IS THERE SUCH A THING AS INTERVENTION AS A PARTY IN THE ICJ PROCEDURE?

SERGEI GORBYLEV[†]

ABSTRACT

Referring to the question as to whether there is such a thing as intervention as a party, this paper will: 1) analyze the status of the intervening state and its procedural rights under the International Court of Justice (hereinafter the "ICJ") Statute and the Rules of Court; 2) consider the position of the ICJ with regard to the status of the intervening state elaborated in the case law; 3) discuss the conditions for intervention; and 4) touch on the issue of correlation between intervention and the principle of a sound administration of justice. Having done this analysis, the author concludes that there are many reasons which lead to the negative answer to the question imposed in the title of the article. No, there is no such a thing as intervention as a party.

Key words: ICJ, intervention, Statute of the ICJ, Rules of Court, ICJ case law, conditions for intervention, and the principle of a sound administration of justice.

I. INTRODUCTION

"The possibility of third-party intervention in civil procedures is generally recognized in domestic legal systems" and raises no problem.[1] By contrast, the status of an intervening state in proceedings before the ICJ

[†] The author holds a Master of Advanced Studies degree (LL.M.) in International Dispute Settlement from Geneva University Law School and Graduate Institute of International and Development Studies, Switzerland. An equivalent of LL.B (Hons.) degree he obtained from Saratov State Law Academy, Russia. In 2010-2011, he was also a fellow at the University of Wyoming College of Law, U.S.A. Over the past 5 years he has held several positions in the private and public sector. He trained at the United States District Court for the District of Wyoming, worked as the legal advisor in the law firm in Russia, and served for the Federal Antimonopoly Service of the Russian Federation. Before receiving his LL.M. degree, he worked as an associate in Litigation & Dispute Resolution practice for the Moscow-based Yukov Khrenov and Partners law firm.

[1] Mariano Garcia Rubio, *Intervention Before the International Court of Justice: The Nicaraguan Intervention in the Salvador/Honduras Case*, 1 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 165, 166 (2001).

was one of the points of uncertainty since 1922.[2] In the Advisory Committee's introduction of the procedure of intervention in 1922, three positions with regard to the status of the intervening states were identified: an intervening state might be a co-plaintiff, or co-defendant, with one of the two or more original parties to the dispute; it might "claim certain exclusive rights; or" it might intervene as a replacement of one of the parties so that the displaced party would withdraw.[3] Many years have passed but the issue is still at stake. It is still uncertain whether there is such a thing as intervention as a party.

This paper seeks to clarify the status of an intervening state and attempts to reply in a definitive way on the question as to whether there is such a thing as intervention as a party. In doing so, this paper firstly will analyze the status of the intervening state and its procedural rights under the ICJ Statute and the Rules of Court. Secondly, this paper will consider the position of the ICJ with regard to the status of the intervening state elaborated in case law. Thirdly, the paper will look at the conditions for intervention. Next, this paper will proceed with the issues of correlation between intervention and the principle of a sound administration of justice. Finally, this paper will reach a conclusion as to whether there is such a thing as intervention as a party.

II. THE STATUS OF THE INTERVENING STATE AND ITS PROCEDURAL RIGHTS UNDER THE ICJ STATUTE AND THE RULES OF COURT

"The Statute of the ICJ provides two forms of intervention: the so-called discretionary . . . intervention (Article 62) and intervention as of right . . . (Article 63)."[4]

Article 62(1) reads as follows: "Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the ICJ to be permitted to intervene."[5] Whereas Article 63 states: "Whenever the construction of a convention to which

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[2] CHRISTINE CHINKIN, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1359 (Oxford University Press ed., 2006).

[3] LEAGUE OF NATIONS. ADVISORY COMM. OF JURISTS, PROCES-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE JUNE 16TH—JULY 24TH, WITH ANNEXES 745 (1920).

[4] Julian Hermida, *A Proposal Toward Redefining the Model of Application of International Law in the Domestic Arena,* 7 SINGAPORE J. OF INT'L AND COMP. L. 489, 498 (2003) (Since the practice of the ICJ shows very rare application of Article 63 of the Statute of the ICJ, this paper will consider the features of application of Article 62 of the ICJ Statute as most applicable. However, some of the findings of the paper can be used with regard to Article 63 of the ICJ Statute as well.).

[5] Statute of the International Court of Justice, 1946 I.C.J. Acts & Docs., art. 62(1).

states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.[6] Every state so notified has the right to intervene in the proceedings."[7]

Thus, Article 62 covers the general situation and "allows a state to submit a request to be permitted to intervene in a dispute between other States when it believes that it has an interest of a legal nature which will be affected by the decision."[8] Whereas, "Article 63 deals with situation[s] in which a third state is concerned with the interpretation to be given by the ICJ to a convention"; hereby, "[t]he interest of the intervening state does not imply that a specific right of the same state is at issue."[9] That interest might be rather explained with reference to the fact that any interpretation of a convention by the ICJ constitutes an authoritative precedent, which tends to influence the attitude of all the states that are parties to that convention.[10]

The Rules of Court also contain some provisions with regard to intervention; namely, Article 81 provides for intervention, saying: "An application for permission to intervene under the terms of Article 62 of the Statute, signed in the manner provided for in Article 38, paragraph 3, of these Rules, shall be filed as soon as possible, and not later than the closure of the written proceedings."[11]

As it could be seen, neither the Statute of the ICJ, nor the Rules of Court, expressly spell out on the status of the intervening state. The procedural consequences of a successful request to intervene are also silent on the issue at stake. The rights and obligations of an intervening state are specified in Article 85(3) of the Rules of Court, which allows an intervening state to be heard by the Court or Chamber.[12] However, this is possible only on the subject of intervention, not on the case as a whole. Therefore, the right of an intervening state to be heard is quite limited by the subject of intervention.

Other consequences of intervention are not spelled out at all. Particularly, the Statute of the ICJ and the Rules of Court do not determine the extent to which an intervening state is bound by the ICJ's decision. By analogy with the right of an intervening state to be heard, coupled with the

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[6] *Id.* at art. 63.
[7] *Id.*
[8] *Id.*
[9] Paolo Palchetti, *Opening the International Court of Justice to Third States: Intervention and Beyond*, 6 Max PLANK Y.B. OF UNITED NATIONS L. 139, 141 (2002).
[10] SHIGERU ODA, THE INTERNATIONAL COURT OF JUSTICE VIEWED FROM THE BENCH (1976-1993) 9 (vol. 244); *See generally* Phillip C. Jessup, *Intervention in the International Court*, 75 A.J.I.L 903 (1981); *see generally* CHINKIN, *supra* note 2, at153.
[11] Rules of Court, 1978 I.C.J. Acts & Docs., art. 81(1).
[12] *Id.* at art. 85(1).

provision of Article 59 of the Statute of the ICJ, it could be assumed that an intervening state must be bound by the judgment to the extent that it relates to intervention.[13]

The issues of composition of the Court to determine claims of intervention as well as whether an intervening state can seek any remedy other than a declaration of its interests are also a matter of concern.[14] So, with regard to the procedural consequences of intervention, it is also not clear what status an intervening state can acquire.

Therefore, since neither the Statute of the ICJ nor the Rules of Court expressly determines the status of an intervening state, and since the procedural consequences of intervention are restricted by the provisions of the Rules of Court, or were not even determined by the Statute of the ICJ or the Rules of Court, it could be assumed that there is no such a thing as intervention as a party. However, it would not be fair to suggest the answer without having looked at the Court's practice.

III. THE POSITION OF THE ICJ ON THE STATUS OF THE INTERVENING STATE

Looking at the case law, we observe that the decisions of the Court conflict with each other. In early cases, namely, in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* Case, the Court discussed the issue for the first time.[15] In its observations, the Court stated:

> [t]here is nothing in Article 62 to suggest that it was intended as an alternative means of bringing an additional dispute as a case before the Court . . . or as a method of asserting the individual rights of a State not a party to the case. Such a dispute . . . may not . . . be brought before the Court by way of intervention.[16]

Then the Court proceeded and found that:

> [T]he Italian Application to intervene tends inevitably to produce a situation in which the Court would be seised of a dispute between Italy on the one hand and Libya and Malta on the other, or each of them separately, without the consent of the latter States; Italy would

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[13] *See* CHINKIN, *supra* note 2, at 1359.
[14] *Id.*
[15] Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1984 I.C.J. Rep. 3, ¶ 37 (Mar. 21).
[16] *Id.*

> thus become a party to one or several disputes which are not before the Court at present. In this way the character of the case would be transformed.[17]

From this passage it could be extracted that though the Court did not pronounce it clearly, there was a presumption made by the Court that the intervener could not be recognized as a party to the case. Later on, in a landmark case, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, the Court came to another conclusion and found that:

> It is . . . clear that a State which is allowed to intervene in a case, does not, by reason only of being an intervener, become also a party to the case. It is true, conversely, that, provided that there be the necessary consent by the parties to the case, the intervener is not prevented by reason of that status from itself becoming a party to the case.[18]

So, despite the fact that neither Article 62 of the Statute of the ICJ, nor Article 81 of the Rules of Court, specify the capacity in which a state may seek to intervene, in the Judgment of the *El Salvador/Honduras* case, the Chamber of the Court accepted that a state may be permitted to intervene under Article 62 of the Statute either as a non-party or as a party.[19]

After observation of the case law, the answer to the main question of this paper as to whether there is such a thing as intervention as a party became not as clear as it was before. Even if there was not a single case where an intervening state was admitted as a party to the case, theoretically, this possibility exists. Given that, then, it is worth to look at the conditions for intervention.

IV. THE CONDITIONS FOR INTERVENTION

The legal framework and conditions for intervention are provided for under Article 62 of the Statute, and Article 81 of the Rules of Court.[20] It requires the state to set out the interest of a legal nature, which considers it

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[17] *Id.* at ¶ 41.
[18] Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Judgment, 1990 I.C.J. Rep. 92, ¶ 99 (Sept. 13).
[19] *Id.*
[20] *See* Rules of Court, 1978 I.C.J. Acts & Docs., arts. 81, *see also* Statute of the International Court of Justice, 1946 I.C.J. Acts & Docs., art. 62.

may be affected by the decision in the case, the precise object of intervention, and any basis of jurisdiction, which is claimed to exist as between the state applying to intervene, and the parties to the case.

A. Interest of a Legal Nature

The state seeking to intervene shall set out its own interest of a legal nature, which may be affected by the decision of the ICJ in the main proceedings. "[W]hereas the parties to the main proceedings [ask the Court] to recognize certain of their rights in the case at hand, a State seeking to intervene is, by contrast, contending . . . that the decision on the merits could affect its interests of a legal nature."[21]

In the *Libya/Malta Continental Shelf* case, Italy expressed its legal interest as a desire to protect its own "sovereign rights" over its continental shelf.[22] The Court dismissed Italy's claim in order not to pronounce upon Italy's sovereign rights.[23] This rejection presented third states with an apparently insoluble dilemma. If a third state thinks its rights may be affected by a decision in the pending proceeding, it should request to intervene.[24] However, if the request involves claiming those sovereign rights, it may be rejected as going beyond mere intervention, and raising a new dispute which is not within the terms of the special agreement by which the parties granted the ICJ jurisdiction.[25] Simultaneously, if the third party presents its interests in general terms, its request may be refused, as was the case with Malta in the *Tunisia/Libya Continental Shelf* case; where because of the Malta's description of its legal interest "in general terms," the Court observes that: "[t]he interest of a legal nature invoked by Malta does not relate to any legal interest of its own directly in issue as between Tunisia and Libya in the present proceedings or as between itself and either one of those countries."[26]

Again, it could be seen that since the application to intervene might be rejected as going beyond mere intervention, and raising a new dispute/or as not related to any legal interest at all, it leads us to the conclusion that there is no such a thing as intervention as a party.

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[21] Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2011 I.C.J. Rep. 421, ¶ 37 (May 4).
[22] Continental Shelf (Tunis/Libyan Arab Jamahiriya), Judgment, 1981 I.C.J. Rep. 3, ¶ 19 (Apr. 14).
[23] *Id.*
[24] *Id.*
[25] *See* CHINKIN, *supra* note 2, at 1348.
[26] *Supra* note 22.

B. The Precise Object of Intervention

The precise object of intervention consists of informing the ICJ of the interest of a legal nature, which may be affected by the decision of the court in the main proceedings, but also in contributing to the protection of that interest. Proceedings on intervention are not an occasion for the state seeking to intervene, or for the parties to discuss questions of substance relating to the main proceedings.[27]

At first glance, the object of intervention and the legal interest of the intervening state are about the same. Nevertheless, as Mariano García Rubio pointed out, "both concepts must not be confused."[28] When dealing with the precise object of intervention, the ICJ "distinguished the cases of 'proper' intervention, where the object is the protection of the legal interests of the intervening State, from those of 'improper' intervention, where the recognition of subjective rights constitutes the purpose of the intended intervention."[29]

"In cases of 'improper' intervention the basis of competence provided for in Article 62 is not sufficient for admitting an application because the intervening State is in fact introducing a new dispute as between itself and one or both of the original parties.'"[30] In this regard, the Chamber clearly stressed that Article 62 "is not intended to enable a third State to tack on a new case, to become a new party, and so have its own claims adjudicated by the Court . . . [a] case with a new party, and new issues to be decided, would be a new case.'"[31]

"When the purpose of intervention is the protection of the legal interests of the intervening State, Article 62 suffices as a basis of competence."[32] With this regard the ICJ pronounced:

> The competence of the Court in this matter of intervention is not, like its competence to hear and determinate the dispute referred to it, derived from the consent of the parties to the case, but from the consent given by them, in becoming parties to the ICJ's Statute, to the ICJ's exercise of its powers conferred by the Statute.[33]

Therefore, an intervening state application might be rejected because

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[27] *See* Land, Island and Maritime Frontier Dispute, *supra* note 18, at ¶ 45.
[28] Rubio, *supra* note 2, at 186.
[29] *Id.* at 188-89.
[30] *Id.* at 189.
[31] *Id.*
[32] *Id.* at 190.
[33] Land, Island and Maritime Frontier Dispute, *supra* note 18, at ¶ 96.

of its "improper" character. This, in turn again leads us to the conclusion that there is no such a thing as intervention as a party.

C. Jurisdictional Link

The question as to whether a jurisdictional link has to exist between the state seeking to intervene and the parties to the case, was debatable from the beginning. An examination of this question reveals an apparent conflict between the Statute of the ICJ, and the Rules of Court. Article 62 is silent on whether a jurisdictional link is required between the would-be intervener, and the parties to the case. Whereas, Article 81(2)(c) of the Rules of Court states that a state requesting intervention must indicate any basis for jurisdiction that might exist between itself and the parties to the case.[34] As Gosego Rockfall Lekgowe discussed, the question that immediately arises is, whether the Rules of Court impose additional substantive restrictions on intervention supplementing the substantive Article 62.[35]

The issue was firstly discussed in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, where Malta had sought to intervene without assuming the obligations of a party. The Court unanimously dismissed the application on the basis of a lack of an interest of a legal nature, and found it unnecessary to examine whether in such a case, there might be a need for a jurisdictional link. However, the Court noted, *obiter*, had Malta sought to assert a claim of its own legal interest in the subject matter of the case, and to become a party to the case, this would have raised the issue of the jurisdictional link.[36]

The question then again arose in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* Case. Italy sought to intervene and participate in the proceedings to the full extent necessary to implement its rights. The ICJ held that it could not adjudicate on the legal relations between Italy and Libya without the consent of Libya, or on those between Italy and Malta without the consent of Malta. This case pronounces clearly that where the intervening state seeks to intervene as a party, a jurisdictional link is required.[37]

The issue was addressed in the *Land, Island and Maritime Frontier*

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[34] Rules of Court, 1978 I.C.J. Acts & Docs., arts. 81(2)(C).
[35] Gosego Rockfall Lekgowe, *Third Party Intervention at the International Court of Justice: Challenges and Prospects*, SOC. SCI. RES. NETWORK (Aug. 5, 2012), http://ssrn.com/abstract=2124664.
[36] SLIABTAI ROSENNE & YAEL RONEN, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2005, 1484 (Martinus Nijhoff Publishers 2006).
[37] Lekgowe, *supra* note 35.

Dispute (El Salvador/Honduras). Nicaragua submitted an application to intervene and did not intend to become a party to the case. The Chamber concluded that there is no bar to permission being given for intervention. In doing so, the ICJ held that "'the procedure of intervention is to ensure that a state with possibly affected interests may be permitted to intervene even though there is no jurisdictional link.'"[38] In interpreting Article 81, the ICJ held that paragraph 2(c) of that Article "shows that a valid link of jurisdiction is not treated as [conditional] for intervention."[39]

Therefore, the ICJ spells out that there is no need to establish a jurisdictional link as long as the state does not intend to become a party to the case. At the same time, the ICJ pronounces that a jurisdictional link is required where the intervening state seeks to intervene as a party. Thus, the ICJ again leaves a room for intervener to be admitted as a party to the case.

V. CORRELATION BETWEEN INTERVENTION AND THE PRINCIPLE OF A SOUND ADMINISTRATION OF JUSTICE

The conditions for intervention, namely, an interest of a legal nature and the precise object of intervention, are closely connected with the principle of a sound administration of justice.

Article 81(2) of the Rules of Court requires the state to establish its interest of a legal nature, which may be affected by the decision in the main case.[40] Moreover, it requires the precise object of the requested intervention to be specified in the application.[41] In a number of instances in the past, the Court has had occasion to refer to these provisions, saying that those elements are essential.[42]

Indeed, they are essential from the point of view of the good administration of justice. In order to identify its task in incidental proceedings instituted by an intervening state, the ICJ must begin with examining the application. However, it may happen that uncertainties or disagreements arise with regard to the interest of a legal nature of the dispute with which the ICJ has been seized, or to the precise object of the application submitted to it. In such a case, it is clear that the ICJ cannot, in principle, allow a dispute brought before it to be transformed by intervention into another dispute, which is different in character.

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[38] MALCOLM N. SHAW, INTERNATIONAL LAW 797 (Cambridge Univ. Press, 7th ed. 2014).
[39] SHABTAI ROSENNE, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE 108 (Martinus Nijhoff Publishers 1993).
[40] Rules of Court, 1978 I.C.J. Acts & Docs., arts. 81(2).
[41] *Id.*
[42] *See* Land, Island and Maritime Frontier Dispute, *supra* note 18, at ¶ 38.

It is, of course, possible for the state to bring another claim, and then it is for the ICJ to decide whether the proceedings should be joined or not, in accordance with Article 47 of its Rules. However, "the absence in the ICJ's procedures of any system of compulsory intervention, whereby" the ICJ could cite third state as a party, makes it impossible to bring another claim by way of intervention.[43] The ICJ itself has such a concern recognizing that: "An incidental proceeding cannot be one, which transforms that case into a different case with different parties."[44] I tend to agree with this statement; otherwise, it would alter the incidental nature of intervention.

VI. CONCLUSION

As it was stated in the introduction, this paper intended to find a definitive answer to the question, whether there is such a thing as intervention as a party. There are many reasons that lead to the negative answer. No, there is no such a thing as intervention as a party. However, there is also a reason not to answer this question in an absolutely definitive way. Namely, the ICJ accepted that a state might be permitted to intervene either as a non-party, or as a party. At least for the ICJ, there is such a thing as intervention as a party. Therefore, even if there was not a single case where an intervening state was admitted as a party to a case, this possibility cannot be disregarded; the more cases there are, the clearer an answer we obtain.

[43] *See* Continental Shelf, *supra* note 15, at ¶ 40.
[44] Land, Island and Maritime Frontier Dispute, *supra* note 18, at ¶ 98.