CURRENT DEVELOPMENTS

THE 2011 JUDICIAL ACTIVITY OF THE INTERNATIONAL COURT OF JUSTICE

*By Jacob Katz Cogan**

The International Court of Justice rendered four judgments in 2011: on April 1, a ruling on the respondent's preliminary objections in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), upholding one objection and finding that the Court had no jurisdiction to entertain the application;[1] on May 4, two rulings on Costa Rica's and Honduras's applications for permission to intervene in *Territorial and Maritime Dispute* (Nicaragua v. Colombia), rejecting both;[2] and on December 5, a final decision on jurisdiction, admissibility, and the merits in *Application of the Interim Accord of 13 September 1995* (Former Yugoslav Republic of Macedonia v. Greece), finding for the applicant.[3] The Court also issued three orders in incidental proceedings: on March 8, one on Costa Rica's request for the indication of provisional measures in *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua);[4] on July 4, one on Greece's application for permission to intervene as a nonparty in *Jurisdictional Immunities of the State* (Germany v. Italy);[5] and on July 18, one on Cambodia's request for the indication of provisional measures in *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) (Cambodia v. Thailand).[6] The Court indicated provisional measures in response to both requests, and granted Greece permission to intervene.

The year 2011 stood out for the Court's innovations in its doctrine concerning incidental matters. In *Application of the Racial Discrimination Convention*, the Court strictly interpreted

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[1] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections (Int'l Ct. Justice Apr. 1, 2011). All the materials of the Court cited in this report are available on its website, http://www.icj-cij.org.

[2] Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene (Int'l Ct. Justice May 4, 2011); *id.*, Application by Honduras for Permission to Intervene (Int'l Ct. Justice May 4, 2011).

[3] Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Maced. v. Greece) (Int'l Ct. Justice Dec. 5, 2011).

[4] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Provisional Measures (Int'l Ct. Justice Mar. 8, 2011).

[5] Jurisdictional Immunities of the State (Ger. v. It.), Application by Greece for Permission to Intervene (Int'l Ct. Justice July 4, 2011).

[6] Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)* (Cambodia v. Thai.), Provisional Measures (Int'l Ct. Justice July 18, 2011). The Court also issued orders fixing the time limits in a number of other pending cases.

a compromissory clause to precondition the Court's jurisdiction on the applicant's satisfaction of high bars to demonstrating the existence of a "dispute" and the pursuit of "negotiations." In *Territorial and Maritime Dispute*, the Court distinguished between an "interest of a legal nature" and a "right," opening up the possibility that, going forward, the Court would depart from its past practice and permit more interventions under Article 62 of the Statute—a possibility that was not realized in this case but was achieved later in the year in *Jurisdictional Immunities*. And in *Certain Activities*, the Court added a requirement that the rights for which protection was sought in a provisional measures request must be "plausible"—a merits parallel to the traditional obligation to establish prima facie jurisdiction. The year was also notable for the election of two new members of the Court, the reelection of three current members, and the resignation of another.

I. THE COURT'S JUDICIAL ACTIVITY

Application of the Racial Discrimination Convention (Georgia v. Russian Federation)

In April, two-and-a-half years after it had indicated provisional measures, the Court upheld one of Russia's preliminary objections to the Court's jurisdiction, thereby concluding the case. Georgia had alleged that Russia breached its obligations under Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and it founded the Court's jurisdiction on CERD Article 22.[7] Russia raised four objections: there was no "dispute" between the parties as required by Article 22; Georgia had not satisfied the article's procedural requirements, such as "not settled by negotiation"; the alleged wrongful acts took place outside of Russian territory, with the consequence that the CERD did not apply; and the Court's jurisdiction, assuming any, was limited to events that occurred after the treaty entered into force between the parties.[8] Of these, the Court examined just the first two. By 12 votes to 4, the Court rejected Russia's contention that there was no dispute between the parties.[9] But by 10 votes to 6, the Court upheld Russia's argument that Georgia had not satisfied Article 22's procedural preconditions.[10] Consequently, by the same vote, the Court decided that it had no jurisdiction to entertain Georgia's application.[11] Because Article 22's provisions are similar to those in other compromissory clauses, the Court's reasoning will have

[7] International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 UNTS 195 [hereinafter CERD]. Article 22 provides:

> Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

[8] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Preliminary Objections, para. 22.

[9] *See id.*, para. 187(1)(a). In favor were President Owada; Judges Al-Khasawneh, Simma, Abraham, Keith, Supúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, Greenwood, and Donoghue; and Judge *ad hoc* Gaja. Opposed were Vice-President Tomka and Judges Koroma, Skotnikov, and Xue. The Court included Judge *ad hoc* Gaja (appointed by Georgia).

[10] *See id.*, para. 187(1)(b). In favor were Vice-President Tomka and Judges Koroma, Al-Khasawneh, Keith, Supúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, and Xue. Opposed were President Owada; Judges Simma, Abraham, Cançado Trindade, and Donoghue; and Judge *ad hoc* Gaja.

[11] *See id.*, para. 187(2). President Owada and Judges Koroma, Simma, Abraham, Greenwood, and Donoghue appended separate opinions; Vice-President Tomka and Judge Skotnikov appended declarations; Judge Cançado

important consequences for future litigants. The judgment will therefore be read closely by foreign ministry legal advisers and others who might be called upon to counsel clients about the filing of cases at the Court. As a case report has already been published in this *Journal*, only a few additional points will be noted.[12]

In response to Russia's first objection concerning the lack of a dispute between the parties under the CERD, the Court was broadly in agreement on the existence of a "dispute," as reflected by the proportion of votes in favor of that subparagraph of the *dispositif*. There was considerable divergence, however, as to the meaning of "dispute" and hence as to the critically important question of when the dispute arose.[13] In setting out the law on the existence of a dispute, the judgment established a three-part test: (1) "disagreement on a point of law or fact"; (2) "whether that disagreement is with respect to 'the interpretation or application' of CERD"; and (3) "whether that disagreement existed as of the date of the Application."[14] None of that, in itself, was especially novel, but the Court also innovatively added that, for a dispute to exist: (1) "the exchanges [between the parties] must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter"[15] (the notice requirement), and (2) the applicant must have made a claim, and the respondent must have "positively opposed it" (the positive-opposition requirement).[16] Upon reviewing the evidence, much of which it dismissed as without "legal significance,"[17] the Court found that a dispute had, in fact, arisen between the parties, but only as of August 9, 2008, much later than Georgia suggested.[18] The Court therefore rejected Russia's first preliminary objection, but because the Court found that the dispute

Trindade appended a dissenting opinion; President Owada, Judges Simma, Abraham, and Donoghue, and Judge *ad hoc* Gaja appended a joint dissenting opinion.

[12] *See* Bart M. J. Szewczyk, Case Report: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), 105 AJIL 747 (2011). On the earlier provisional measures order, see Cindy Galway Buys, Case Report: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), 103 AJIL 294 (2009), and D. Stephen Mathias, *The 2008 Judicial Activity of the International Court of Justice*, 103 AJIL 527, 537–38 (2009).

[13] Worded as it was (that is, whether the first preliminary objection should be rejected or upheld), the vote masked the extent of support among members of the Court for the judgment's definition of the term "dispute." For example, though voting with the majority, President Owada and Judges Abraham, Donoghue, and Simma disagreed with the Court's definition, and though voting in the minority, Vice-President Tomka and Judge Skotnikov agreed with it. *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Preliminary Objections, Decl. Tomka, V.P.; Decl. Skotnikov, J.

[14] *Id.*, Preliminary Objections, para. 31.

[15] *Id.*, para. 30. The Court did acknowledge that "it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court," but it went on to say that an "express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice." *Id.*

[16] *Id.*, para. 31; *see also id.*, para. 30 (citing South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, 1962 ICJ 319, 328 (Dec. 21)). That said, the Court recognized that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for." *Id.*, para. 30. A number of the separate opinions criticized these notice and positive-opposition requirements, explaining how they created hurdles to the Court's jurisdiction not in accord with precedent. *See id.*, Sep. Op. Owada, P.; Sep. Op. Simma, J., para. 6; Sep. Op. Abraham, J.; Sep. Op. Donoghue, J.

[17] *See, e.g., id.*, Preliminary Objections, para. 54.

[18] *See id.*, para. 113. The Court's method of evaluating the evidence submitted by Georgia to demonstrate the existence of a dispute was also severely criticized by a number of members, particularly Judge Simma. He wrote that "by finding specific faults or defects with each piece of documentary evidence" dated prior to August 9, 2008 (alleged faults as to "formal designation, authorship, executive inaction, attribution, and notice"), and

had existed for only three days prior to August 12, the day that the application was filed,[19] Georgia's victory would prove to be a pyrrhic one, as will become evident.

In considering Russia's second objection, the Court was called upon to interpret the phrase "which is not settled by negotiation or by the procedures expressly provided for in this Convention." Over a vigorous joint dissenting opinion, the Court agreed with Russia that Article 22's text ("which is not settled by") created a procedural precondition that had to be satisfied for the Court to exercise its jurisdiction.[20] The Court then inquired into whether the requisite "negotiations" had taken place (it being conceded by Georgia that it did not use "procedures expressly provided for in this Convention"). To make that determination, the Court indicated that it must "assess[] whether Georgia genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning [Russia's] compliance" with its CERD obligations, and if it did, "whether Georgia pursued these negotiations as far as possible with a view to settling the dispute."[21] Applying the law to the facts, the Court found that neither party attempted to negotiate an end to their CERD dispute; Article 22's procedural requirements therefore were not satisfied.[22] Hence, the second preliminary objection was upheld and, lacking jurisdiction to proceed, the case was dismissed.[23] The Court's conclusion regarding the existence of negotiations was made considerably easier by the Court's previous finding that the "dispute" between the parties concerning the CERD arose only days before Georgia filed its application with the Court.[24] After all, negotiations can commence only once a dispute arises.[25] The Court's conclusion was also facilitated by the requirement that the

then categorically rejecting that evidence because of those faults, the Court "fail[ed] to capture possible differences in the degrees of probative value that various documents may exemplify." *Id.*, Sep. Op. Simma, J., paras. 4, 7.

[19] Article 22 does not require the identification of the specific date when a dispute arose. As suggested below, it appears that the Court specified the date because that date was relevant, in its view, to the evaluation of Russia's second preliminary objection.

[20] It appears that the provisional measures order also interpreted Article 22 as establishing a type of requirement. *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures, 2008 ICJ REP. 353, para. 114 (Oct. 15). In its preliminary objections judgment, the Court stressed that the clause would be of no effect if it were not interpreted as a requirement. Taking a different approach, the joint dissenting opinion concluded that "the Court has never conditioned its jurisdiction on the existence of prior negotiations between the parties, except on the basis of an express provision to that effect." *Id.*, Preliminary Objections, Joint Diss. Op. Owada, P., Simma, Abraham & Donoghue, JJ., para. 25. The text here, the dissenting judges argued, did not contain an express condition.

[21] *Id.*, Preliminary Objections, para. 162. Previously, in its provisional measures order, the Court had explained that "negotiation" meant that "some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD." *Id.*, Provisional Measures, 2008 ICJ REP., para. 114.

[22] *See id.*, Preliminary Objections, paras. 178, 181. In its provisional measures order, the Court considered, prima facie, that it had jurisdiction because, inter alia, issues relating to the CERD were "raised in bilateral contacts between the Parties" and before the Security Council (and there commented upon by Russia), with the consequence that the "Russian Federation was made aware of Georgia's position in that regard." *Id.*, Provisional Measures, 2008 ICJ REP., para. 115.

[23] This was the first time that the Court concluded that it lacked jurisdiction only because the condition of negotiation had not been satisfied. *See id.*, Preliminary Objections, Joint Diss. Op., para. 63.

[24] *See id.*, Preliminary Objections, para. 113.

[25] Thus, as Judges Donoghue and Simma noted, if the Court had found that the dispute between the parties existed before August 9, it would no doubt have also found that negotiations had taken place, and hence would have rejected Russia's second preliminary objection. *See id.*, Sep. Op. Simma, J., para. 5; Sep. Op. Donoghue, J., para. 21.

precondition(s)[26] had to be satisfied "before the seisin of the Court,"[27] thereby effectively limiting the time period for possible negotiations in this case to three days. Though it could no longer proceed with its case at the Court, Georgia still had another judicial forum available to it: the European Court of Human Rights.[28]

It is in the nature of a preliminary objections judgment that it will reprise the jurisdictional arguments made at the provisional measures phase (if there is one)—and so it was here. Objecting to Georgia's request for the indication of provisional measures, Russia had argued three of the four points that it would raise again in its preliminary objections.[29] At that earlier stage, where a lower, prima facie threshold applied, the Court rejected Russia's jurisdictional demurrers. Now, though, on second look, the Court interpreted and applied Article 22 differently and sustained Russia's second objection. It is unusual, though not unprecedented, for the Court to essentially reverse itself, as it did here, by throwing out a claim that it had previously, albeit provisionally, recognized.[30] In this case, the order indicating provisional measures was made by a highly divided court on a vote of 8 to 7, and the preliminary objections judgment went the other way by a vote of 10 to 6. A third of the Court's membership had changed in the intervening years,[31] but two continuing members of the Court (Judges Keith and Supúlveda-Amor) changed their minds—and their votes, in the end, were decisive.[32] Since neither wrote separately at either stage, we do not know their reasons for switching sides, beyond their evident agreement with the judgment's conclusions.

The Court was clearly aware that its revised view on jurisdiction might mistakenly appear to be something other than a reflective reconsideration of Article 22's proper ambit and application in this case. For this reason, the Court made a point to recall in its judgment that its provisional measures order explicitly acknowledged (as such orders typically do) that "the decision given in the present proceedings in no way prejudge[d] the question of the jurisdiction of the Court."[33] Similarly, in his separate opinion, Judge Greenwood, though not a member of

[26] Because Georgia did not assert that it used or attempted to use "procedures expressly provided for in this Convention," the Court did not need to decide whether Article 22 preconditioned jurisdiction on an applicant's resort to both those procedures *and* negotiations or to just one of those mechanisms. *See id.*, Preliminary Objections, para. 183. The joint dissenting opinion concluded that the two mechanisms were not cumulative. *See id.*, Joint Diss. Op., para. 41.

[27] *Id.*, Preliminary Objections, para. 141. As the joint dissenting opinion pointed out, this closing date for negotiations was considerably earlier than the one that the Court applied in analogous circumstances in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croat. v. Serb.), Preliminary Objections, 2008 ICJ REP. 412, para. 85 (Nov. 18) (condition must be satisfied by "the date when the Court decides on its jurisdiction").

[28] *See* Georgia v. Russia (No. 2), App. No. 38263/08 (Eur. Ct. H.R. Dec. 13, 2011) (declaring the application admissible).

[29] It appears that Russia did not raise at the provisional measures stage the arguments that made up its fourth preliminary objection. *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Provisional Measures, paras. 71–72, 83, 98–103.

[30] *See* Jacob Katz Cogan, *The 2009 Judicial Activity of the International Court of Justice*, 104 AJIL 605, 608 & n.21 (2010).

[31] Judges Cançado Trindade, Donoghue, Greenwood, Xue, and Yusuf replaced Judges Buergenthal, Higgins, Parra-Aranguren, Ranjeva, and Shi. Judge Parra-Aranguren did not participate in the provisional measures phase of the case.

[32] If they had voted as they had previously, there would have been a tie vote on the second preliminary objection. President Owada, who voted against upholding the objection, would have had the casting vote.

[33] Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Preliminary Objections, para. 129 (quoting *id.*, Provisional Measures, 2008 ICJ REP., para. 148).

the Court at the provisional measures stage, also felt it important to point out that requests for the indication of provisional measures are decided "without the opportunity for the consideration of extensive evidence or the detailed analysis of legal issues which can be undertaken in later phases of the proceeding."[34]

Territorial and Maritime Dispute (Nicaragua v. Colombia)

In May, the Court issued two judgments in *Territorial and Maritime Dispute*—on Costa Rica's and Honduras's applications for permission to intervene pursuant to Article 62 of the Statute.[35] Costa Rica requested status as a nonparty. Honduras requested status as a party or, in the alternative, as a nonparty. This was the first time that a state had explicitly sought to intervene as a party under this article. In its application, Costa Rica sought to intervene in order to "inform[] the Court of the nature of Costa Rica's legal rights and interests [in the Caribbean Sea] and [to seek] to ensure that the Court's decision regarding the maritime boundary between Nicaragua and Colombia does not affect those rights and interests."[36] Honduras sought to intervene "to protect the rights of the Republic of Honduras in the Caribbean Sea . . . [and] to inform the Court of the nature of the legal rights and interests of Honduras which could be affected by the decision of the Court, taking account of the maritime boundaries claimed by the parties in the case."[37] Colombia did not object to the applications,[38] but Nicaragua did. By votes of 9 to 7 (Costa Rica)[39] and 13 to 2 (Honduras),[40] the Court found that it could not grant either of the applications. Though the Court issued separate judgments regarding the two applications, this review will consider them jointly.

The Court began its analyses by reviewing the legal framework for intervention under Article 62, which, it noted, requires the applicant to establish two elements.[41] First, the state seeking

[34] *Id.*, Sep. Op. Greenwood, J., para. 2.

[35] Previously, in 2007, the Court ruled on Colombia's preliminary objections to the jurisdiction of the Court. *See* D. Stephen Mathias, *The 2007 Judicial Activity of the International Court of Justice*, 102 AJIL 588, 602–04 (2008).

[36] Costa Rica Application for Permission to Intervene, para. 24, Territorial and Maritime Dispute.

[37] Honduras Application for Permission to Intervene, para. 33, Territorial and Maritime Dispute.

[38] Indeed, Colombia argued that both Costa Rica and Honduras satisfied the requirements of Article 62 for intervention as nonparties. Colombia also did not object to Honduras's request to intervene as a party. *See* Territorial and Maritime Dispute, Application by Honduras for Permission to Intervene, para. 55.

[39] In favor were President Owada and Vice-President Tomka; Judges Koroma, Keith, Supúlveda-Amor, Bennouna, Skotnikov, and Xue; and Judge *ad hoc* Cot. Opposed were Judges Al-Khasawneh, Simma, Abraham, Cançado Trindade, Yusuf, and Donoghue, and Judge *ad hoc* Gaja. Judge Keith and Judge *ad hoc* Gaja appended declarations; Judges Al-Khasawneh, Abraham, and Donoghue appended dissenting opinions; Judges Cançado Trindade and Yusuf appended a joint dissenting opinion. Having invoked Article 24(1) of the Statute, Judge Greenwood did not participate in the judgment. *See* Verbatim Record, Territorial and Maritime Dispute, Application by Costa Rica for Permission to Intervene, ICJ Doc. CR 2010/12, at 11.

[40] In favor were President Owada and Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Keith, Supúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, and Xue; and Judges *ad hoc* Cot and Gaja. Opposed were Judges Abraham and Donoghue. These last two judges agreed with the Court that Honduras's application to intervene as a party should be rejected. They believed, however, that the application should have been granted to allow Honduras to intervene as a nonparty. Judges Al-Khasawneh and Keith appended declarations; Judges Cançado Trindade and Yusuf appended a joint declaration; and Judges Abraham and Donoghue appended dissenting opinions. Having invoked Article 24(1) of the Statute, Judge Greenwood did not participate in the judgment. *See id.* Judge Skotnikov, who was not present during the Honduras hearings, also did not participate in the judgment.

[41] Because, as will be seen, the application was rejected for other reasons, the Court did not need to decide whether Honduras could intervene as a party. Nonetheless, the Court's short discussion of the issue (in both judgments)

to intervene must show "its own interest of a legal nature in the main proceedings, and a link between that interest and the decision that might be taken by the Court at the end of those proceedings."[42] Innovatively, the Court distinguished between an "interest of a legal nature" and a "right." Article 62, the Court pointed out, requires that a state seeking to intervene as a nonparty "establish that its *interest* of a legal nature may be affected" and not "that one of its *rights* may be affected."[43] A legal interest was "a real and concrete claim of [the] State [requesting intervention], based on law."[44] Since an interest of a legal nature was not the same as a right, it "[did] not benefit from the same protection as an established right and [was] not subject to the same requirements in terms of proof."[45] Second, the state seeking to intervene must explicate, as stated in Article 81(2)(b) of the Rules of Court, "the precise object of the intervention," which "must be connected with the subject of the main dispute."[46]

Having set out Article 62's requirements, the Court examined the legal interests claimed by Costa Rica and Honduras in support of their applications to intervene and whether those legal interests would be affected by the Court's eventual decision on the merits. The Court accepted (at least for argument's sake) the notion that Costa Rica had an interest of a legal nature since the maritime area that it claimed[47] overlapped in part with those areas claimed by Nicaragua and Colombia in this case.[48] The Court did not find, however, that that this legal interest would

helpfully reiterates the distinction between party and nonparty intervention under Article 62 (which does not use those terms) and confirms the possibility of intervention as a party, which was discussed previously by a chamber of the Court in *Land, Island and Maritime Frontier Dispute* (El Sal./Hond.), Application by Nicaragua for Permission to Intervene, 1990 ICJ REP. 92, para. 99 (Sept. 13). Here, the Court explained that whereas "the status of intervener as a party requires . . . the existence of a basis of jurisdiction as between the States concerned, the validity of which is established by the Court at the time when it permits intervention," "such a basis of jurisdiction is not a condition for intervention as a non-party." Territorial and Maritime Dispute, Application by Honduras for Permission to Intervene, para. 28; *accord id.*, Application by Costa Rica for Permission to Intervene, paras. 38–39; *see* Rules of Court, Art. 81(2)(c). "If it is permitted by the Court to become a party to the proceedings," the Court continued, "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." Territorial and Maritime Dispute, Application by Honduras for Permission to Intervene, para. 29. By contrast, "a State permitted to intervene in the proceedings as a non-party 'does not acquire the rights, or become subject to the obligations, which attached to the status of a party, under the Statute and Rules of Court, or the general principles of procedural law.'" *Id.* (quoting Land, Island and Maritime Frontier Dispute, Application by Nicaragua for Permission to Intervene, 1990 ICJ REP., para. 99).

[42] Territorial and Maritime Dispute, Application by Costa Rica for Permission to Intervene, para. 23; *id.*, Application by Honduras for Permission to Intervene, para. 33. Honduras asserted that Article 62, like Article 63, provided a "right" to intervene. The Court dismissed the suggestion. *Id.*, para. 36. *But see id.*, Diss. Op. Abraham, J., paras. 5–15.

[43] *Id.*, Application by Costa Rica for Permission to Intervene, para. 26 (emphasis added); *id.*, Application by Honduras for Permission to Intervene, para. 37 (emphasis added). It appears that the Court left open the possibility of requiring states seeking to intervene as a party to demonstrate a legal right.

[44] *Id.*, Application by Costa Rica for Permission to Intervene, para. 26; *id.*, Application by Honduras for Permission to Intervene, para. 37. This was the first time that the Court defined the term "interest of a legal nature."

[45] *Id.*, Application by Costa Rica for Permission to Intervene, para. 26; *id.*, Application by Honduras for Permission to Intervene, para. 37.

[46] *Id.*, Application by Honduras for Permission to Intervene, para. 44. The Court explained that the proper object of an intervention "is to enable a third State . . . to participate in the main case in order to protect" a "legal interest [that] might be affected by a possible decision of the Court." *Id.*, para. 46; *accord id.*, Application by Costa Rica for Permission to Intervene Costa Rica, para. 33.

[47] *See id.*, Application by Costa Rica for Permission to Intervene, para. 55 & accompanying sketch-map.

[48] *See id.*, para. 65. Both Colombia and Nicaragua, while "differ[ing] in their assessment as to the limits of the area in which Costa Rica may have a legal interest," nonetheless "recognize[d] the existence of Costa Rica's interest in at least some areas claimed by the parties to the main proceedings." *Id.*

be affected by the Court's final judgment. In particular, Costa Rica did not "show that its interest of a legal nature . . . . need[ed] a protection that [was] not provided by the relative effect of decisions of the Court under Article 59 of the Statute," which limits the "binding force" of the Court's decision to "the parties and in respect of that particular case."[49] Neither Colombia nor Nicaragua asked the Court to fix the southern endpoint of the maritime boundary between them, as doing so might "affect [a] third State's interests," such as those of Costa Rica.[50] Further, the Court indicated that it "will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved."[51] Hence, Costa Rica's application for permission to intervene was denied.[52]

Honduras's intervention hinged on two distinct claims: first, the Court's 2007 judgment in *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*[53] did not delimit the maritime border between Honduras and Nicaragua east of the 82nd meridian, and second, the Court would need to decide in the main proceedings whether Honduras's 1986 Maritime Delimitation Treaty with Colombia (1986 Treaty) was still in force.[54] If these assertions were true, then conceivably Honduras would have a legal interest potentially affected by the dispute between Nicaragua and Colombia insofar as that dispute pertained to the area north of the 15th parallel and between meridian 79° 56′ 00″ and the 82nd meridian. That area would be claimed by Honduras (vis-à-vis Nicaragua) and also assigned to it by the 1986 Treaty (in regard to Colombia).[55] In response to Honduras's contentions, the Court, while being sure not to impermissibly cross the line into interpreting its 2007 judgment, made clear that in that case it had indeed delimited the maritime border between Honduras and Nicaragua east of the 82nd meridian. The fact (pointed to by Honduras) that the Court had left open the endpoint of the straight bisector line that it set out was immaterial because (in accordance with the Court's prior practice) it had done so "in order to refrain from prejudicing the rights of third

[49] *Id.*, para. 87. At the same time, the Court acknowledged, referring to its judgment in *Land and Maritime Boundary Between Cameroon and Nigeria*, that "in the case of maritime delimitations where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient." Territorial and Maritime Dispute, Application by Costa Rica for Permission to Intervene, para. 85 (citing Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Eq. Guinea intervening), 2002 ICJ REP. 303, para. 238 (Oct. 10)).

[50] Territorial and Maritime Dispute, Application by Costa Rica for Permission to Intervene, para. 88.

[51] *Id.*, para. 89.

[52] Judge Donoghue argued, in part, that, even if the Court could protect third states, intervention should still be granted because Article 62 "does not require the applicant for intervention to prove that intervention is the *only* means by which the Court can avoid affecting an interest of a legal nature." *Id.*, Diss. Op. Donoghue, J., para. 6; *accord id.*, Application by Honduras for Permission to Intervene, Diss. Op. Donoghue, J., para. 14. Judge Al-Khasawneh emphasized that Article 62 provides a different form of protection from Article 59 and so the latter cannot substitute for the former. *Id.*, Application by Costa Rica for Permission to Intervene, Diss. Op. Al-Khasawneh, J., para. 11. Judge Abraham similarly pointed out that despite the Court's attempt to shield third states in its decision on the merits, if the Court does not receive the more detailed information that intervention provides, it will be unable to accomplish that very goal. *Id.*, Diss. Op. Abraham, J., para. 12.

[53] Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), 2007 ICJ REP. 659 (Oct. 8).

[54] Unlike its judgment on Costa Rica's request, which assumed a legal interest and then focused on effect, the Court did not distinguish the issue of Honduras's "legal interest" from that of whether that interest would be affected by the decision in the case.

[55] The eastern edge of the area claimed by Honduras is, for expositional purposes, somewhat simplified here. More precise measurements can be found in the Court's judgment. *See* Territorial and Maritime Dispute, Application by Honduras for Permission to Intervene, para. 57.

States," which by definition could not include Honduras.[56] Nor did the 1986 Treaty create for Honduras a legal interest that may be affected because, the Court noted, when it issues its judgment in the main proceedings, it will not consider that bilateral treaty in its determination of the maritime boundary between Colombia and Nicaragua (just as it did not rely upon that same treaty in its 2007 judgment regarding the boundary between Honduras and Nicaragua).[57] Having rejected both of Honduras's arguments, its application to intervene was denied.

Only twice before (out of eleven requests) had the Court granted an Article 62 application to intervene (and one of those times only in part),[58] so the judgments' *dispositifs* were fully in line with the Court's previous practice. Though the Statute's text could easily be interpreted to allow for a liberal approach to intervention, the appropriate standard depends on a host of policy considerations,[59] and the Court has always been strict. Nevertheless, while the outcomes here were typical of the past, the judgments' reasoning appeared to portend a different future. The Court's distinction between legal interests and rights, effectively making the former easier to demonstrate than latter, seemed to signal its inclination to treat interventions more generously. That inclination, if indeed it was an inclination, was underscored by the Court's decision to draw the distinction in a case in which doing so was unnecessary: it was not raised by the parties, did not affect the outcome (though the Costa Rica vote was close), and was made over the objection of several judges.[60] It is impossible to say definitively whether the Court has actually changed direction on Article 62 interventions (especially in maritime delimitation cases),[61]

[56] *Id.*, para. 64 (quoting Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea). The Court noted that its prior decision was res judicata and that its reasoning in that judgment was important to a proper understanding of the *dispositif*. *Id.*, para. 70.

[57] *See id.*, para. 73. Judge Abraham, in his dissenting opinion, stated that Honduras's application to intervene as a nonparty should have been granted for two reasons: first, because the decision in the main proceedings may fix the endpoint of the bisector line established in the Court's 2007 judgment, and second, because the decision may affect Honduras's ability to claim territory granted to it by the 1986 treaty. *Id.*, Diss. Op. Abraham, J., paras. 27–35. Judge Donoghue, in her dissenting opinion, similarly argued that the existence of overlapping bilateral claims (Honduras v. Colombia; Nicaragua v. Colombia) in the same area, as well as the possibility that the Court's decision could effectively set the endpoint to the 2007 judgment's line, established a sufficient legal interest to grant Honduras's application. *Id.*, Diss. Op. Donoghue, J., paras. 43–49.

[58] Previously, a chamber of the Court granted Nicaragua's application in part in *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, 1990 ICJ REP., para. 105, and the full Court granted Equatorial Guinea's application in *Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon v. Nigeria), Application by Equatorial Guinea for Permission to Intervene, 1999 ICJ REP. 1029, para. 18 (Oct. 21).

[59] *See* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Application by the Philippines for Permission to Intervene, 2001 ICJ REP. 575, 630, para. 20 (Oct. 23) (Sep. Op. Weeramantry, J. *ad hoc*).

[60] These judges thought that those two concepts were effectively one and the same. *See, e.g.*, Territorial and Maritime Dispute, Application by Costa Rica for Permission to Intervene, Diss. Op. Al-Khasawneh, J.; Decl. Keith, J.; *id.*, Application by Honduras for Permission to Intervene, Decl. Al-Khasawneh, J.; Decl. Keith, J. A judge may have disagreed with the Court's distinction and still have favored a liberal approach to intervention. *See, e.g.*, *id.*, Application by Costa Rica for Permission to Intervene, Diss. Op. Al-Khasawneh, J.

[61] Indeed, as Judge Abraham pointed out in his dissenting opinion on Costa Rica's request for permission to intervene, given the techniques maintained by the Court to ensure that its judgment in the main proceedings does not affect the interests of third states, "on voit mal dans quelle circonstance la Cour autoriserait jamais, à l'avenir, l'intervention d'un Etat tiers dans une affaire de délimitation maritime." *Id.*, Application by Costa Rica for Permission to Intervene, Diss. Op. Abraham, J., para. 26. As several judges pointed out, the Court's rulings have had the practical effect of establishing a mechanism for third states to submit information about their legal interests that may be affected by the Court's decision—the filing of an application to intervene that the Court will reject—but the mechanism is highly inefficient (requiring oral proceedings, per Article 84 of the Rules of Court, if there is an objection), thereby delaying the resolution of the main case and increasing the costs of the proceedings to the parties. *See id.*, para. 12; *id.*, Decl. Gaja, J. *ad hoc*, para. 4; *id.*, Application by Honduras for Permission to Intervene, Diss.

but a preliminary, if tentative, confirmation would come two months later in *Jurisdictional Immunities of the State*, discussed below.[62]

Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece)

In December, the Court issued its judgment in *Application of the Interim Accord of 13 September 1995*, in which the former Yugoslav Republic of Macedonia (FYROM) claimed that Greece had breached its obligations under Article 11, paragraph 1, of the Interim Accord by objecting to the FYROM's admission to the North Atlantic Treaty Organization (NATO).[63] That paragraph provides that Greece "agrees not to object to the application by or the membership of [the FYROM] in international, multilateral and regional organizations and institutions of which [Greece] is a member" except "if and to the extent the [FYROM] is to be referred to in such organization or institutions differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)"—that is, as "the former Yugoslav Republic of Macedonia."[64]

The Court first rejected Greece's claims that the Court lacked jurisdiction and that the application was inadmissible.[65] In doing so, it noted that the dispute before it did not pertain to the difference over the name of the applicant,[66] nor did it concern conduct attributable to NATO and its member states.[67] Moreover, the Court dismissed Greece's assertion, based on the Court's decision in *Northern Cameroons*, that a judgment in this case would not "have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties";[68] although the Court cannot order NATO to reverse its decision and admit the FYROM, the Court's judgment "would have 'continuing applicability' for there is an 'opportunity for a future act of interpretation or application'" of the Interim Accord.[69] The vote on

Op. Donoghue. J., para. 58. If the Court continues to be reluctant to grant interventions, then, as Judge Donoghue and Judge *ad hoc* Gaja suggested, it might consider instituting a new procedure to allow for the more efficient submission of relevant information by nonparties. *Id.*, para. 59; *id.*, Application by Costa Rica for Permission to Intervene, Decl. Gaja, J. *ad hoc*, para. 5.

[62] *See infra* note 115 and accompanying text.

[63] Interestingly, throughout its judgment, the Court referred to the parties as "the Applicant" and "the Respondent" instead of using their names, its usual practice.

[64] 1891 UNTS 3, 7.

[65] The Court's jurisdiction was founded on Article 21, paragraph 2, of the Interim Accord. The paragraph provides: "Any difference or dispute that arises between the Parties concerning the interpretation or implementation of this Interim Accord may be submitted by either of them to the International Court of Justice, except for the difference referred to in Article 5, paragraph 1." *Id.* at 10. Greece had informed the Court that, while it considered that the Court manifestly lacked jurisdiction, it would not raise preliminary objections pursuant to Article 79 of the Rules of Court. Instead, it would address those issues together with the merits. Greece stated that it proceeded in this manner so that the Court would not be "precluded from examining any part of the substantive record that could illuminate issues of jurisdiction and admissibility." Verbatim Record, Application of the Interim Accord of 13 September 1995, ICJ Doc. CR 2011/8, at 46–47.

[66] If it had, the Court's jurisdiction would have been precluded by Article 21, paragraph 2, of the Interim Accord.

[67] Consequently, the rule in *Monetary Gold Removed from Rome in 1943* (It. v. Fr., UK & U.S.), Preliminary Question, 1954 ICJ REP. 19, 32–33 (June 15), did not apply.

[68] Northern Cameroons (Cameroon v. UK), Preliminary Objections, 1963 ICJ REP. 15, 34 (Dec. 2).

[69] Application of the Interim Accord of 13 September 1995, para. 51. The Court also disagreed with Greece's claim that the Court's judgment would interfere with the diplomatic process set out by the Security Council in its Resolutions 817 (Apr. 7, 1993) and 845 (June 18, 1993).

jurisdiction and admissibility was 14 to 2 (Judge Xue and Judge *ad hoc* Roucounas voted against).[70]

On the merits, the Court found that Greece had breached its obligations under Article 11, paragraph 1, by objecting to the FYROM's admission to NATO. The vote was 15 to 1 (Judge *ad hoc* Roucounas voted against). In so doing, the Court concluded the following: the statements made by Greek government officials in 2007 and early 2008 constituted objections to, and not observations on, the FYROM's eligibility for NATO membership;[71] the FYROM's intention to call itself by its constitutional name ("Republic of Macedonia") "in its relations with and dealings within" NATO (once it was admitted to membership) did not satisfy the exception in Article 11, paragraph 1, to Greece's obligation not to object "if and to the extent the [FYROM] is to be referred to *in* such organization or institution differently than" as "the FYROM";[72] and Article 22 of the Interim Accord did not allow Greece to object to the FYROM's admission to NATO because "no provision of the North Atlantic Treaty required [Greece] to object to the [FYROM's] membership."[73]

Having concluded that Greece had breached its obligations under the Interim Accord, the Court took up Greece's arguments that the wrongfulness of its actions was precluded by the doctrine of *exceptio non adimpleti contractus* (which it claimed was a general principle of international law) and that its noncompliance was justified as a response to a material breach (under the law of treaties) or as a countermeasure (under the law of state responsibility). Each of these claims, the Court pointed out, was based on an allegation that the FYROM had breached its obligations under the Interim Accord and also that there was a connection between the FYROM's alleged breach and Greece's objection to the FYROM's admission to NATO. Hence, if there was no breach by the FYROM, or if there was no connection between a breach and Greece's objection, then the wrongfulness of Greece's objection could not be precluded or justified. Reviewing the FYROM's alleged breaches, the Court found only one (the use of a symbol in violation of Article 7(2) of the Interim Accord),[74] but the Court also found no evidence of a connection between that breach (which took place in 2004) and Greece's objection to the FYROM's NATO membership (in 2008).[75] Consequently, the Court rejected Greece's justifications. By analyzing Greece's claims in this way, the Court did not need to decide whether *exceptio non adimpleti contractus* was a general principle of international law or otherwise elaborate on the legal bases for Greece's arguments.[76]

[70] Judge Simma appended a separate opinion; Judge Bennouna and Judge *ad hoc* Vukas appended declarations; and Judge Xue and Judge *ad hoc* Roucounas appended dissenting opinions. Judge Al-Khasawneh did not participate in the judgment. *See infra* notes 158–59. The Court included Judges *ad hoc* Roucounas (appointed by Greece) and Vukas (appointed by the FYROM).

[71] Application of the Interim Accord of 13 September 1995, paras. 81–82.

[72] *Id.*, para. 103.

[73] *Id.*, para. 111. Article 22 provides: "This Interim Accord is not directed against any other State or entity and it does not infringe on the rights and duties resulting from bilateral or multilateral agreements already in force that the Parties have concluded with other States or international organizations."

[74] *See* Application of the Interim Accord of 13 September 1995, para. 153. In its discussion of the alleged breach of Article 5, paragraph 1, the Court helpfully elaborated on the duty to negotiate in good faith. *See id.*, paras. 131–32.

[75] The Court also "consider[ed] that this incident cannot be regarded as a material breach with the meaning of Article 60" of the Vienna Convention on the Law of Treaties. *Id.*, para. 163.

[76] *See id.*, para. 161. Judge Simma, in his separate opinion, and Judge Bennouna, in his declaration, criticized the Court for not taking up the *exceptio* question. Judge Simma would have found that no such principle exists

Its declaration that Greece had breached its obligations was, the Court concluded, a sufficient remedy.[77] There was no need to order Greece "to refrain from any future conduct that violates its obligation under Article 11, paragraph 1," as the FYROM had requested, because as the Court has noted many times, "As a general rule, there is no reason to suppose that a State . . . will repeat [its wrongful act] in the future, since its good faith must be presumed."[78] Despite the ruling, it appears that the Court's judgment will not have an effect on the FYROM's NATO membership bid.[79]

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)

In March, the Court indicated provisional measures in *Certain Activities*. Costa Rica alleged that Nicaragua had breached its international obligations by its "incursion into and occupation of Costa Rican Territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River."[80] Costa Rica requested that the Court indicate provisional measures, including that it order Nicaragua to withdraw its troops from Costa Rican territory and that it cease the construction of the canal, the felling of trees on Costa Rican territory, and the dredging.[81] In its order, the Court decided (unanimously) that "[e]ach Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*"—the word eventually used by both parties to refer to the "canal" (according to Costa Rica) or "natural channel" (according to Nicaragua)—"any personnel, whether civilian, police or security."[82] The Court also decided, by 13 votes to 4, that Costa Rica could nevertheless "dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where

in contemporary international law. Judge Bennouna would have recognized a limited principle. Judge *ad hoc* Roucounas, in his dissenting opinion, describes the *exceptio* principle as "si juste et si equitable qu'on le retrouve d'une façon ou d'une autre dans tous les systèmes juridiques," including in contemporary international law. *Id.*, Diss. Op. Roucounas, J. *ad hoc*, para. 66.

[77] *See* Application of the Interim Accord of 13 September 1995, Judgment, para. 168. In his declaration Judge *ad hoc* Vukas disagreed with the Court's refusal to order Greece to refrain from any future conduct in violation of its obligations under Article 11(1) of the Interim Accord.

[78] *Id.*, Judgment, para. 168 (quoting Navigational and Related Rights (Costa Rica v. Nicar.), 2009 ICJ REP. 213, para. 150 (July 13)).

[79] Indeed, as the secretary general of NATO stated after the Court issued its judgment:

> The ruling does not affect the decision taken by NATO allies at the Bucharest summit in 2008. We agreed that an invitation will be extended to the former Yugoslav Republic of Macedonia as soon as a mutually acceptable solution to the name issue has been reached. This decision was reiterated at subsequent summit and ministerial meetings.

Statement of the NATO Secretary General on ICJ Ruling (Dec. 5, 2011) (footnote omitted), *at* http://www.nato.int/cps/en/natolive/news_81678.htm.

[80] Application by Costa Rica, para. 41, Certain Activities Carried Out by Nicaragua in the Border Area, Provisional Measures. It has been suggested that the Nicaraguan presence in the territory was due to an error in Google Maps. *See* Frank Jacobs, *The First Google Maps War*, N.Y. Times Borderlines Blog (Feb. 28, 2012), *at* http://opinionator.blogs.nytimes.com/2012/02/28/the-first-google-maps-war/. Nicaragua denies any such error.

[81] *See* Provisional Measures Request by Costa Rica, para. 19, Certain Activities Carried Out by Nicaragua in the Border Area.

[82] Certain Activities Carried Out by Nicaragua in the Border Area, Provisional Measures, para. 86(1). The Court included Judges *ad hoc* Dugard (appointed by Costa Rica) and Guillaume (appointed by Nicaragua).

that territory is situated."[83] In doing so, Costa Rica was required to "consult with the Secretariat of the Ramsar Convention[84] in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect."[85] Both parties were also (unanimously) required to "refrain from any action which might aggravate or extend the dispute . . . or make it more difficult to resolve,"[86] and to "inform the Court as to its compliance."[87]

According to settled doctrine, for the Court to indicate provisional measures, the applicant must establish three elements: prima facie jurisdiction; a link between the rights to be protected and the measures requested; and risk of irreparable prejudice and urgency. As Nicaragua did not contest jurisdiction,[88] the Court did not linger long to confirm Costa Rica's contention that Article XXXI of the Pact of Bogotá[89] "appear[ed], prima facie, to afford a basis on which its jurisdiction could be founded."[90] Arriving at the second element, the Court took an innovative turn. Instead of proceeding directly to the requirement that a link be established between the right and the measures, the Court paused and noted that it "may exercise th[e] power [to indicate provisional measures] only if it is satisfied that the rights asserted by a party are at least plausible."[91] This novel "plausibility" element had been hinted at in the 2009 provisional measures order in *Questions Relating to the Obligation to Prosecute or Extradite* (the most recent such order),[92] but the Court did not then separate out "plausibility" from the general linkage requirement or, indeed, indicate that plausibility was a condition for the Court's exercise of its powers. Though the Court, in that case, concluded that the rights asserted by Belgium "appear[ed] to be plausible,"[93] it did so without fanfare, and none of the judges who wrote separately commented on plausibility or suggested that it was now a stand-alone element. In

[83] *Id.*, para. 86(2).

[84] [Author's note: Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, TIAS No. 11,084, 996 UNTS 245.]

[85] Certain Activities Carried Out by Nicaragua in the Border Area, para. 86(2). Voting in favor were President Owada and Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood, and Donoghue; and Judge *ad hoc* Dugard. Voting against were Judges Sepúlveda-Amor, Skotnikov, and Xue, and Judge *ad hoc* Guillaume. The dissenting judges did not agree with the Court's decision to allow Costa Rican, but not Nicaraguan, personnel into the disputed territory. Doing so, they argued, gave the appearance of prejudging the merits, as a state can have obligations regarding territory (such as the wetland at issue) only if it maintains sovereignty over that territory. Instead, to the dissenters, both parties should have been required to protect the wetland and to consult with the Ramsar Convention secretariat. *See id.*, Decl. Skotnikov, J., paras. 12–13; Sep. Op. Sepúlveda-Amor, J., para. 34; Decl. Xue, J.; Decl. Guillaume, J. *ad hoc*, para. 19. For the Court's view, see *infra* note 98 and accompanying text.

[86] Certain Activities Carried Out by Nicaragua in the Border Area, Provisional Measures, para. 86(3).

[87] *Id.*, para. 86(4). Judges Koroma and Sepúlveda-Amor, and Judge *ad hoc* Dugard appended separate opinions. Judges Skotnikov, Greenwood, and Xue, and Judge *ad hoc* Guillaume appended declarations.

[88] *See id.*, para. 51.

[89] American Treaty on Pacific Settlement ("Pact of Bogotá"), 30 UNTS 84, 94.

[90] Certain Activities Carried Out by Nicaragua in the Border Area, Provisional Measures, para. 49.

[91] *Id.*, para. 53.

[92] Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Provisional Measures, 2009 ICJ REP. 139, para. 56 (May 28) ("Whereas the power of the Court to indicate provisional measures *should* be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible." (emphasis added)). This tentative language, though, was enough to spur the parties in *Certain Activities* to make arguments regarding plausibility during the oral proceedings. *See* Verbatim Record, Certain Activities Carried Out by Nicaragua in the Border Area, Provisional Measures, ICJ Docs. CR 2011/1–CR 2011/4.

[93] *Id.*, para. 57.

Certain Activities, however, the Court highlighted plausibility and characterized it as a requirement—lest there be any mistake going forward that it was now a distinct element and black-letter law. Having done so, and having examined the evidence and arguments, the Court concluded that the rights asserted by Costa Rica were plausible and also that the claimed rights and the measures requested were linked.[94]

It was at the third (or now fourth) element—irreparable prejudice and urgency—that the Court narrowed Costa Rica's request, since by the time the hearings had concluded, "the work in the area of the *caño* ha[d] come to an end."[95] The Court was particularly concerned with the possibility that the "situation [of competing claims over disputed territory] gives rise to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death."[96] For that reason, the Court required each party to refrain from sending any personnel into the disputed territory, with the exception, as noted above, of Costa Rican civilian environmental protection personnel.[97] The Court excepted Costa Rican personnel (as opposed to both Costa Rican *and* Nicaraguan personnel) because, it pointed out, only Costa Rica had Ramsar Convention obligations regarding the disputed territory (Nicaragua's obligations pertained to adjacent territory).[98]

The new "plausibility" requirement elicited some comment and criticism in the individual opinions. Since the Court did not define "plausibility" and since that word does not have an established legal meaning, some judges thought the word too vague, such that it was difficult to know precisely what the standard entailed.[99] One possible consequence of this "indeterminacy" going forward, Judge Sepúlveda-Amor pointed out, was that states might "over-address the substance of the dispute at an early stage" and thus "overburden" Article 41 proceedings.[100] Judge Greenwood disagreed and suggested that such criticisms represented much ado about nothing, as the Court "was not adding a new requirement but simply spelling out the implications of the general principle that provisional measures exist to protect rights which might be adjudged to belong to one of the parties."[101] Nevertheless, however logical Judge Greenwood's conclusion might be, it does not acknowledge the practical consequences of the Court's move. There may be very good reasons for taking the step that it did by explicitly adding plausibility. Provisional measures orders restrict the rights of one or both parties—which should be done only if the rights asserted by the party requesting the measures have some minimal

[94] *See* Certain Activities Carried Out by Nicaragua in the Border Area, Provisional Measures, paras. 58–62.

[95] *Id.*, para. 74.

[96] This was so even though Nicaragua stated that none of its troops were then in the disputed territory and that it did not intend to send troops or other personnel there, aside from persons replanting trees or government inspectors who would monitor the reforestation. *Id.*, paras. 71–72.

[97] It appears that the Court's excepting such personnel was based, at least in part, upon a January 2011 report of a Ramsar Advisory Mission (requested by Costa Rica) that described the risk of environmental damage to the area. See *id.*, Decl. Greenwood, J., para. 13, and Misión Ramsar de Asesoramiento No. 69 (Jan. 3, 2011), *at* http://www.ramsar.org/pdf/ram/ram_rpt_69-CostaRica_s.pdf.

[98] *See* Certain Activities Carried Out by Nicaragua in the Border Area, Provisional Measures, para. 80.

[99] *See id.*, Sep. Op. Koroma, J.; Sep. Op. Sepúlveda-Amor, J.

[100] *Id.*, Sep. Op. Sepúlveda-Amor, J., paras. 3, 15. Though Judge Supúlveda-Amor did not mention it, some evidence of this possibility could be seen in the oral proceedings in this case. *See supra* note 92.

[101] *Id.*, Decl. Greenwood, J., para. 5. Judge Sepúlveda-Amor agreed that plausibility "should not be read as introducing a new requirement" but "as an attempt . . . to 'name' or 'label' a requirement already implicit in the Court's case law." *Id.*, Sep. Op. Sepúlveda-Amor, J., para. 16.

basis. Further, plausibility will provide greater transparency in the Court's reasoning: henceforth the Court will do explicitly (evaluate claims) what heretofore it has done implicitly through other doctrinal devices, such as urgency and irreparable harm. That said, parties will now need to prepare for and argue provisional measures requests differently than they have in the past, and the Court will need to evaluate the claimed rights at this stage (while simultaneously being attentive not to prejudge the merits) in ways that it has not had to do before. Those changes are substantial, and there are risks and costs that come with them, in addition to the benefits.

Why did the Court go to the trouble of making the plausibility point as clearly as it did (when it had never done so before, *Questions Relating to the Obligation to Prosecute or Extradite* notwithstanding), and why did it choose to do so in this case (which did not turn on the issue)? There is no clear answer. Whether a party needs to demonstrate, at least at some minimal level, the existence of the right to be protected at the provisional measures stage is an issue that has been discussed for many years inside and outside the Court. It has been the subject of separate opinions by Judge Shahabuddeen in *Passage Through the Great Belt*[102] and, more recently, Judges Abraham and Bennouna in *Pulp Mills*.[103] In the latter case, Judge Abraham explained that because *LaGrand* held that provisional measures orders are binding, the Court henceforth needed to undertake an evaluation of the rights asserted by the requesting party, and he used the word "plausible" to describe the standard appropriate to that evaluation.[104] Indeed, he wrote that "the Court itself will inevitably be required" to clarify the question.[105] Five years later, the Court did clarify its doctrine and, in doing so, squarely, if implicitly, adopted Judge Abraham's position.

In addition to the decision's novel elaboration of the requirements for the indication of provisional measures, it was also notable for the hints that it showed of an implied collaboration between the Court and the Organization of American States (OAS). In November 2010, ten days before Costa Rica filed its application with the Court, the OAS Permanent Council, in a resolution, endorsed the OAS secretary general's recommendations that Costa Rica and Nicaragua should, among other things, "avoid the presence of military or security forces in the area, where their existence might rouse tension."[106] Four months later, the Court's order referenced this precise language[107] and similarly required the two countries to "refrain from sending" such personnel into the disputed territory.[108] This connection was not lost on OAS

[102] Passage Through the Great Belt (Fin. v. Den.), Provisional Measures, 1991 ICJ REP. 12, 28 (July 29) (sep. op. Shahabuddeen, J.).

[103] Pulp Mills on the River Uruguay (Arg. v. Ur.), Provisional Measures, 2006 ICJ REP. 113, 137, para. 1 (July 13) (sep. op. Abraham, J.); *id.*, 2006 ICJ REP. at 142 (sep. op. Bennouna, J.). For a discussion of Judge Abraham's separate opinion, see D. Stephen Mathias, *The 2006 Judicial Activity of the International Court of Justice*, 101 AJIL 602, 610–11 (2007).

[104] Pulp Mills on the River Uruguay, Provisional Measures, 2006 ICJ REP. at 137, para. 11 (sep. op. Abraham, J.). It is interesting to note that French was the authoritative language of the Court's provisional measures order in *Questions Relating to the Obligation to Prosecute or Extradite*, in which it first used the word "plausible." 2009 ICJ REP., para. 76.

[105] Pulp Mills on the River Uruguay, Provisional Measures, 2006 ICJ REP. at 137, para. 2. (sep. op. Abraham, J.).

[106] Situation in the Border Area Between Costa Rica and Nicaragua, OAS Doc. CP/RES. 978, para. 1 (1777/10) (Nov. 12, 2010) [hereinafter Permanent Council Resolution].

[107] Certain Activities Carried Out by Nicaragua in the Border Area, para. 16.

[108] The Court's directive that the parties' "police and security forces [shall] co-operate with each other in a spirit of good neighbourliness, in particular to combat any criminal activity which may develop in the disputed territory"

Secretary General José Miguel Insulza, who, in a press release issued the day of the Court's decision, "welcomed the ruling" and made a point of quoting the parallel language of the resolution and the order, albeit emphasizing the mandatory nature of the Court's ruling (as opposed to the precatory language of the OAS resolution).[109] The OAS's support of the Court's order will likely improve the chances of its successful execution by the parties. Indeed, given the prior OAS resolution, the Court, attentive to the roles of other international actors in establishing expectations of compliance, might well have anticipated the OAS endorsement as it was considering its order.

Jurisdictional Immunities of the State (Germany v. Italy)

In July, by 15 votes to 1 (Judge *ad hoc* Gaja voted against), the Court decided to permit Greece to intervene as a nonparty in *Jurisdictional Immunities of the State*.[110] In its written observations, Greece pointed out, among other things, that the Court, when it resolves the dispute between Germany and Italy, will "establish whether a judgment handed down by a Greek court [specifically in the *Distomo* case, decided in favor of Greek nationals] can be enforced on Italian territory (having regard to Germany's jurisdictional immunity)."[111] Neither Germany nor Italy objected to Greece's application,[112] though Germany, in its written observations, expressed skepticism that Greece had demonstrated that it had "an interest of a legal nature which may be affected by the decision," as the Statute requires, because the enforcement of the Greek judgment was of interest only to the private litigants, not the Greek state.[113] In permitting the intervention, the Court noted that Greece had to show only that its legal interest "may" (not "will") be affected.[114] The Court, relying on its judgments just two months earlier in *Territorial and Maritime Dispute*, also pointed out that Greece need not "establish that one of its rights may be affected," only "an interest of a legal nature."[115] Consequently, because the Court "might find it necessary to consider the decisions of the Greek courts in the *Distomo* case," the Court decided—"in light of the principle of State immunity, for the purposes of making findings with regard to" Germany's submissions that Italy breached its obligations by declaring the Greek judgments enforceable—that Greece had a "sufficient" interest of a legal nature that

also resembled the Permanent Council's instruction that the parties should "review and strengthen cooperation mechanisms . . . in order to prevent, control, and confront" criminal activity. *Compare* Certain Activities Carried Out by Nicaragua in the Border Area, para. 78, *with* Permanent Council Resolution, *supra* note 106, para. 1.

[109] OAS Secretary General Welcomes International Court's Ruling in Costa Rica–Nicaragua Case, OAS Press Release E-557/11 (Mar. 8, 2011).

[110] Judge Cançado Trindade appended a separate opinion, and Judge *ad hoc* Gaja appended a declaration. Judge *ad hoc* Gaja had been appointed by Italy.

[111] Observations of Greece in Reply to the Written Observations of Germany and Italy, para. 5, Jurisdictional Immunities of the State, Application by Greece for Permission to Intervene.

[112] Jurisdictional Immunities of the State, Application by Greece for Permission to Intervene, para. 5.

[113] Written Observations of the Federal Republic of Germany on the Application for Permission to Intervene Filed by Greece, Jurisdictional Immunities of the State; Additional Observations of Germany, para. 4, Jurisdictional Immunities of the State. Germany could have objected for the reasons it gave in its written observations. That it did not can be interpreted as a strategic move, perhaps one made to ensure the expeditious conclusion to the proceedings.

[114] Jurisdictional Immunities of the State, Application by Greece for Permission to Intervene, para. 22.

[115] *Id.*, para. 24.

may be affected by the judgment.[116] Though the Court granted Greece's application, Greece's intervention was limited to the decisions in the *Distomo* case.[117]

This was just the third time that the Court has permitted a state to intervene under Article 62.[118] Though the Court may permit an intervention despite the opposition of one or both of the parties to the case,[119] in practice the views of the parties correlate well with the Court's decision.[120] While Germany expressed doubts that Greece had satisfied the Statute's requirements, neither party, as the Court was clear to note, opposed Greece's application. Thus, the position was similar to that in *Land and Maritime Boundary Between Cameroon and Nigeria*, in which neither party objected to Equatorial Guinea's application, which was also permitted.[121] Indeed, apparently due to the lack of opposition (and the absence of oral proceedings),[122] the Court's decisions in both *Land and Maritime Boundary* and *Jurisdictional Immunities* took the form of an order instead of a judgment.

Despite the relative ease with which the Court disposed of the matter, one might still be skeptical about its conclusion concerning Greece's legal interest. As Judge *ad hoc* Gaja, as he then was, explained in his declaration, Italy had no obligations under international law or European Union law to enforce the Greek judgments.[123] Consequently, for Judge *ad hoc* Gaja, Greece had no interest of a legal nature in such enforcement. Nor would the Court need to decide whether the Greek decisions were themselves in accordance with international law, since that was not at issue in the case. Taking a different tack, though, the Court concluded that it "might find it necessary to *consider* the decisions of the Greek courts" in order for it to rule on one of Germany's submissions, and that was "sufficient to indicate that Greece" had the necessary "interest of a legal nature which may be affected by the judgment in the main proceedings."[124] The Court did not elaborate on what "consider" meant or why such consideration established an "interest of a legal nature." Here, it appears, we have an important consequence of the Court's distinction in *Territorial and Maritime Dispute* between "rights" and "legal interests." Judge *ad hoc* Gaja concluded, correctly it would seem, that Greece had no right that would be affected by the Court's decision—but to the Court that was beside the point since Greece had the requisite legal interest.

[116] *Id.*, para. 25.

[117] *Id.*, para. 32.

[118] *See supra* note 58 and accompanying text.

[119] Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Application by Nicaragua for Permission to Intervene, 1990 ICJ REP. 92, para. 96 (Sept. 13).

[120] The Court has acknowledged that opposition of the parties is "very important," but it has also indicated that such opposition is "no more than one element to be taken into account by the Court." Continental Shelf (Libya/Malta), Application by Italy for Permission to Intervene, 1984 ICJ REP. 3, para. 46 (Mar. 21).

[121] Land and Maritime Boundary Between Cameroon and Nigeria, Application by Equatorial Guinea for Permission to Intervene, 1999 ICJ REP., paras. 12, 16, 18. Indeed, in its earlier judgment on preliminary objections, the Court had all but invited Equatorial Guinea (and Sao Tome and Principe) to intervene. *See* Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, 1998 ICJ REP. 275, para. 116 (June 11).

[122] *See* Jurisdictional Immunities of the State, Application by Greece for Permission to Intervene, para. 6; Rules of Court, Art. 84(2).

[123] Jurisdictional Immunities of the State, Application by Greece for Permission to Intervene, Decl. Gaja, J. *ad hoc*, para. 2 ("Italy is free in its relations with Greece to apply its domestic legislation on the recognition and enforcement of foreign judgments and to grant or refuse enforcement for reasons of its own choice.").

[124] Jurisdictional Immunities of the State, Application by Greece for Permission to Intervene, para. 25 (emphasis added).

Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia *v.* Thailand) (Cambodia v. Thailand)

In July, the Court granted Cambodia's request for the indication of provisional measures.[125] Cambodia, in its application pursuant to Article 60 of the Statute,[126] had asked the Court to declare that the obligation in the second paragraph of the operative clause of the Court's 1962 judgment—in which Thailand was to "withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple [of Preah Vihear], or in its vicinity on Cambodian territory"[127]—"is a particular consequence of the general and continuing obligation to respect the integrity of the territory of Cambodia, that territory having been delimited in the area of the Temple and its vicinity by the line on the Annex I map, on which the Judgment of the Court is based."[128] Cambodia's provisional measures request sought an order directing Thailand to "cease" its "incursions onto [this] territory."[129]

As the underlying case was a request for interpretation (in which the Court's jurisdiction is based entirely on Article 60),[130] the Court began by inquiring whether "there appears *prima facie* to exist a 'dispute' within the meaning of Article 60 of the Statute."[131] The Court found that the parties had several differences of opinion in relation to the operative clause of the 1962 judgment.[132] The Court next evaluated the plausible character of the alleged rights at stake in the case and their link with the measures requested. Because this provisional measures request was the first in an interpretation case since the incorporation of "plausibility" into its provisional measures doctrine, the Court explained that "in proceedings under Article 60 of the Statute, this supposes that the rights which the party requesting provisional measures claims to derive from the judgment in question, in light of its interpretation of that judgment, are at least plausible."[133] Cambodia's claimed rights in area surrounding the precincts of the temple were,

[125] Judge Sepúlveda-Amor did not participate in the decision. The Court included Judges *ad hoc* Cot (appointed by Thailand) and Guillaume (appointed by Cambodia).

[126] This was only the fifth time that the Court has been asked to render an interpretation in accord with Article 60.

[127] Temple of Preah Vihear (Cambodia v. Thai.), 1962 ICJ REP. 6, 37 (June 15).

[128] Application by Cambodia, para. 45, Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)*, Provisional Measures. Cambodia included what became known as the "Annex I map" in its application instituting proceedings against Thailand on October 6, 1959. It was then incorporated by reference in Cambodia's memorial.

[129] Provisional Measures Request by Cambodia, para. 3, Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)*. In particular, Cambodia requested that the Court order Thailand to "immediate[ly] and unconditional[ly] withdraw[]. . . all [its] forces *from those parts of Cambodian territory situated in the area" of the temple, to cease "all military activity" in that* area, and to "refrain from any act or action which could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings." *Id.*, para. 8.

[130] *See* Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)*, Provisional Measures, para. 15 ("[T]he Court's jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case.").

[131] *Id.*, para. 21.

[132] *Id.*, para. 31 (noting that the disputes concerned "the meaning and scope of the phrase 'vicinity on Cambodian territory'"; "the nature of the obligation imposed on Thailand . . . to 'withdraw any military or police forces, or other guards or keepers,' and, in particular, . . . the question of whether this obligation is of a continuing or an instantaneous character"; and "the question of whether the Judgment did or did not recognize with binding force the line shown on the annex I map as representing the frontier between the two Parties").

[133] *Id.*, para. 33.

to the Court, plausible.[134] Finding plausibility, the Court also concluded that Cambodia established "the necessary link between the alleged rights [of Cambodia to sovereignty in area in the vicinity of the temple] and the measures [it] requested."[135] Finally, the Court determined whether the failure to grant provisional measures would cause "irreparable prejudice" to the rights asserted by Cambodia and whether Cambodia's request was "urgen[t]."[136] Given the violence in the disputed area, including the loss of life and damage to the temple, the Court found both irreparable prejudice and urgency.[137] In considering what provisional measures to indicate, the Court recalled its discretion to act "independently of the parties' requests," including its power to indicate measures against both parties, in order to "prevent[] the aggravation or extension of the dispute."[138] The Court therefore decided, by 11 votes to 5, that "[b]oth Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone [PDZ], as defined in paragraph 62 of the present Order, and refrain from any military presence within that zone and from any armed activity directed at that zone."[139] The Court also ordered Thailand, by 15 votes to 1 (Judge Donoghue voted against), not to "obstruct Cambodia's free access to the Temple . . . or Cambodia's provision of fresh supplies to its non-military personnel in the Temple," and ordered both parties to "continue the cooperation which they have entered into within [the Association of Southeast Asian Nations (ASEAN)]," to "refrain from any action which may aggravate or extend the dispute," and to "inform the Court as to [their] compliance" with the provisional measures indicated.[140] This was only the second time that the Court has indicated provisional measures in an Article 60 case.[141]

As in *Certain Activities*, the Court's order seemed attentive to the positions and roles of other international bodies. Earlier in the year, on February 14, the Security Council met in closed session "on the situation on the border between Cambodia and Thailand."[142] In a press statement, the Council "called on the two sides to display maximum restraint and avoid any action that may aggravate the situation."[143] The Council also "urged the parties to establish a permanent ceasefire" and "expressed support for ASEAN's active efforts in this matter and encouraged the parties to continue to cooperate with the organization in this regard," noting the upcoming meeting of ASEAN foreign ministers.[144] At that meeting, on February 22, the

[134] *Id.*, paras. 39–40.

[135] *Id.*, para. 45.

[136] *Id.*, para. 47.

[137] *Id.*, para. 56.

[138] *Id.*, paras. 58–59.

[139] *Id.*, para. 69(B)(1). Voting in favor were Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, and Greenwood; and Judge *ad hoc* Guillaume. Voting against were President Owada; Judges Al-Khasawneh, Xue, and Donoghue; and Judge *ad hoc* Cot. Judge Koroma and Judge *ad hoc* Guillaume attached declarations; Judge Cançado Trindade appended a separate opinion; President Owada, Judges Al-Khasawneh, Xue, and Donoghue, and Judge *ad hoc* Cot appended dissenting opinions.

[140] *Id.*, paras. 69(B)(2)–(4), 69(C).

[141] The first time was in 2008 in *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) (Mex. v. U.S.), Provisional Measures, 2008 ICJ REP. 311 (July 16).

[142] Security Council Press Statement, UN Doc. SC/10174 (Feb. 14, 2011).

[143] *Id.*

[144] *Id.*

ASEAN foreign ministers, in a statement, welcomed Cambodia's and Thailand's "strong commitment to the . . . . 'settlement of differences or disputes by peaceful means' and 'renunciation of the threat or use of force,'" as well as their invitations for observers from Indonesia (the then-ASEAN chair) "to assist and support the parties in respecting their commitment to avoid further armed clashes between them."[145] Though neither the Council nor the ASEAN foreign ministers called for the establishment of a PDZ, and though neither took any formal decisions, both communicated through their statements an authoritative framework of expectations as to how Cambodia and Thailand were to resolve their dispute. In its order, the Court operated within this space, adding its own voice to those of the Council and ASEAN, and using its own authorities to promote and achieve the common goal of a peaceful resolution of the dispute.

Even so, the Court's order was not without controversy. Previously, when it indicated provisional measures in the context of armed clashes over contested territory, the Court either had deferred to the parties to determine the specific territory to which they should withdraw their armed forces or in which they should refrain from armed activity, or had limited the scope of the provisional measures to the territory in dispute between the parties (without the Court itself ascertaining the dimensions of that area). For example, in *Certain Activities*, the Court ordered the parties to refrain from sending personnel into the "disputed territory" (without defining that territory).[146] And in *Frontier Dispute*, decided in 1986, a chamber of the Court ordered the withdrawal of armed forces to positions that, in the first instance, should be "determined by an agreement between" the parties.[147] Here, the Court itself (going beyond Cambodia's request) not only defined a PDZ (delimiting a quadrangular area with straight lines connecting points, whose coordinates were calculated based on defined latitudes and longitudes) but included in that area territories not disputed by the parties (such as the temple itself).[148] Other than noting that the area of the temple "has been the scene of armed clashes between the Parties and . . . that such clashes may reoccur," and remarking that "defin[ing] a zone" was "necessary . . . in order to protect the rights which are at issue in these proceedings," the Court did not explain why it took this innovative step or why it chose the coordinates that it did for the PDZ.[149] As noted by the judges in dissent, the Court could instead have adopted the more usual approach of requiring the parties to refrain from military activities in, and directed

[145] Statement by the Chairman of the Association of Southeast Asian Nations (ASEAN) Following the Informal Meeting of the Foreign Ministers of ASEAN (Feb. 22, 2011), *at* http://www.aseansec.org/documents/N110222.pdf.

[146] Certain Activities Carried Out by Nicaragua in the Border Area, Provisional Measures, para. 86(1).

[147] Frontier Dispute (Burkina Faso/Mali), Provisional Measures, 1986 ICJ REP. 3, para. 32(1)(D) (Jan. 10); *cf.* Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Provisional Measures, 1996 ICJ REP. 13, para. 49 (Mar. 15) (ordering the parties to "ensure that the presence of any armed forces in the Bakassi Peninsula does not extend beyond the positions in which they were situated prior to 3 February 1996"—that is, the ceasefire line of February 1994).

[148] Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)*, Provisional Measures, para. 62.

[149] In his declaration, Judge Koroma stated that "the Court decided to create a provisional demilitarized zone of a size adequate to minimize the risk of further armed clashes—including shelling—in the disputed area." *Id.*, Decl. Koroma, J., para. 3. In his dissenting opinion, President Owada noted the argument, with which he did not agree, that "given the unique geomorphological characteristic of the terrain involved, the demilitarization of the territory in dispute between the Parties may be extremely difficult, if not impossible, to enforce, whereas this artificially created demilitarization zone takes into account the specific topographical features of the area and is therefore more amenable to effective enforcement." *Id.*, Diss. Op. Owada, P., para. 14.

toward, the "area of dispute" or the "area around the Temple." For these judges, the Court's approach raised questions regarding the prudence of the measures[150] and, more fundamentally, the Court's powers and legitimacy.[151] What's more, as Judge Donoghue noted in dissent, the expansive nature of the Court's decision might, going forward, "chill the appetite of States to consent even in a limited way to the Court's jurisdiction."[152] These concerns, it would seem, might have been resolved, or at least their seriousness might have been mitigated, if the Court had more clearly articulated the reasons for indicating the measures that it did.

II. COMPOSITION OF THE COURT AND RELATIONS WITH OTHER UN ORGANS

Composition of the Court. On November 10, the General Assembly and the Security Council met concurrently to fill the positions of the five members of the Court whose terms were scheduled to expire on February 5, 2012. There were initially eight candidates, including four current members.[153] Only Judge Simma (Germany) did not seek a new term. After the first round of voting, Judges Owada (Japan), Tomka (Slovakia), and Xue (China) were reelected, and Giorgio Gaja (Italy) was elected as a new member.[154] Since a fifth vacancy remained open, additional balloting took place in the Assembly (seven rounds total) and the Council (five rounds), but no other candidate received an absolute majority in both organs before adjournment. On November 22, the Assembly and the Council again met concurrently. Ever since the third round of voting in both the Assembly and the Council, only two candidates had remained on the ballot[155]—Judge Koroma (Sierra Leone) and Julia Subutinde (Uganda), a judge at the Special Court for Sierra Leone. Judge Koroma had consistently received an absolute majority of votes in the Council but not the Assembly, and Judge Subutinde had likewise received an absolute majority or nearly so in the Assembly but not the Council. After four additional rounds in the Assembly and three in the Council, this pattern continued. Neither candidate was elected before another adjournment.[156] Finally, on December 13, following a single additional ballot in each chamber, Judge Sebutinde was elected.[157]

[150] *Id.*, Diss. Op. Cot, J. *ad hoc*, paras. 22–23.

[151] *Id.*, Diss. Op. Owada, P., para. 10; Diss. Op. Al-Khasawneh, J.; Diss. Op. Xue, J.; Diss. Op. Donoghue, J., para. 27.

[152] *Id.*, Diss. Op. Donoghue, J., para. 28.

[153] *See* List of Candidates Nominated by National Groups: Note by the Secretary-General, UN Doc. A/66/183–S/2011/453 (July 26, 2011); Election of Five Members of the International Court of Justice: Curricula Vitae of Candidates Nominated by National Groups: Note by the Secretary-General, UN Doc. A/66/184*–S/2011/454* (July 26, 2011).

[154] *See* ICJ Press Release No. 2011/34 (Nov. 11, 2011); UN Docs. GA/11171 (Nov. 10, 2011), SC/10444 (Nov. 10, 2011), S/PV.6655 (Nov. 10, 2011), S/PV.6654 (Nov. 10, 2011), S/PV.6653 (Nov. 10, 2011), S/PV.6652 (Nov. 10, 2011) & S/PV.6651 (Nov. 10, 2011).

[155] The two other candidates who had not yet been elected—Tsvetana Kamenova (Bulgaria) and El Hadji Mansour Tall (Senegal)—withdrew after the second round of balloting. Merits aside, their candidacies did not conform to the informal allocation of seats on the Court. *See* Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and Its Critics*, 103 AJIL 209, 231 (2009).

[156] UN Docs. GA/11178 (Nov. 22, 2011), SC/10456 (Nov. 22, 2011), S/PV.6667 (Nov. 22, 2011), S/PV.6666 (Nov. 22, 2011) & S/PV.6665 (Nov. 22, 2011).

[157] ICJ Press Release 2011/39 (Dec. 15, 2011); UN Docs. GA/11194 (Dec. 13, 2011), SC/10482 (Dec. 13, 2011) & S/PV.6682 (Dec. 13, 2011).

On October 17, Judge Al-Khasawneh was designated prime minister of Jordan by King Abdullah II.[158] By a letter dated November 20, Judge Al-Khasawneh, a former vice-president of the Court, informed President Owada of his resignation, effective December 31.[159]

Addresses of the president. For his last time as president of the Court, President Owada delivered several addresses at UN headquarters in New York concurrently with the General Assembly's consideration of the Court's annual report. These addresses included statements to the Security Council, the General Assembly, the Sixth Committee, and the legal advisers of UN member states.[160] In his speech to the General Assembly, President Owada pointed out that, "given a remarkable increase in the number of cases on the docket, the Court is now opining on more than a few cases on a parallel basis, thus making its best endeavours to eliminate a backlog on judicial work."[161] President Owada's speech to the Sixth Committee focused on incidental proceedings: provisional measures, preliminary objections, counterclaims, and intervention. In his statement to the Security Council, President Owada returned to a theme he had touched on in previous years: "the organic linkage" between the Court and the Council in the "common pursuit of the objectives of maintaining international peace and security and promoting the rule of law in our world."[162] He indicated that "[i]t is my hope that an implicit understanding between the Bench and the Security Council, through the development of the principle of mutual complementarity between the Court and the Council will help further to enhance the confidence and effectiveness in our ability to resolve recurring conflicts in this troubled world."[163] In his speech to the legal advisers, President Owada addressed the seminar topic, "The Contribution of the International Court of Justice to International Law," focusing on the Court's advisory procedure.

III. THE COURT'S DOCKET AND FUTURE WORK

In addition to the four judgments and three orders discussed above, the Court held four hearings.[164] Two new contentious cases, one request for provisional measures, and one

[158] *See* Letter of Designation to Awn Khasawneh (Oct. 17, 2011), *at* http://www.kingabdullah.jo/index.php/en_US/royalLetters/view/id/297.html; *see also* Ranya Kadri & Ethan Bronner, *Government of Jordan Is Dismissed by the King*, N.Y. TIMES, Oct. 18, 2011, at A8.

[159] Note by the Secretary-General Concerning the Date of an Election to Fill a Vacancy in the International Court of Justice, UN Doc. S/2012/38 (Jan. 17, 2012); ICJ Press Release 2012/1 (Jan. 20, 2012). In light of the Statute's prohibition on the "exercise" by a "member of the Court [of] any political or administrative function," it is unclear why Judge Al-Khasawneh submitted his letter of resignation more than a month following his designation as prime minister and with effect more than two months after the appointment. ICJ Statute, Art. 16(1). Though his resignation had not yet become effective, Judge Al-Khasawneh did not participate in the Court's judgment in *Application of the Interim Accord of 13 September 1995*.

[160] The addresses are available online at http://www.icj-cij.org/court/index.php?p1=1&p2=3&p3=1. For the debate in the General Assembly on the Court's Annual Report, see UN GAOR, 66th Sess., 43th plen. mtg., UN Doc. A/66/PV.43 (Oct. 26, 2011); UN Doc. GA/11163 (Oct. 26, 2011). For the discussion in the Sixth Committee of the president's speech, see Press Release, Legal Committee Delegates Suggest Flaws in International Law Commission Proposals, Suggest Possible Adjustments, UN Press Release GA/L/3424 (Oct. 28, 2011). As is traditional, the Security Council issued an "official communiqué" noting that "Members of the Council and Judge Owada had an exchange of views." UN Doc. S/PV.6637 (Oct. 25, 2011).

[161] Speech to General Assembly 13.

[162] Statement to the Security Council 1.

[163] *Id.* at 11.

[164] These were in *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.) (on Costa Rica's request for provisional measures), *Application of the Interim Accord of 13 September 1995* (Former Yugoslav

application to intervene were submitted.[165] One case was removed from the Court's list at the request of the applicant.[166]

Having concluded three cases and introduced two cases, the Court entered 2012 with fifteen cases on its docket. In one of these fifteen, *Jurisdictional Immunities*, deliberations were under way. In another, *Diallo* (Guinea v. Democratic Republic of the Congo), the Court had reserved subsequent procedure in the event that the parties, within six months of the 2010 judgment, did not agree on the question of compensation. Since no agreement was reached, the Court fixed time limits for the filing of a memorial and a countermemorial on that matter.[167] All of the remaining cases were active, save for two—*Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) and *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda)—which "technically remain[ed] pending" following decisions on the merits and pending negotiations between the parties concerning the implementation of the Court's judgments.[168]

Republic of Maced. v. Greece) (on jurisdiction, admissibility, and the merits), *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) (Cambodia v. Thai.) (on Cambodia's request for provisional measures), and *Jurisdictional Immunities of the State* (Ger. v. It.; Greece intervening) (on the merits).

[165] These were *Jurisdictional Immunities of the State* (Ger. v. It.) (application by Greece for permission to intervene), *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) (Cambodia v. Thai.) (requesting an interpretation of 1962 judgment and the indication of provisional measures), and *Construction of a Road in Costa Rica Along the San Juan River* (Nicar. v. Costa Rica) (alleging that Costa Rica, by constructing a road along the San Juan River, has breached its obligations not to violate Nicaragua's territorial integrity, its obligations not to damage Nicaraguan territory, and its obligations under general international law and international environmental conventions).

[166] This was *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* (Belg. v. Switz.). *See* Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belg. v. Switz.), Removal from List (Int'l Ct. Justice Apr. 5, 2011). Belgium had instituted proceedings on December 21, 2009, and filed its memorial on November 23, 2010. On February 18, 2011, in accordance with Article 79(1) of the Rules of Court, Switzerland submitted preliminary objections to the jurisdiction of the Court and to the admissibility of the application. On March 21, 2011, in a letter quoted in the April 5 order removing the case from the list, Belgium informed the Court that, "in concert with the Commission of the European Union, [it] considers that it can discontinue the proceedings." It did so because Switzerland, in its preliminary objections, had, according to Belgium,

> indicate[d] that the reference by the [Swiss] Federal Supreme Court in its 30 September 2008 judgment to the non-recognizability of a future Belgian judgment [did] not have the force of *res judicata* and [did] not bind either the lower cantonal courts or the Federal Supreme Court itself, and that there [was] therefore nothing to prevent a Belgian judgment, once handed down, from being recognized in Switzerland in accordance with the applicable treaty provisions.

Switzerland did not oppose the request for the discontinuance.

[167] Diallo, Fixing of Time Limits (Sept. 20, 2011).

[168] Report of the International Court of Justice, Aug. 1, 2010–July 31, 2011, UN GAOR, 66th Sess., Supp. No. 4, at 2 n.1, 22 & 25–26, UN Doc. A/66/4 (2011).