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By Brian McGarry

February 21, 2024

Days before anyone could even read it, Nicaragua's application to intervene under Article 62 of the ICJ Statute in *South Africa v Israel* made headlines around the world. To most observers, this intervention may recall those filed in *Ukraine v Russia*, another Genocide Convention case in which third States have attracted much attention. Yet there are two fundamental distinctions between that “mass intervention” (§116)—a vaguely pejorative term accidentally coined in this blog—and Nicaragua's request to the Court. Firstly, Nicaragua seeks intervention under Article 62, whereas all interventions in *Ukraine v Russia* (and those sought in another Genocide Convention case, *The Gambia v Myanmar*) have been filed under Article 63. Secondly, Nicaragua seeks to intervene “as a party”, whereas every State admitted to intervene in ICJ proceedings has done so as a non-party.



As explored below, the value of Nicaragua's recourse to Article 62—rather than the more limited form of intervention under Article 63—is questionable. Yet its more specific choice to intervene under Article 62 “as a party” is consistent with my view that non-party intervention under Article 62 requires a unique legal interest in the Court's decision, as distinguished from States' shared interest in the fulfilment of Genocide Convention obligations. More than anything actually stated in its application, this premise appears to explain why Nicaragua does not seek to intervene under Article 62 as a non-party.

Intervening in Cases Instituted under the Genocide Convention

Under Article 63 of the ICJ Statute, third States may seek to influence the Court's construction of conventions to which they are party. In contrast to the narrow scope of these treaty interpretation questions, Article 62 of the Statute provides a broader canvas for putting information before the Court regarding “an interest of a legal nature which may be affected by the decision in the case”. Given that many of the Article 63 declarations filed in *Ukraine v Russia* sought to provide the Court with evidence and arguments not strictly limited to questions of treaty interpretation, (§84) one might wonder why none of these 33 States had instead (or additionally) sought to intervene under Article 62.

Indeed, some ICJ Judges and legal scholars have characterized obligations *erga omnes* and *erga omnes partes*—such as those reflected in the Genocide Convention—as giving rise not only to standing to institute an ICJ case, but also to an ‘interest of a legal nature’ for purposes of intervening under Article 62. Yet as I have argued in the wilderness, the standing to institute new proceedings, and the statutory requirements for intervention, remain juridically distinct concepts with very different practical consequences. The

invocation of State responsibility based on obligations *erga omnes* or *erga omnes partes* serves to resolve a *horror vacui*—situations where impunity would reign because, in the absence of direct injury, no State would be entitled to bring the perpetrator State to justice. The object of this rule is satisfied as soon as one State institutes a justiciable case. It is not furthered by adding more States to ongoing proceedings through any form of intervention.

This point is especially clear in ICJ practice, where all intervening States have entered these proceedings as non-parties. They thus do not raise claims, seek remedies, or participate in any agreement to remove the case. Unlike parties, they cannot appoint judges *ad hoc* to the bench. They need not consent to the Court’s jurisdiction in the manner of a party. Nor do they demonstrate the existence of a dispute with any parties according to the Court’s standards for determining the admissibility of new cases.

It is not at all apparent why other thresholds applicable to the admissibility of a case, such as standing to invoke responsibility, should instead be assimilated into non-party intervention, as many third States implied in declarations seeking intervention in *Ukraine v Russia* by referring at length to their interests in the fulfilment of obligations *erga omnes* or *erga omnes partes*. Indeed, the complete absence of reference to these concepts in the Court’s June 2023 Order admitting intervention makes clear that the admissibility of Article 63 intervention is based only on whether the third State is a party to the treaty in question (without relevant reservation), irrespective of whether any third State would enjoy standing to institute a new case based on the *erga omnes partes* character of a treaty obligation. This is consistent with a point long emphasized by the Court: that the law of treaties (as reflected in the interpretation of the ICJ Statute) and the law of State responsibility (as reflected in the invocation of obligations *erga omnes* or *erga omnes partes*) “obviously have a scope that is distinct”. (¶47)

By the same logic, the *erga omnes* character of an obligation has no bearing on the requirements of non-party intervention under Article 62. Instead, the third State must meet the *lex specialis* requirements of Article 62, as the Court has interpreted these terms throughout its history. This task is not assisted by conflating the Court’s use of similar language in distinct contexts. For example, as Judge Keith has observed, its famous “reference to ‘legal interest’ [in] *Barcelona Traction* [...] relate[s] to the capacity of a State to bring a claim rather than to the substantive character of the right or interest, a matter apparently distinct from the ‘interest of a legal nature’ to be assessed in determining a request for intervention”. (¶9, citing ¶33)

In its most comprehensive exegesis on Article 62, the Court notably rejected intervention precisely because the third State had not articulated a sufficiently unique interest. It found that when a State’s “intervention is not to have the effect of putting in issue its own claims”—i.e., non-party intervention—Article 62 requires more than interests “of the same kind as the interests of other States”. (¶33) The Court has never since called this premise into question.

The Promise and Perils of Nicaragua’s Application

As the Court developed this jurisprudence, however, one particularly “vexed question” (¶45)—whether Article 62 intervention requires a jurisdictional basis—was resolved by further complicating the practice of intervention. This culminated in a Chamber of the Court in *El Salvador/Honduras* admitting Nicaragua as the first-ever non-party Article 62 intervener. In the same breath, the Chamber found 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”. (¶99) In the Chamber’s view, a State may thus intervene as a party if it not only satisfies the requirements of Article 62, but also shows that all three States are party to an instrument which concerns the subject-matter of the dispute and provides mutual consent to the Court’s jurisdiction in cases between States A and B, A and C, and B and C—a so-called ‘jurisdictional link’. The very fact that the ICJ Registry’s press release announcing Nicaragua’s current application places conspicuous quotation marks around the request to intervene “as a party”, however, recalls that the full Court has never actually tested this 34-year-old theory.

To the extent that the Court accepts intervention as a party in principle, I argue that the limitations noted above would not necessarily bar this form of intervention on the basis of an interest in the fulfilment of obligations *erga omnes* or *erga omnes partes*. Indeed, it remains an open question as to whether intervention as a party—an unrealized construction of judicial imagination—can even be properly understood as ‘intervention’ in the sense that the Court has used the term. The broad sweep of the Court’s oft-repeated dictum that “every intervention is incidental” to the case at hand does not sit easily next to the *El Salvador/Honduras* Chamber’s vision of a third State entering the arena as a party.

It is thus unclear whether an application to intervene as a party under Article 62 should lead the Court to impose on the third State admissibility criteria which apply to the State that instituted the case, such as standing to invoke the responsibility of other parties. If so, it is arguably coherent to admit Article 62 intervention as a party on the basis of a State’s shared interest in the fulfilment of obligations *erga omnes* or *erga omnes partes*, since it could rely on this basis to instead bring these proceedings in the form of a new case. It is equally plausible, however, that the Court might seize the opportunity to reinforce the ‘incidental’ character of intervention by assessing such a request solely in light of the established requirements of Article 62 and the presence of a jurisdictional link with the parties.

Enter Nicaragua with a long résumé of intervention experience. This includes third States seeking to participate in *Nicaragua v US* and *Nicaragua v Colombia*, as well as its own ground-breaking appearance before the above noted Chamber in *El Salvador/Honduras*. In the present case, Nicaragua distinguishes its application to intervene as a party by tying it to Article 36(1) of the Statute, (¶1) and thus presents the Genocide Convention as its jurisdictional link with South Africa and Israel. As argued above, this is perhaps the only way for it to intervene under Article 62 regarding the “common interest” of “all States parties” to the Convention. (¶10, 14)

Yet by asserting that its request “is concerned with the application or the fulfilment of the Convention, as well as with its construction or interpretation which is inseparable from its application”, (¶16) Nicaragua divorces Articles 62 and 63 from their separate historical geneses, and interprets these treaty provisions rather indistinguishably. As a mechanism for States to inform the interpretation of treaties to which they have become parties, Article 63 is rooted in the consent-based origins of international arbitration, and finds clear antecedents in an 1875 Resolution of the *Institut de Droit international*, the 1899 and 1907 conventions establishing the Permanent Court of Arbitration, and the 1907 draft convention and 1910 draft protocol of the International Prize Court. By contrast, Article 62 was innovated by the Hague Committee of Jurists while drafting the 1920 Statute of the PCIJ, in recognition of the need to ensure that this unprecedented global court would not infringe the claimed rights of third States when resolving disputes between other States. While the construction of a convention obviously gives rise to a ‘legal interest’ in the generic sense of the phrase, Article 62 thus reflects a historical rationale that is distinct from Article 63, which has led the Court to give it specialized meaning in its jurisprudence and a different approach in its Rules of Court.

There are several points in Nicaragua’s application that call into question the utility of its intervention under Article 62 rather than 63. In this respect, Nicaragua seeks to add value by updating the factual record in “an ongoing situation” (¶6)—though the sources cited by Nicaragua are generally in the public domain (¶4), and South Africa remains entitled to present such information to the Court. Given the discretionary nature of Article 62 requests (rather than Article 63 declarations), it is worth recalling that the Court has in the past rejected such requests on the basis that the third State had already conveyed its interests through the application itself.

Nevertheless, in framing the object of its intervention, Nicaragua does not limit itself to protecting its own rights, but additionally seeks “to invoke Israel’s responsibility” (¶21)—an objective which would find no place in non-party intervention under Article 62 or 63. By emphasizing that it “does not intend to change the subject matter of the case”, (¶21) however, Nicaragua shows some concern that such a perception could be fatal to its application. This concern is prudent in light of the Court’s abovementioned dictum that “every intervention is incidental” to the case at hand, as well as its comparable practice regarding other matters regulated in Part III(D) of the ICJ Rules of Court (‘Incidental Proceedings’), such as its development of the doctrine of ‘direct connection’ to limit the admission of counterclaims.

Yet uncertainty characterizes every aspect of intervention ‘as a party’. As noted above, this ambiguity includes the question of whether the application must satisfy the admissibility criteria for instituting a new case, such as demonstrating the existence of a dispute with one (or more) parties. While it assures the Court that it does not seek “to bring an additional dispute before the Court”, (¶18) Nicaragua advances beyond the only prior application to intervene as a party in ICJ proceedings by including a section which co-opts the “clearly established” dispute between South Africa and Israel. (¶23) By contrast, the evidence which Nicaragua adduces regarding its own efforts to crystallize

this dispute emphasizes its pleas to “the international community” (¶11) more than to the parties. Indeed, the only direct correspondence with Israel cited by Nicaragua is a note verbale it sent to Jerusalem six days before filing its application (¶11, 27).

Voyage to the Interstices of Procedure

From a practical perspective, the strongest argument favouring applications to intervene as a party is that judicial economy is served by admitting third States which would otherwise institute new cases. Nicaragua picks up this point by reminding the Court that it “could bring principal proceedings before the Court against Israel”. (¶18) Were Nicaragua to instead institute a separate Genocide Convention case relating to Gaza—as it threatens to do against four other States on allegations of complicity with genocide—the Court may well be inclined to join Nicaragua’s new case against Israel and South Africa’s existing case into the same proceedings (though this remains entirely within its discretion).

Although Nicaragua frames its request to intervene “in accordance with Article 85 of the Rules of Court”, (¶25) the ICJ Rules do not explicitly provide for intervention as a party—a symptom of the Court’s generally reactive approach to intervention. I have recommended amending the Rules specifically to address intervention as a party in cases where the application that begins the case places multiple jurisdictional instruments before the Court. While that issue does not arise in this instance, Nicaragua’s request is indeed complicated by the spectre of Israel filing preliminary objections to the Court’s jurisdiction, as well as Nicaragua’s own decision not to anticipate this prospect in its request by compartmentalizing (or otherwise restricting itself to) jurisdictional questions in the cautious manner adopted by some non-party interveners in *Ukraine v Russia*. It remains to be seen whether the Court will circumscribe the scope of intervention to jurisdictional questions for the time being—an aspect of the case in which Nicaragua shows little interest—or leave the request to languish until Israel’s eventual deadline to file preliminary objections.

If the Court admits Nicaragua’s intervention as a party, it must moreover determine whether Nicaragua and South Africa are parties in the same interest. This is arguably so in light of Nicaragua’s acknowledgement that it “coincides with the reasons and justifications that have moved South Africa to bring the case”, (¶8) and has “pronounced itself in support of South Africa’s Application”. (¶11) This determination may in turn affect whether Nicaragua would be entitled to appoint a judge *ad hoc* in this case—a prospect that the Court could be understandably wary of in light of how many other States might then do the same.

Nicaragua’s historic request to intervene raises still other questions for the parties and the Court to consider in this case. While it avoids complicating matters further by replicating South Africa’s prayer for relief verbatim, it arguably ought to have edited this to request the Court to declare that not only South Africa and Israel, but also Nicaragua itself—as a would-be party to the case—must act in accordance with its obligations under the Genocide Convention. (¶9) Additionally, Nicaragua’s characterization of recourse to the

Court as “[t]he only effective mean available to Nicaragua to implement its obligation to prevent and likely to have a deterrent effect” is questionable in light of the thin support for arguing that intervention has deterrent effect, and in light of its framing of this action as a “duty”—an absurd, unworkable theory that renders a voluntary procedure mandatory, and leaves all States Parties vulnerable to claims of violating the Convention by failing to intervene. (¶17) Indeed, Nicaragua later hedges on this point, framing the Convention as merely “allow[ing]” intervention, (¶19) while dubiously suggesting that South Africa’s application in this case could have excluded intervention. (¶17)

Conclusion

While the procedural innovations of international courts often arise in response to the managerial demands of the case at hand, these practical solutions can yield strange reverberations in subsequent cases. Such is the tale of ‘intervention as a party’ in ICJ proceedings, which Nicaragua weds to a case alleging grave, ongoing violations of international law. Surely there are more sceptics of intervention now that 32 States—unable to salvage the beating heart of *Ukraine v Russia*—are left resembling a chorus in a Brechtian farce, as they return to the stage to support Ukraine’s remaining argument that Ukraine itself is not genocidal. It is fair to expect some cynicism as Nicaragua forges an even more complex approach to persuading the Court in *South Africa v Israel*.

Nicaragua invites further cynicism by obscuring its reasons for requesting intervention as a party under Article 62. Although it seeks to “invoke Israel’s responsibility”, the practical and legal value of presenting a verbatim copy of South Africa’s prayer for relief is unclear at best. Nicaragua notes that it wishes to be bound by the Court’s ruling, (¶20) but this does not explain why it does not declare intervention under the well-tested mechanism of Article 63. While it is true that Article 63 interveners are technically bound only by the treaty interpretation which underlies the Court’s decision, it is difficult to see how its conclusions on the merits could more directly impact Nicaragua’s rights or obligations under the Genocide Convention. As such, Nicaragua’s focus on “the reasons which constitute the necessary steps to the *dispositif*” would have been well-served by intervening under Article 63. (¶16, citing ¶47)

The issues raised by Nicaragua’s request cannot be resolved by simply repeating that an interest is an interest is an interest. They must be determined according to Article 62’s history, practice, and context within the Statute. Much of the academic and political dialogue on intervention has sought to frame a rebuttable presumption of entitlement to intervene in cases raising obligations *erga omnes*, while the theory and practice of Article 62 repeatedly point in the opposite direction. Respectfully, were the Court to find—in this or a future case—that an interest in the fulfilment of obligations *erga omnes* is sufficient for all forms of intervention under Article 62, it would need to clearly reconcile this finding with the points raised above to safeguard legal coherence and avoid undesirable ripple effects. In this regard, one could imagine a future case which does not involve allegations of genocide or torture, and where the party that originally instituted the case has been

directly injured. Could any third State compel the Court to definitively declare whether the obligations concerned are *erga omnes*, simply by filing an Article 62 request which frames them as such?

Though it is hard to imagine the newly re-composed Court relishing the chance to address long-simmering tensions in its Statute as a humanitarian catastrophe unravels in real time, Nicaragua is nonetheless entitled to request intervention. For all of the questions which attach to this request, Nicaragua's application reflects the premise that a shared interest in the fulfilment of obligations under the Genocide Convention is insufficient for non-party Article 62 intervention. While admitting intervention as a party on the very same basis would seem counterintuitive, I conclude that intervention as a party cannot be properly understood as 'intervention' in the sense that the Court has used this term. Indeed, as quoted above, the *El Salvador/Honduras* Chamber did not even utter the phrase with which it is credited, but rather opined that a would-be intervener might instead become a party—that is, a caterpillar *or* a butterfly, not a caterpillar 'as' a butterfly. The Court must now carefully deliberate the framing and lasting consequences of any further decision on this "vexed question".