise require two or more separate cases.
- From the intervener's point of view it is offered an opportunity, although not already party to the litigation, to protect its rights within the context of the existing litigation without having to institute a separate action for this purpose.
- From the community's point of view there is a public interest in disposing of as much controversy as possible in the least time<sup>17</sup>: *interest rei publicae ut sit finis litium*.
- In contentious litigation in both domestic and international forums the court gains its factual information from the material placed before it by the parties. Parties place before the Court information pertinent to their respective cases. The Court does not necessarily have the whole picture of the setting in which the dispute takes place. It may well be that some circumstances material to the whole proceeding are consequently left out. Thus it enables the Court to be possessed of a fuller background of information relating to the subject-matter of its decision.
- "Third parties furnish elements of law and fact; this insures that the decision will conform to the truth, and therefore with justice, so that the authority and credibility of justice do not suffer."<sup>18</sup>
- Parties may even act in collusion, against a third party<sup>19</sup>.
- There is an avoidance of a risk of contrary judgments on the same subject-matter.
- A second judge will take a first decision into consideration<sup>20</sup>, especially if the decision introduces changes into the applicable legal doctrine<sup>21</sup>.

<sup>17</sup> *Atlantis v. United States*, 379 F. 2d 824 cited by Habscheid, p. 480.

<sup>18</sup> Habscheid, pp. 479-480.

<sup>19</sup> Santiago Torres Bernárdez, "L'intervention dans la procédure de la Cour Internationale de Justice", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 256, 1995, pp. 193-457 (hereinafter Torres Bernárdez), p. 226.

<sup>20</sup> Habscheid, p. 480.

<sup>21</sup> Torres Bernárdez, p. 226.



- The same judge would be even more inclined to follow a previous decision<sup>22</sup>.
- There is an avoidance of needless repetitive judgments.
- It enables the Court to deliver a more effective and harmonious judgment, having taken into account the direct and indirect interest of all parties concerned.

(b) *Factors peculiar to international litigation*

- The drafting history of Article 62 clearly shows an intention to enable intervention notwithstanding the rule that judgments of the Court are only binding *inter partes*.
- The role of the International Court of Justice reaches beyond mere resolution of disputes towards comprehensive conflict prevention.
- “The great persuasive authority (as declarations or expositions of the law) which the decisions of the Court normally possess, with a resulting influence, at least *de facto*, on the legal interest of all States.”<sup>23</sup>
- The International Court plays a dual role as court of first instance and court of last resort. As court of first instance its findings or assumptions on questions of fact have a finality which domestic courts do not enjoy. This makes it doubly important that its findings of fact be based on as complete a picture as possible.
- In international law, the International Court of Justice tends to use past decisions as precedent<sup>24</sup> and, in any event, the Court may not annul its decisions. As Judge Jennings put it in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, “the slightest acquaintance with the jurisprudence of this Court shows that Article 59 does by no manner of means exclude the force of persuasive precedent”<sup>25</sup>.
- Only parties to a dispute may request interpretation or revision of a decision by the International Court of Justice (a procedure similar to the French *tierce opposition* does not exist)<sup>26</sup>.

<sup>22</sup> Habscheid, p. 480.

<sup>23</sup> Fitzmaurice, “The Law and Procedure of the International Court of Justice (1951-1954): Questions of Jurisdiction, Competence and Procedure”, 34 *British Year Book of International Law*, 1958, p. 126.

<sup>24</sup> Torres Bernárdez, p. 227, citing Judge Jennings in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1984*, p. 157.

<sup>25</sup> Judgment, *I.C.J. Reports 1984*, p. 157.

<sup>26</sup> Torres Bernárdez, p. 228.

- In international law, a third party may not be in a position to sue in order to protect its rights<sup>27</sup>.

#### *B. Policy Considerations against Intervention*

21. Considerations which may operate against intervention being granted include:

- States may tend to avoid referring disputes to the Court if they fear that third States may interfere with the proceedings by intervention.
- It could give States a facility to achieve indirectly by way of intervention what they cannot achieve directly, unless there is the requirement of a jurisdictional link.
- “International law in its historical evolution has shown a general reticence towards third party interference in the judicial (or arbitral) settlement of bilateral disputes.”<sup>28</sup>
- “If an unrestrained right of intervention should be permissible on the international plane, it would seem that nearly every third State would be able to identify *some* ‘interest’ in any international dispute.”<sup>29</sup>
- The fact that the rights of third States are protected by the rule that the decisions of the Court are binding only *inter partes*.
- A State may see an advantage to itself which has been described in the literature<sup>30</sup> as a “free ride”, namely a chance to submit arguments while “it would not be submitting its own claims to decision by the Court nor be exposing itself to counter claims”<sup>31</sup>. In other words it would be able to enjoy the benefits of entering the proceedings without assuming the obligations of a party to the case within the meaning of the Statute.
- The private suitor has an interest in having no third party meddle with his suit<sup>32</sup>.
- The procedure could in effect be used to prejudge the merits of the intervener’s claim against one of the parties to the case but in relation to a different dispute which is not before the Court. This was a basis for the Court’s refusal to grant Malta’s Application for intervention in the case first referred to.
- There may be room for using the procedure of intervention to obtain what may in effect be a “quasi-advisory opinion” in the sense that the

<sup>27</sup> Torres Bernárdez, p. 228.

<sup>28</sup> Shabtai Rosenne, *Intervention in the International Court of Justice*, 1993, p. 190.

<sup>29</sup> V. S. Mani, *International Adjudication: Procedural Aspects*, 1980, p. 250.

<sup>30</sup> See Anna Madakou, *Intervention before the International Court of Justice*, 1988, p. 83.

<sup>31</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application for Permission to Intervene, Judgment, *I.C.J. Reports 1981*, pp. 19-20.

<sup>32</sup> Habscheid, p. 480, citing *Atlantis v. United States of America*, 379 F. 2d 824.

intervening State has the opportunity of asking the Court to make some pronouncement or observation bearing on its rights which, while not being a judgment on its own claims, in effect expresses an opinion directly or indirectly concerning them. Whether such an option was within the intent of the framers of Article 62 is open to doubt.

- The Court, while being conscious that parties may be discouraged from litigation by the possibility of an unwanted intrusion of third parties into the case, would not neglect its responsibilities as custodians of justice for the entire international community.
- Intervention may not be necessary because it would be possible for the Court, “while replying in a sufficiently substantial way to the questions raised in the Special Agreement” to take into account the interests of other States as well, as indeed the Court said it would in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene*<sup>33</sup>.
- In the *Legal Status of Eastern Greenland*<sup>34</sup> case, the Permanent Court observed

“Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power.”

This observation, cited with approval by this Court in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene*<sup>35</sup>, would offer some protection to third States and lessen the need for intervention, but it does not, with respect, give much satisfaction to a party who is unable to place before the Court the material on which it relies in support of its claim.

- The Court does not decide questions of title “in the absolute” but “has to determine which of the Parties has produced the more convincing proof of title”<sup>36</sup>. This is a consequence which follows from the adversarial rather than the inquisitorial nature of the proceedings before the Court. Its decision does not therefore foreclose the issues in which the third State is interested.

All of these could in one way or another influence a court against granting an application for intervention. In varying degrees they may assume relevance in the particular circumstances of each case, having

<sup>33</sup> *I.C.J. Reports 1984*, pp. 25-26.

<sup>34</sup> *P.C.I.J., Series A/B, No. 53*, p. 46.

<sup>35</sup> *Judgment, I.C.J. Reports 1984*, p. 26.

<sup>36</sup> *Ibid.*, p. 27, quoting language of the International Court of Justice used in *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 52.

regard to the wide discretion the Court enjoys on the grant or refusal of an application for intervention.

*C. Differences between Domestic and International Intervention Procedures*

22. The differences between domestic and international procedures include the following:

- First of all it needs to be observed that domestic intervention law allows of two forms of intervention — compulsory and voluntary. The former, based as it is on the domestic court's compulsory jurisdiction over its subjects, does not have its counterpart in international law.
- International relations are so complex and far-reaching that even though a particular judgment may not be binding upon a State it may still have repercussions on its immediate interests, as where nuclear testing may affect neighbouring States.
- If a requirement of a jurisdictional link be imposed, States which will obviously be affected would not necessarily have the capacity to intervene, which would be almost taken for granted in a corresponding domestic situation. Since the question of a jurisdictional link does not arise in the case of domestic litigation in view of its compulsory nature, there is here a hiatus in the fabric of international justice. This can have repercussions of varying degrees of intensity, depending upon the closeness of another dispute to the issues determined by the case in hand.
- If a requirement of a jurisdictional link be imposed, numerous situations could arise where a State would be prevented from asserting its position on matters important to itself, for example the interpretation of a treaty to which it is not a party, which interpretation once given by the International Court would tend to be followed even in disputes between other parties.
- The pre-eminent position of the International Court, situated as it is at the apex of the international judicial structure, attracts special recognition to its pronouncements, even in matters indirectly related to the particular dispute before the Court. This situation does not arise to the same degree in domestic litigation.
- In international litigation, where a certain confidentiality attaches to the pleadings of the original parties, the prospective intervener is under a handicap in relation to formulating its intervention. This is a provision that can operate harshly against such an intervener who to some extent has to work in the dark. Domestic law does not in general impose such a limitation, as the pleadings of both parties would be easily obtainable. This aspect assumes special importance in a case such as the present.
- The question of a consensual link does, of course, arise in arbitration

proceedings but an important distinction must be made here between determinations of the International Court and arbitral awards. The latter are totally without effect upon non-parties while the former, despite the inter-parties rule, do affect non-parties owing to the weight and authority attaching to decisions of the Court, especially on matters of law.

- As already observed, the role of the International Court necessarily comprises not merely the settlement of the immediate dispute before it, but also the development and clarification of international law. This responsibility weighs particularly heavily on the International Court. This is to some extent offset by the principle that a “legal interest” under Article 62 does not cover an interest merely in clarifying or developing the law. Yet, while resolving the immediate dispute before it, the International Court needs also to take a somewhat wider perspective than a domestic court.
- A possible (though debatable) further difference is that domestic courts can view the disputes before them through narrow lenses focused exclusively on the two parties and the immediate dispute, excluding a vision of the wider landscape beyond. An international court cannot afford to do this, least of all the International Court of Justice. As already observed, the International Court of Justice is obliged, while adjudicating upon the rights of the two immediate parties, to have regard to the rights of other States even though they may not be parties to the dispute. In the *Monetary Gold* case for example, a third party’s — Albania’s — rights needed to be protected even though that State was not a party and did not request to intervene<sup>37</sup> in litigation to which several other States — Italy, United States of America, France, the United Kingdom — were parties. In such a case in domestic litigation, the court would perhaps have compulsorily joined Albania. In that case, the Court had necessarily to protect Albania’s interests which were the very subject of the litigation.
- Another important difference is that the International Court does not merely resolve the immediate dispute in hand but plays a role in preventive diplomacy and comprehensive conflict resolution. Sir Robert Jennings as President of the Court stressed this role of the Court in his report to the General Assembly on 8 November 1991<sup>38</sup>, when he observed that the procedure of the Court was

“beginning to be seen as a resort to be employed in a closer relationship with normal diplomatic negotiation. No longer is resort to the International Court of Justice seen, to use the traditional

<sup>37</sup> *I.C.J. Reports 1954*, p. 32.

<sup>38</sup> *I.C.J. Yearbook 1993-1994*, p. 218 at p. 220.

phrase, as a 'last resort' when all negotiation has finally failed. Rather, it is sometimes now to be seen as a recourse that might usefully be employed at an earlier stage of the dispute."<sup>39</sup>

This can well have repercussions on its procedure and the interpretation of its procedural rules, especially in regard to intervention.

23. These are some of the background factors that lie behind the exercise by the Court of its discretion under Article 62. The exercise of this extremely wide discretion involves the delicate balance of a series of considerations which are not always articulated<sup>40</sup> and assume varying degrees of importance in the context of each particular case. Their enumeration could be of assistance both in the evaluation of particular cases and in the general development of this important branch of law.

I shall now proceed to consider some of the specific issues that arise in this case.

#### I. THE PROBLEM OF A JURISDICTIONAL LINK

24. The Court's jurisdiction is consensual. This distinguishes international from domestic jurisdictions.

##### (i) *Tension between Article 62 of the Statute and the Consensual Principle*

25. Despite the consensual basis of the Court's jurisdiction and despite the principle that the Court's judgment is binding only between the parties, the Statute finds a place for Article 62 which states:

"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."

Whether this provision was deliberately retained<sup>41</sup> or not, the fact is that the Statute expressly provides for intervention without any consensual restrictions being imposed upon it.

26. There are no words in Article 62 indicative of an intent to restrict the right to intervene only to States which have already submitted to the jurisdiction.

<sup>39</sup> See also *I.C.J. Yearbook 1991-1992*, p. 211, for a previous address by Sir Robert Jennings to the General Assembly to the effect that resort to the Court should be seen "as an integral part of the work of preventive diplomacy in the United Nations".

<sup>40</sup> The considerable academic literature on the inarticulate premises of judicial reasoning becomes relevant here. For a basic reference see Julius Stone, *Legal System and Lawyers' Reasonings*, 1964.

<sup>41</sup> See *supra*, para. 10.

One way of looking at the matter is to assume that when a party so seeks to intervene, it is implicitly submitting to the Court's jurisdiction, thereby becoming subject to any orders the Court may make.

Another approach is to consider Article 62 to be an exception to the usual jurisdictional rule. The framers of the Court's Statute could well have laid down a jurisdictional link as a precondition to the right to intervene, but they chose not to do so. Consent could be viewed as necessary where the intervener seeks to become a party, but not otherwise.

(ii) *Legislative History of Article 62*

The legislative history of Article 62 throws some light on whether a jurisdictional link was integrated into the elements necessary for an intervention.

The concept of intervention in international proceedings was first addressed in the Draft Regulations for International Arbitral Procedures of the Institut de droit international of 28 August 1875. Article 16 of those Regulations provided that "[t]he voluntary intervention of a third party is admissible only with the consent of the parties that have concluded the *compromis*".

This draft quite clearly excluded interventions where the jurisdictional link was lacking and envisaged no departure from the consensual principle even in interventions.

It was however a draft intended for use in arbitral proceedings, which are strictly consensual, as opposed to judicial proceedings by a court vested with some measure of international authority, which is recognized by all nations.

Matters progressed a step away from intervention being confined only to parties admitted with the consent of the principal litigants, when Article 56 of the 1899 Hague Convention provided that where there was a question as to the interpretation of a convention to which Powers other than those in dispute are parties they should be able to intervene.

The same principle was repeated in the 1907 Convention. These advances were still confined to the interpretation of a convention — the situation covered by Article 63 of the Statute of the Court.

The next steps in the history of international intervention occurred through Article 62 of the Court's Statute which in its terms permitted intervention for the first time by third parties in cases other than the interpretation of a convention to which they were parties.

At the meeting of the Advisory Committee of Jurists (Proceedings of the Committee, 16 June-24 July 1920) in 1920 there was a conscious effort to widen the circle of possible interveners.

Lord Phillimore suggested a draft under which a third State which con-

sidered that a dispute submitted to the Court affected its interests may request to be allowed to intervene and that the Court shall grant permission if it thinks fit.

Mr. Fernandes agreed with this proposal but sought to make the right of intervention dependent upon certain conditions, such as that the interests affected must be legitimate interests.

The President (Baron Descamps) thought the solution of the question of intervention should be drawn from the common law, and suggested a draft enabling a State to intervene if it considered that its rights may be affected by a dispute.

Mr. Adatci suggested replacing the word "right" by the word "interest".

Thereafter, a draft of the present Article was submitted by the President and this formula was adopted. Earlier drafts regarding international proceedings, such as the Institut's draft of 1875 which expressly make voluntary intervention possible only with the express consent of the parties to the compromise, were no doubt available as models from which to make a choice but no such qualification was imposed.

Throughout this discussion there was no reference to the need for a jurisdictional link.

Hudson has drawn attention<sup>42</sup> to the circumstance that, at the time of the draft, the Committee was near unanimous in recommending compulsory jurisdiction. If this were so, there would indeed have been no need for Article 62 to stipulate a consensual link. Yet, as Rosenne has pointed out in the reference already cited, the retention of this provision was deliberate.

The retention of Article 62 despite the abandonment of the principle of compulsory jurisdiction is thus significant. Whether it was an oversight or deliberate, the fact remains that this statutory provision remained and as such it needs to be given all force and efficacy<sup>43</sup>. It cannot be neutralized by interpretation or indeed even by Rules which the Court may make in the exercise of its undoubted power to regulate its procedure.

(iii) *Statutory Provisions to be Rendered Effective Rather than Negatived by Interpretation*

27. That important provision of the Statute must be given effect as far as is practicable. If the requirement of a jurisdictional link be postulated, that could in many cases render nugatory an express provision in the Statute of the Court.

One must have regard to the general principle that statutory provisions

<sup>42</sup> Manley O. Hudson. *The Permanent Court of International Justice 1920-1942, A Treatise*, 1972, p. 420.

<sup>43</sup> See McDougal, Lasswell and Miller, *op. cit.*



are to be given effect as far as possible and not nullified by contrary interpretation.

The separate opinions rendered in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene*<sup>44</sup> are of interest on this matter. While Judge Morozov was of the view that the intervener must show a jurisdictional basis for its claim, Judges Oda and Schwebel were both specific in their view that an intervening State does not need to show a jurisdictional link with the original litigant State. The inconclusive nature of the Court's decision in relation to this problem concerning intervention was the subject of adverse comment, among others by Judge Philip C. Jessup<sup>45</sup>.

The jurisdictional link was not a basis for the Court's decision in that case.

The present Judgment<sup>46</sup> goes far towards settling this issue, consolidating the law on this matter along the lines indicated by the decisions in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*<sup>47</sup> and *Land and Maritime Boundary between Cameroon and Nigeria*<sup>48</sup>. I agree that a jurisdictional link is required only if the State seeking to intervene is desirous of "itself becoming a party to the case"<sup>49</sup>.

(iv) *Article 81 (2) (c) of the 1978 Rules*

28. Article 81, paragraph 2, of the 1978 Rules of Court represents a fundamental departure from the 1972 Rules inasmuch as Article 81, paragraph 2 (c), requires the application to set out "any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case". There was no reference to this jurisdictional link in the 1972 Rules which only required a description of the case, a statement of law and fact justifying intervention and a list of the documents in support.

This reference to a jurisdictional basis, it will be noted, does not specify it as a necessary factor for intervention. It is only mentioned as a circumstance which the applicant needs to set out, a circumstance which would no doubt be of assistance to the Court in making its overall decision. The use of the expression "any basis of jurisdiction" rather than "the basis of jurisdiction" is also significant.

A Rule of the Court cannot nullify a provision of the Court's Statute and must always be read in conformity with it. In the *Continental Shelf*

<sup>44</sup> *I.C.J. Reports 1981*, pp. 22 ff.

<sup>45</sup> In an Editorial Comment in the *American Journal of International Law* (75 *AJIL*, 1981, p. 903 at p. 908).

<sup>46</sup> See paragraphs 35 and 36.

<sup>47</sup> *I.C.J. Reports 1990*, p. 135.

<sup>48</sup> *I.C.J. Reports 1999 (II)*, pp. 1034-1035, para. 15.

<sup>49</sup> Para. 35

case between Tunisia and Libya<sup>50</sup> it was Malta's argument that this provision went in fact beyond the authority given to the Court to regulate its procedure<sup>51</sup>. It argued that the Court's rule-making power could not be employed to introduce a new substantive condition for the grant of permission to intervene.

(v) *Conclusion*

29. The legislative history of Article 62, the rules of interpretation, the need for enhancing the services rendered by the Court to the international community and the jurisprudence of the Court thus combine to point to the conclusion that a jurisdictional link is not a prerequisite to intervention.

2. THE PROBLEM OF AN INTEREST OF A LEGAL NATURE

30. This is another important grey area in the field of international intervention procedure, and attracted the comment from the first writer on intervention before the PCIJ that it was "an almost indefinable monster"<sup>52</sup>.

While it defies definition as to what it is, guidelines are evolving as to what it is not. It must not be

- a merely general interest but one which may be affected by the decision in this case;
- a merely political or social interest;
- an interest in the general development of the law;
- "an interest in the Court's pronouncements in the case regarding the applicable general principles and rules of international law"<sup>53</sup>;
- an interest in particular points of law that "concerned it, simply because they were in issue before the Court in proceedings between other States"<sup>54</sup>.

Further, it need not be

- an interest in the actual subject-matter of the case. While not directly within the subject-matter it is sufficient if it will be affected by the decision;

<sup>50</sup> *I.C.J. Reports 1981*, p. 8, para. 12.

<sup>51</sup> Cf. Wolfgang W. Fritzemeyer, *Intervention in the International Court of Justice*, 1983, p. 75.

<sup>52</sup> W. Farag, *L'intervention devant la Cour Permanente de Justice Internationale (Articles 62 et 63 du Statut de la Cour)*, 1927. [Translation by the Registry.]

<sup>53</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 17, para. 30.

<sup>54</sup> See D. W. Greig, "Third Party Rights and the I.C.J.", 32 *Virginia Journal of International Law*, pp. 285-299.

- an interest which *will* be affected. It is sufficient to show that it is an interest which *may* be affected by the decision.

How does the case of the Philippines fit within these guidelines?

31. At this point it is necessary to observe that the burden of proof of a legal interest, which always lies on the applicant under Article 62, will naturally vary from case to case, depending, *inter alia*, on the closeness of the connection of the subject-matter in dispute and the subject-matter of the interest which the intervenient seeks to protect.

There could be a vast range of cases between a total coincidence of the subject of the case and the interest of the intervenient on the one hand, and the total absence of any common elements on the other.

The burden of proof in regard to the intervenient's legal interest would naturally be lighter in the case of the coincidence of the parties' claims and the intervener's interest and heavier as these two elements diverge.

32. In the present case the intervener clearly disclaims any interest in the actual subject-matter of the case. On the other hand the interest it seeks to protect is in a totally different territory and stems from an entirely different source of title. The burden that lies on the intervener is thus heavily increased and it is this burden which, in all the circumstances of the case, the Philippines has not discharged.

33. It will surely relate to a legal interest if any of the documents of title referred to by the Parties have a bearing on the claim that the Philippines alleges it has to North Borneo, for example the documents of 1891, 1900, 1907 and 1930. On the contrary, the Philippines does not claim any right or interest through these documents but relies on a grant by the Sultan of Sulu in 1878 which does not in fact relate to the two islands in question in this case. Furthermore, the Philippines expressly disclaims any territorial claim to the two islands.

34. The Philippine claim is based upon the treaties, agreements or other documents which have a direct or indirect bearing on the legal status of North Borneo. The Court needs to know with some degree of particularity what these are, what bearing if any they have on North Borneo and how their interpretation has impinged on the claim to a totally distinct territory. The Judgment of the Court details the lack of particularity in the pleadings of the Philippines in this regard, and it is unnecessary to traverse the same ground here.

35. Since it would be incumbent on an intervener claiming an interest totally different from the subject-matter of the action to state its case with great particularity, one is left with a sense of inadequacy as to the particulars of the legal interest which the Philippines wishes to protect.

36. A useful contrast is offered by the *Cameroon v. Nigeria* case, where the interest asserted by the intervener was specific and clear from all the surrounding circumstances. Likewise in the *Continental Shelf*

(*Tunisia/Libyan Arab Jamahiriya*)<sup>55</sup> case, although the Court did not actually rule on the matter, the intervener stated with great particularity how a judgment rendered in the case would affect its interest<sup>56</sup>, itemizing five separate elements point by point. To quote the Court these were spelled out “coast by coast, bay by bay, island by island, sea area by sea area”.

37. That is an index of the extent of particularity sometimes provided to court in intervention procedures. Though such minute detail may not be necessary, even a lesser degree of particularity is lacking in the Philippine presentation, leaving the Court in a state of vagueness and conjecture as to what precisely is the legal interest which the Philippines claims.

38. In making this observation I am conscious that the Philippines lacked access to the pleadings of the Parties. Yet even within these constraints the material publicly available on the conflicting claims of the Parties would have directed the Philippines to the ways in which these conventions infringed on whatever claim they had to a totally different territory. The deeds which the Parties were relying on were all accessible to the intervenient and could well have been analysed by the Philippines from this point of view. The Court would not of course have required minute and detailed analyses, but some indications of the particular ways in which the Court’s approach to these sources of title could have impinged on the interests of the Philippines would have been sufficient. There were suggestions that this might be possible but the degree of particularity necessary to activate the processes of the Court was lacking.

39. I am in agreement with the Court that the necessary specificity is lacking in the Philippine case.

### 3. PRECISE OBJECT OF INTERVENTION

40. The Court has considered the three objects listed by the Philippines in terms of Article 81 (*b*) of the Rules, and has found at least two of them to be appropriate. This being so, there has been compliance by the Philippines with Article 81 (*b*).

The third reason listed by the Philippines, which the Court has found does not constitute an “object” within the meaning of the Rules and has hence rejected, is not properly an object of a party but nevertheless spells out an important function performed by the Court, as I have indicated in the earlier part of this opinion. This is a matter for the Court and is not an “object” of a party seeking to intervene.

<sup>55</sup> *I.C.J. Reports 1981*, p. 3.

<sup>56</sup> At pp. 17-18.

## 4. THE PROBLEM OF THE LATENESS OF THE INTERVENTION

41. It is always desirable for interveners to file their application as early as possible in the proceedings. This is essential for the expeditious disposal of the Court's work and quite apart from any specific provision in the Rules is a courtesy due from the intervener both to the Court and to the other parties. Paragraph 1 of Article 81 of the Rules of Court requires an application for intervention to be filed not later than the closure of written proceedings. But what is meant by the "closure of written proceedings"?

42. In a case such as this where the special agreement expressly visualized the possibility of a further round of written pleadings, a third party could not know that the second round of pleadings was necessarily the last. Indeed, the parties themselves would not know this until they had perused each other's second round of pleadings, for then only would they make up their minds that they would not go for a further round.

The Court does not have a practice of making a formal order of closure of written proceedings. Closure of written proceedings is thus a *de facto* situation that arises when the written proceedings are for practical purposes understood to be closed.

A third party watching these proceedings from the outside would naturally be anxious, if it is thinking in terms of intervention, to know the position of the parties as contained in their written replies to the earlier rounds of pleadings. It would be entitled, having regard to the *compromis* in the present case, to assume that the date of filing of the second round would not necessarily be the date of "closure of written proceedings".

43. A further circumstance to be taken into account in considering the third party's position is the unavailability to it of even the pleadings that had already been filed, and the fact that it had made application to the Court for the pleadings to be made available to it. The extreme step of shutting out the application for belatedness is therefore one which the Court should not take, and I agree with the Court in this regard, though as the Parties rightly point out the Philippines could well have made application considerably earlier.

The Philippines could well argue that they made their application before the closure of the written proceedings, and that it would be an injustice to them, if not a denial of due process, to impose on them the extreme penalty of refusing their Application for this reason.

## 5. THE PROBLEM OF THE TENSION BETWEEN THE PRINCIPLE OF CONFIDENTIALITY OF PLEADINGS AND THE PRINCIPLE OF INTERVENTION

44. Although, as Rosenne points out<sup>57</sup>, the Court has so far refrained from exercising this power, it has the discretion under Article 53,

<sup>57</sup> S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, *Procedure*, 1997, p. 1289.

paragraph 1, of the Rules to make pleadings available to interveners in appropriate circumstances and an intervener is entitled to explore this possibility.

There is a tension here between the principle of intervention and the principle of confidentiality, for the latter may in certain cases shut out a legitimate intervention by denying the intending intervener the information necessary for it to formulate its intervention. The discretion of the Court must therefore be very carefully exercised, especially when the lack of knowledge of the parties' pleadings is offered as an excuse for what might be a belated intervention. An intervener's actual pleadings could in certain cases be heavily dependent upon a knowledge of the pleadings of the parties. The mere publication of the special agreement would not give the intervenient the full information it might require.

45. As Rosenne observes<sup>58</sup>, the tension already referred to between the principle of intervention and the principle of confidentiality can even amount to a denial of justice in particular cases, and will perhaps need to be reviewed in the future. Indeed, he points out in his treatise on intervention that the availability to a prospective intervener of the written proceedings to date is important both when it is considering whether it has an interest of a legal nature and even more so after that State has decided to submit an application<sup>59</sup>.

I believe this procedural aspect needs careful review by the Court, for there can well be cases where a denial of the documents to a prospective intervener could for practical purposes defeat that intervener's statutory right to make an application for intervention. The present is not such a case but there may well be cases where this is so.

46. For the reasons stated above I am in agreement with the Court's decision and I hope this separate opinion will be of some assistance in drawing attention to important aspects relating to intervention which will need further consideration in the procedural jurisprudence of the future.

(Signed) C. G. WEERAMANTRY.

---

<sup>58</sup> S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, *Procedure*, 1997, p. 1289.

<sup>59</sup> S. Rosenne, *Intervention in the International Court of Justice*, 1993, p. 191.