

**SPEECH BY H.E. MR. RONNY ABRAHAM, PRESIDENT OF THE INTERNATIONAL COURT OF
JUSTICE, BEFORE THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY**

27 October 2017

[Translation]

Mr. Chairman,
Distinguished delegates of the Sixth Committee,

It is a once again an honour for me to address this Committee and a pleasure to have a further opportunity to strengthen the ties between our two institutions. I would like to use this occasion to congratulate His Excellency Mr. Burhan Gafoor on his election as Chairman of the Sixth Committee for the seventy-second session of the General Assembly.

I have chosen to speak to you today about the place of third parties in the judicial practice and jurisprudence of the International Court of Justice. As you know, Article 59 of the Statute provides that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”. The Court nonetheless recognizes that the interests of third States, and more particularly their legal interests, may be affected in contentious proceedings, and that this has to be taken into consideration. There are a number of ways in which such consideration manifests itself. In certain circumstances, third States can play an active role in a contentious case between two other States. Protection can also be afforded to third States, even when they take no action, in contentious cases to which they are not parties and whose resolution may concern or affect them. I will address these two situations in turn.

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I will begin with the most obvious way in which the interests of third States are taken into account in contentious proceedings, namely, the existence of the possibility of their intervening in proceedings pending between two other States.

The Statute of the Court has two articles on intervention, which present two distinct scenarios. Article 62, paragraph 1, provides that “[s]hould 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”. The second paragraph of the same article states that in such an event “[i]t shall be for the Court to decide upon this request”. Article 63, for its part, addresses situations in which “the construction of a convention to which States other than those concerned in the case are parties is in question”. Under these circumstances, such States are notified forthwith by the Registrar, and, I quote, “[e]very State so notified has the right to intervene in the proceedings”.

The conditions for intervention on the basis of Article 63 are clearly defined, and the Statute provides that intervention on that basis is a right. A third State that invokes Article 63 of the Statute does not file an application for permission to intervene but a *declaration* of intervention, and the Court simply makes a finding that that State is indeed in an Article 63 situation. The Statute and the Rules of Court make no provision as to what form the Court’s decision should take in this regard, but in three out of the four such instances that have arisen since the Court’s beginnings it has rendered its decision by means of an order. However, if a State does not fulfil the conditions under Article 63, but nonetheless considers that it has an interest of a legal nature that may be affected by

the decision in a dispute submitted to the Court by other States, it can submit to the Court an *application* for permission to intervene under Article 62 of the Statute; the Court can then decide whether to admit or not to admit the application. Once again, the Statute and the Rules of Court make no provision as to what form the Court's decision should take in this respect, but the practice shows that, except in certain circumstances, it decides by means of a judgment. You will note that, in the two situations of intervention provided for in the Statute, it is the third State that instigates the procedure leading to intervention. As the Court observed in 1984 in its Judgment on the Application by Italy for permission to intervene in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, and as it recalled that same year in its Judgment on preliminary objections in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, and again in subsequent cases, there is no system of compulsory intervention in the Court's procedures, in the sense that the Court cannot direct that a third State be made a party to proceedings.

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Since its inception, the Court has been seised of only four declarations of intervention under Article 63 of the Statute. A State which wishes to avail itself of the right of intervention conferred upon it by Article 63, paragraph 2, must do so, according to the relevant provisions of the Rules of Court, "as soon as possible and not later than the date fixed for the opening of oral proceedings". The Rules nonetheless specify that "[i]n exceptional circumstances, an application submitted at a later stage may . . . be admitted". Among other things, the declaration must contain particulars of the basis on which the declarant State considers itself a party to the convention concerned, it must identify the particular provisions of the convention the construction of which it considers to be in question, and it must include a statement of its construction of those provisions.

The conditions for intervention on the basis of Article 63 are clear, and the object of such intervention is limited: for intervention to be possible, the principal proceedings must call into question the construction of a convention to which the State wishing to intervene is party, and the object of the intervention must be "to allow [that] State . . . to present to the Court its observations on the construction of that convention". The Court recalled these rules in its Order of 6 February 2013, in which it found that the declaration of intervention filed by New Zealand in the case concerning *Whaling in the Antarctic (Australia v. Japan)* was admissible.

Article 86 of the Rules provides that a State intervening under Article 63 of the Statute "shall be furnished with copies of the pleadings and documents annexed, and shall be entitled . . . to submit its written observations on the subject-matter of the intervention". The State is also "entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention". Finally, Article 63, paragraph 2, of the Statute states that the construction of the convention concerned given by the judgment will be equally binding upon the intervening State — a provision which is not without ambiguity and one which the Court has not had the opportunity to interpret until now.

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The conditions for intervention under Article 62 of the Statute are less clear and merit closer examination.

The Rules provide that an application for permission to intervene "shall be filed as soon as possible, and not later than the closure of the written proceedings". However, they also state, as in the case of intervention based on Article 63, that "[i]n exceptional circumstances, an application

submitted at a later stage may . . . be admitted”. The application for permission to intervene must set out, first, the interest of a legal nature which the State applying to intervene considers may be affected by the decision in the case, second, the precise object of the intervention and, third, any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case.

The Court has had occasion to clarify the conditions under which a third party may intervene on the basis of Article 62 in its jurisprudence.

First, it has made it clear that the consent of the parties to a case is not required for a third State’s application for permission to intervene under Article 62 to be accepted. Indeed, a State wishing to intervene as a non-party may do so without any basis of jurisdiction between itself and the parties to the proceedings. By contrast, the Court has emphasized that if a State applying to intervene does intend to become itself a party to the proceedings, such a basis of jurisdiction is essential. This distinction between the option to intervene as a party and the option to intervene as a non-party is not made explicit in Article 62 of the Statute, or in the relevant articles of the Rules, but has been elucidated by the Court in its jurisprudence, and in particular its Judgments of 4 May 2011, by which it ruled on the Applications respectively presented by Honduras and Costa Rica for permission to intervene in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. The distinction between intervention as a party and intervention as a non-party is not only critical in terms of the conditions that must be met for an application for permission to intervene to be accepted, it also has implications for the scope of the intervening State’s procedural rights. I will return to this point in a moment.

Moreover, the Court has observed that the purpose of intervention under Article 62 is preventive. Therefore, it cannot be used by a State to submit new issues for decision by the Court, at least when the intervening State does not become a party to the case. The State must confine itself to protecting its interests of a legal nature that are already at stake by the decision in the dispute before the Court. As stated by the Chamber constituted to entertain the case concerning *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras in its Judgment of 13 September 1990 on Nicaragua’s Application for permission to intervene, intervention “is not intended to enable a third State to tack on a new case”, but is aimed at “protecting a State’s ‘interest of a legal nature’ that might be affected by a decision in an existing case already established between other States”.

Finally, when deciding on an application for permission to intervene, the Court does not ask itself whether the participation of the third State seeking to intervene might be useful or even necessary, since an affirmative answer to this question is not sufficient for its application to be accepted. Instead the Court asks itself only one question: in the dispute forming the subject-matter of the main proceedings is the legal interest of the third State at issue (or “en cause” as it states in the French version of Article 62 of the Statute), or, to use the terms of the English version of Article 62, does the third State “ha[ve] an interest of a legal nature which may be affected by the decision in the case”? This was clearly expressed by the Court in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, in which Italy, seeking to intervene under Article 62 of the Statute, invoked, *inter alia*, in support of its Application for permission to intervene “the impossibility, or at least the greatly increased difficulty, of the Court’s performing the task entrusted to it by the Special Agreement [concluded between Malta and Libya] in the absence of participation in the proceedings by Italy as intervener”. I would recall that, in this case, the Court decided that Italy’s Application for permission to intervene could not be allowed.

As I have just mentioned, the French text of Article 62 of the Statute talks about an “intérêt juridique en cause” in a dispute — that is, a “legal interest at issue” — while the English text refers

to an “interest of a legal nature *which may be affected* by the decision in the case”. The Court has noted this difference in the wording of the French and English texts and, considering the English version to be “more explici[t]”, it has, when seised of an application for permission to intervene under Article 62, systematically sought to ascertain whether the legal interest claimed by the State seeking to intervene “may be affected”, in its content and scope, by any future decision of the Court in the principal proceedings.

This “interest of a legal nature” which the intervening State must be able to claim is indeed an interest and not a right. The Court has consistently held that “[t]he State seeking to intervene as a non-party . . . does not have to establish *that one of its rights* may be affected”; it need only demonstrate that one of its *interests* might be affected. However, the interest invoked must be “of a legal nature”, that is to say — and I quote the Judgments I mentioned earlier relating to the Applications for permission to intervene in the *Territorial and Maritime Dispute* case between Nicaragua and Colombia — the interest “has to be the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature”.

Lastly, for an intervention to be permitted, it is not necessary to establish that the legal interest of the third State *will be* affected by a future decision in the principal proceedings; it is necessary and sufficient that that interest *may be* affected by that decision. The Court recalled this well-established principle in its Order of 4 July 2011 ruling on the Application by the Hellenic Republic for permission to intervene in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy)*, the most recent application submitted to it on the basis of Article 62. The Court has also consistently held, since its Judgment of 23 October 2001 on the Application by the Philippines for permission to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, that the interest of a legal nature to be shown “is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*.” In other words, a State seeking to intervene in proceedings may base its application on the fact that part of a judgment’s reasoning, and not necessarily the operative part itself, could affect one of its interests of a legal nature.

One question which Article 62 of the Statute does not expressly resolve is whether the very fact that a legal interest may be affected by a decision obliges the Court to allow the intervention, or whether the decision on this point is left to its discretion. In this regard, as the Court observed for the first time in its Judgment of 14 April 1981 on Malta’s Application for permission to intervene in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, and has regularly held since, although Article 62, paragraph 2, provides that it is for the Court to decide on any application for permission to intervene on that basis, the Court — and I quote — “does not consider [this provision] to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy”. Thus, whenever the Court has concluded that the conditions set out in Article 62 of the Statute are met and has judged that the object of the request is consistent with the function of intervention, it has systematically allowed the intervention sought by the third State concerned.

I turn now to what might compel a third State to seek to intervene in a case on the basis of Article 62, namely the consequences of such an intervention. I alluded to this earlier: an intervening State does not necessarily become a party to a case on account of its intervention. Indeed, the State may become a party only if it requests to do so and asserts an applicable basis of jurisdiction between it and the parties to the main proceedings. Whether it intervenes as a party or not, pursuant to Article 85, paragraph 3, of the Rules, a third State is entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention — which subject-matter, I would recall, must be identified by the State in its application for permission to intervene, and which is defined by the Court. However, the “capacity” in which a

third State intervenes has implications for both the procedural rights it acquires and its obligations. The Court summarized these differences in the case concerning *Territorial and Maritime Dispute*, in which Honduras primarily sought to be permitted to intervene as a party and, in the alternative, as a non-party. I quote,

“[i]f it is permitted by the Court to become a party to the proceedings, the intervening State may ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted, pursuant to Article 59 of the Statute. *A contrario*, as the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* has pointed out, a State permitted to intervene in the proceedings as a non-party ‘does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or the general principles of procedural law.’”

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These, in my view, are the basic elements needed to understand the options available to third States in contentious proceedings through the intervention procedure. Before I turn to the second part of my presentation — which, as I mentioned at the start, concerns the protection afforded by the Court to third States in contentious cases to which they are not parties and in which they have not intervened — I would like to point out, as an aside, that a third State which does not wish to intervene in proceedings, but which nevertheless wants to be kept informed of ongoing proceedings between two States, may ask the Court to be furnished with copies of the pleadings and documents annexed in that particular case. Article 53 of the Rules provides that, in such an event, the Court shall take a decision after ascertaining the views of the Parties to the case. In accordance with its established practice, the Court will generally decide to communicate pleadings to a third State if the Parties to the case are in agreement, but on the contrary refuse to do so if one of the Parties objects.

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I come now to the second way in which the interests of third States are taken into consideration in contentious cases, namely the protection they are afforded by the Court even when no action is being taken by them. This consideration manifests itself in two ways: first, in certain circumstances, the Court declares that it is unable to rule on a question which may affect the interests of third States not party to the proceedings; secondly, the Court ensures that its decision does not affect the interests of those States.

With regard to the former point, it was in the well-known *Monetary Gold Removed from Rome in 1943* case that the Court first observed that it cannot rule on the rights and obligations of a third State in proceedings without the consent of that State, when those rights and obligations form “the very subject-matter” of the decision to be taken. In this case introduced by Italy against France, the United Kingdom and the United States, the Court was asked to decide to which State — Italy or the United Kingdom — should be delivered a certain quantity of monetary gold removed from Rome by Germany in 1943, gold which was recognized as belonging to Albania, but to which both the United Kingdom and Italy had claims. In its Application, Italy requested that the gold be delivered to it in partial satisfaction for damage which it alleged had been caused to it by Albania.

The Court noted that, in this instance, it was “not merely called upon to say whether the gold should be delivered to Italy or to the United Kingdom”: “[i]t [wa]s requested to determine first certain legal questions upon the solution of which depend[ed] the delivery of the gold”. The Court found that it was not able to consider Italy’s first submission, because it “centre[d] around a claim by Italy against Albania, a claim to indemnification for an alleged wrong”, and that in order to respond to that claim, it would have to determine whether Albania had committed any international wrong against Italy, and whether it was under an obligation to pay compensation to that State. Thus, the Court stated, the decision it was called upon to take would not only “affect” Albania’s legal interests; those legal interests would form “the very subject-matter of the decision”. The Court was of the view that “[t]o go into the merits of such questions would be to decide a dispute between Italy and Albania”, which it could not do without the consent of the latter. The Statute, the Court explained, could not be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.

The Court had a further opportunity to apply the so-called Monetary Gold principle in the case concerning *East Timor*, which was instituted by Portugal against Australia, and in which Portugal accused Australia of, among other things, negotiating and concluding a treaty with Indonesia creating a “‘Zone of Cooperation’ . . . ‘in an area between the Indonesian Province of East Timor and Northern Australia’”. The Applicant alleged, *inter alia*, that by concluding that treaty, Australia had infringed the rights of Portugal as the administering Power of East Timor and the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources.

The Court observed that in order to rule on Portugal’s claim, it was required first to determine the lawfulness of Indonesia’s conduct, and in particular whether Indonesia had the power to enter into treaties on behalf of East Timor relating to the natural resources of its continental shelf. The Court concluded that it could not exercise its jurisdiction to resolve the dispute submitted to it, because “the very subject-matter of [its] decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia [had] entered and remained in East Timor, it could or could not have acquired [such a] power”. Such a decision could not be taken without Indonesia’s consent.

Thus, a third State to proceedings has a guarantee that the Court will not rule on a claim that requires it to make a determination on that State’s international responsibility. It is nonetheless important to recall that this protection has a specific object: to prevent the Court from ruling on the rights and obligations of third States to proceedings. As the Court made clear in its Judgment of 26 June 1992 in the case concerning *Certain Phosphates Lands in Nauru*, the Court will not be deprived of its jurisdiction to entertain a case by the simple fact that the legal interest of a third State may be affected by its decision to come, nor by the fact that its findings may have implications for the legal situation of such third State. The *Monetary Gold* principle only applies when the legal interest of the third State that may possibly be affected forms *the very subject-matter* of the decision that the Applicant is seeking for and when there is a *logical link* between the findings concerning the third State that would be necessary to make and the decision requested by the Applicant. In that case, Australia, which was the Respondent, was arguing that the Court did not have jurisdiction to decide on the alleged breach by Australia of its obligations under a Trusteeship Agreement because, under the terms of the said agreement, the governments of three States constituted the Administering Authority for Nauru. According to Australia, “any decision of the Court as to the alleged breach by [the Australian State] of its obligations under the Agreement would necessarily involve a finding as to the discharge by [the] two other States of their obligations in that respect”. After recalling its jurisprudence relating to the *Monetary Gold* principle, the Court rejected Australia’s argument in those terms: “[i]n the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court’s decision on Nauru’s claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.”

I will now turn to the second way in which the Court protects the rights and interests of third States in contentious proceedings, namely by ensuring that its decision does not affect their interests. I would like to illustrate my point by taking the example of maritime delimitation disputes, where the Court's concern, at each stage of the delimitation process, to protect the rights and interests of third States that are not parties to the proceedings, is particularly apparent.

For instance, when identifying the relevant area it is being asked to delimit, the Court does not consider that it is precluded from including in that area spaces in which the rights of third States may be affected, but does observe that such inclusion is without prejudice to any rights which third States may claim to hold in that area. Thus, in the case concerning *Maritime Delimitation in the Black Sea* between Romania and Ukraine, the Court noted that "where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area . . ., third party entitlements cannot be affected".

Furthermore, a practice has developed whereby, when necessary, the Court will end any line drawn by it to delimit the maritime spaces of States parties to the principal proceedings before that line reaches an area where the legal interests of third States may be affected. The Court has adopted this approach in a number of recent maritime delimitation judgments, including in the *Maritime Delimitation in the Black Sea* case I just mentioned, which was the subject of a 2009 Judgment on the merits.

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This concludes my presentation, which I hope has provided you with a general overview of the different ways in which the Court takes account of third States in contentious proceedings.

A number of other aspects of the Court's practice could have been mentioned with regard to third parties in contentious proceedings — and I am referring here to third parties other than the States authorized to appear before it. For example, the Statute makes provision for any public international organization to submit observations to the Court, whenever the construction of its constituent instrument or that of an international convention adopted by virtue of that instrument is in question in a case submitted to the Court. On the other hand, it makes no such provision for a non-governmental organization to intervene as an *amicus curiae* in contentious proceedings.

My address today has focused solely on the situation of third parties in contentious proceedings before the Court; owing to time constraints, I have not spoken about what happens in advisory proceedings. I would briefly state in this regard that under Article 66 of the Statute, the Registrar must give notice of the request for an advisory opinion to all States entitled to appear before the Court; and that any State entitled to appear before the Court or any international organization, which the Court considers likely to be able to furnish information on the question, must be informed that the Court is prepared to receive written statements, or to hear oral statements at a public sitting to be held for that purpose. Furthermore, a State that has not received such an invitation may express a desire to submit a written statement or to be heard, in which event "the Court will decide". The Practice Directions adopted by the Court further stipulate that the written statements or documents presented by non-governmental organizations in advisory proceedings on their own initiative are "not to be considered as part of the case file", but treated as "publications readily available", which are made accessible in a room of the Peace Palace set aside for that purpose, where they may be consulted by the States and organizations presenting written or oral statements in the case concerned.

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[Translation]

Mr. Chairman,
Distinguished delegates,

This concludes my address today. If time permits, I would be delighted to hear your reactions and answer any questions you may have.

I would like once again to thank all the delegates representing the Member States for their support and the interest they have shown in the work of the International Court of Justice.
