Third-party State Intervention in Disputes Before the International Court of Justice: A Reassessment of Articles 62 and 63 of the ICJ Statute

George N Barrie
Professor, University of Johannesburg
barriegm@telkomsa.net

Abstract

In the modern world, disputes before the International Court of Justice (ICJ) which are normally of a bilateral nature, increasingly also affect the interests of third states. Third states may in many instances wish to intervene in such disputes. Articles 62 and 63 of the Statute of the ICJ has attempted to accommodate such an eventuality. Article 62 provides for intervention by a third state if it has an interest of a legal nature which may be affected by the ICJ's decision in the case. Article 63 allows for member states of a multilateral treaty to intervene in cases involving the interpretation of such a treaty. Intervention under Article 62 is in the discretion of the ICJ. Intervention under Article 63 is a right. Applications to intervene under Article 62 have only been successful in three instances and, applications to intervene under Article 63 have only been successful in two instances. It is submitted that the ICJ should be more flexible in allowing third-party interventions by interpreting Articles 62 and 63 less strictly. This is more in accordance with the greater interdependence of states in the modern world and can prevent the duplication of proceedings. Such flexibility can only enhance the effectiveness of the ICJ in achieving its mandate.

Keywords: Articles 62, 63 ICJ Statute; third-party state intervention.

UNISA university of south africa PRESS

Comparative and International Law Journal of Southern Africa
https://upjournals.co.za/index.php/CILSA
Volume 53 | Number 1 | 2020 | #6598 | 20 pages

https://doi.org/10.25159/0010-4051/6598
ISSN 0010-4051 (Print)

Introduction

States are increasingly being brought into more frequent contact. This has created a greater scope for international regulation of disputes between states before such disputes escalate and derail international law's purpose of peace and harmonization. It is trite that states are obligated to settle their disputes by peaceful means. The prerequisite for the peaceful settlement of international disputes is a mechanism to bring this about. Such a mechanism must occupy a central place within the international legal system.

Besides negotiation, good offices, mediation, inquiry, the utilisation of the United Nations and arbitration, the International Court of Justice (ICJ) plays an important role. The ICJ has been increasingly utilised for the settlement of international disputes between states and has through judgments and advisory opinions greatly contributed to the substantive development of international law.

In the past, the vast majority of disputes brought before the ICJ mainly concerned two states. The cause of the disputes this far have normally been of a bilateral nature. In an increasingly interdependent world, however, decisions of international tribunals, which includes the ICJ, will more and more affect the rights and interests of *third* states, i.e. states not parties to the original dispute. Third states, not parties to original disputes before the ICJ, may wish to intervene in such disputes where of the opinion their vital interests may be affected.

The Statute of the ICJ has attempted to accommodate such an eventuality of third-party intervention with Articles 62 and 63. These two Articles have to date not been much utilised due to the fact that attempts to apply them have in the past received a mixed reaction by the ICJ. With interdependence between states clearly on the rise rather than on the decrease, it can be expected that third-party intervention in disputes before the ICJ will come to the fore more regularly than in the past.

It may thus be opportune to draw attention anew to the fact that decisions of the ICJ, despite being usually formulated in a *bilateral* manner in that two states are involved, can have a much *wider* impact than on the original two parties to the case and can involve *multifaceted interests* of other states. These interests can be of a highly strategic and political character. The question thus arises how is it possible for a state, not an original party to a dispute before the ICJ, to intervene in a dispute before the ICJ where it is of the opinion that its vital interests could be affected.

The ICJ Statute provides for two forms of third-party intervention: (i) intervention under Article 62 which concerns an *interest of a legal nature* of a *third* state which may be affected by the decision in the case and (ii) intervention under Article 63 which relates to the interpretation of a multilateral treaty 'to which states other than those in the case are parties.'

Article 62 is *permissive* whereas an Article 63 intervention is considered as a *right.* Article 62(1) states that it is for the *court to decide* upon the request to intervene. Article 63(2) states that every state which has been notified by the court's registrar of the court's involvement in interpreting a treaty (to which that state is a party) has the *right to intervene* in the proceedings.

The use of the term 'intervention' when discussing the possibility for third-party states to intervene in proceedings before the ICJ is an indication that it is an incidental procedure that has been grafted on a set of rules relating to proceedings before the ICJ. Because Articles 62 and 63 of the ICJ Statute can be seen to have been 'grafted' on the ICJ Statute from similarly numbered Articles of the Statute of the Permanent Court of International Justice (PCIJ) neither provision has been much used. The fact that Articles 62 and 63 have been sparsely utilised is an indication that it is still generally perceived to be undesirable for the ICJ, whose jurisdiction is based on the principle of *consent,* to deal with interests of third states that are not the main parties to a dispute before the court. Nevertheless, the need may arise to provide such states with an opportunity to intervene. States desirous of intervening as allowed under Article 62 and 63 have, however, discovered that various complexities[1] arise when embarking upon such an undertaking. The main complexity being that the ICJ has adopted an extremely strict approach to the granting of intervention to third parties under Articles 62 and 63.[2]

---

1 JM Ruda, 'Intervention before the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 487, 501 saw Articles 62 and 63 as complicated and confusing. For a general overview of the complexities see Phillip Jessup, 'Intervention in the International Court' (1981) 75 American J Intl L 903; Christine Chinkin, 'Third Party Intervention before, the International Court of Justice' (1986) 80 American J Intl L 495; DW Greig, 'Third Party Rights and Intervention before the International Court' (1992) 32 Virginia J Intl L 285; Ronald MacDonald, 'Intervention before the International Court of Justice' (1993) 5 African J Intl and Comp L 1; Christine Chinkin, *Third Parties in International Law* (Oxford University Press 1993) 147; JG Merrills, *International Dispute Settlement* (Cambridge University Press 2002) 132; Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960 – 1989' (2003) 74 British Y Intl L 23; Christine Chinkin, 'Article 62 and 63' in Andreas Zimmerman and Christian Tomuschat (eds), *The Statute of the International Court of Justice* (Oxford University Press 2006) 1331; David Harris and Snadesk Swakumaran, *Cases and Materials in International Law* (Cambridge University Press 2015) 882;

2 John Dugard, Max du Plessis, Tiyanjana Maluwa and Dire Tladi, *Dugard's International Law: A South African Perspective* (Juta 2018) 682.

Uncertainties

As stated above, the ICJ provides for two forms of third-party intervention, the so-called 'general' intervention as governed by Article 62 and the 'special' intervention as governed by Article 63.[3]

Article 62 reads as follows:

> 1 Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> 2 It shall be for the Court to decide upon this request.

Article 63 provides:

> Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.
>
> Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgement will be equally binding upon it.

According to Kolb[4] the substance of what is now Articles 62 and 63 of the ICJ Statute is to be found in Articles 62 and 63 of the Statute of the PCIJ—the predecessor of the ICJ—which were initially meant to *act as arbitration* procedures. An example is the first intervention under Article 63 of the PCIJ Statute in the *SS Wimbledon* case.[5] This case concerned a dispute between the United Kingdom (UK) and Germany which was laid before the PCIJ for arbitration. The dispute concerned the interpretation of Article 380 of the Treaty of Versailles which provided that the Kiel Canal was to be 'free and open to vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.' In stopping a vessel from the UK, a country with which Germany was at peace, Germany, the PCIJ maintained, was in breach of her treaty obligations. The PCIJ allowed France, Italy and Japan to intervene

Articles 62 and 63 of the ICJ Statute inherited from the PCIJ as arbitration procedures do not, however, suit the purposes of the ICJ.[6] An arbitrator essentially is an organ of the *parties* and appointed by them to serve *their* needs and not to concern him or herself with *third parties*' interests. The ICJ, however, is an organ of the *international*

---

3 For the *travaux préparatoires* of Articles 62 and 63 see Chinkin 'Article 62 and Article 63' (n 1) 1333–34, 1371– 1372.

4 Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 696.

5 1923 PCIJ Rep Series A No 1, 25 (*France, Italy, Japan and the UK v Germany*). The case concerned the Kiel Canal and the interpretation of Article 380 of the Treaty of Versailles of 1919.

6 Ruda (n 1) 499.

community and must be involved with justice for that *community* as a *whole*. Third states are automatically part of the international community and should in principle be entitled to 'intrude', as it were, into the relationship between the principal parties to a case before the ICJ by means of procedural intervention.

To date, third-party states have mainly abstained from involving themselves in disputes before the ICJ to which they were not parties.[7] Various reasons were put forward for this state of affairs. The most important reason put forward was that states were uncertain as to whether intervention was a genuine incidental procedure, with the third party *not* becoming a *party* to the case, but simply a participant expressing its views, or whether intervention amounted to an automatic enlargement of the principal case with the intervening state *becoming* a *party* to the dispute. It was also uncertain as to whether the intervening third-party state was bound by the decision.[8] Article 63 *expressly provides* for the latter but Article 62 is *silent* on this point.

Because of these uncertainties, the interpretation of Articles 62 and 63 was left to the judges of the ICJ with the expectation that the jurisprudential interpretations would develop a true doctrine of third-state intervention through judicial practice. These expectations were not met and the idea that third states should not be allowed to participate in proceedings before the ICJ unless the principal parties agreed, remained prevalent. After a long period of hesitancy from the ICJ there have however been some important developments in the ICJ's approach regarding third-party state intervention.[9]

The Legal Effect of Article 62 of the ICJ Statute

A most important case relating to Article 62's interpretation and application is the *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) Application to Intervene* case.[10]

The dispute between El Salvador and Honduras concerned the Gulf of Fonseca. This lay on the Pacific coast of three states, with the north-west coast being the territory of Nicaragua, and Honduran territory lying on the coast between them. By special agreement between El Salvador and Honduras, the dispute was brought before a Chamber of the Court. Nicaragua sought to intervene in regard to the delimitation of the waters of the Gulf, the legal situation of the islands in the Gulf, the legal situation of the maritime spaces outside the Gulf, and the legal régime of the waters of the Gulf itself. El Salvador objected to any intervention, but Honduras did not object to Nicaragua being permitted to intervene for the sole purpose of expressing its views on the legal status of the waters within the Gulf. The Chamber, unanimously, decided that Nicaragua

7 Shabtai Rosenne, *Intervention in the International Court of Justice* (Brill 1993) 190.

8 Merrills (n 1) 132.

9 Gerald McGinley, 'Intervention in the International Court' (1985) 34 Intl Comp L Quarterly 671.

10 [1990] ICJ Rep 92. See Malcolm Evans, 'Note' (1992) 41 Intl Comp L Quarterly 896.

could intervene *only* in regard to the *legal régime* of the waters of the Gulf. Regarding what constitutes an 'interest of a legal nature' the Chamber of the Court said in paragraphs 58 and 90:

> 58. If a State can satisfy the Court that it has an interest of a legal nature which may be affected by the decision in the case, it may be permitted to intervene in respect of that interest. But that does not mean that the intervening State is then also permitted to make excursions into the other aspects of the case. This is recognized by Nicaragua… In the Chamber's opinion, however, it is clear, first, that it is for a State seeking to intervene to demonstrate convincingly what it asserts, and thus to bear the burden of proof; and second, that it has only to show that its interest "may" be affected, not that it will or must be affected… Nevertheless, there needs finally to be clear identification of any legal interests that may be affected by the decision on the merits. A general apprehension is not enough. The Chamber needs to be told what interests of a legal nature might be affected by its eventual decision on the merits.
>
> 90. So far as the object of Nicaragua's intervention is "to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute", it cannot be said that the object is not a proper one: it seems indeed to accord with the function of intervention… It seems to the Chamber however that it is perfectly proper, and indeed the purpose of intervention, for an intervener to inform the Chamber of what it regards as its rights or interests, in order to ensure that no legal interest may be "affected" without the intervener being heard; and that the use in an application to intervene of a perhaps somewhat more forceful expression is immaterial, provided the object actually aimed at is a proper one.

The court's judgment in this case is of the utmost importance for questions of intervention and a number of principles emerged. First, the state requesting intervention bears the burden of proof to demonstrate convincingly that it has an interest of a legal nature which may be affected by the dispute. General fears are not enough. Second, however, it need only demonstrate that its legal interests *may* be affected, not that they will or must be affected. Third, the competence of the court to grant permission to intervene does not depend on the consent of the states who are actually the parties to the dispute before the court. The court's competence flows from the consent to Article 62 which each state gives when it first signs the ICJ Statute. Thus, the opposition of both of the disputing states is not a bar to permitting third-party intervention. Fourth, if permission to intervene is granted, the intervener does *not* thereby become a party to the proceedings. The purpose of intervention is to inform the court that the legal rights of the intervener may be prejudiced, not to trigger a binding judicial determination of its rights. So, importantly, the existence of a jurisdictional link between the intervener and the disputing states is not required. The intervener is not a party, therefore questions of a jurisdictional link between the parties and their consent do not arise. Indeed, as the final award in this case makes clear, the fact that the *intervener is not a party* to the dispute *means* that it is *not bound* by *the court's final judgment*. Moreover, the

intervener cannot agree to be bound by that judgment unilaterally. It must *formally* become a *party* if it wishes to be *bound* (via a pre-existing jurisdictional link or with the consent of the disputants) because otherwise the actual parties would have been propelled into a binding legal settlement with a state that had not needed to show jurisdiction in order to intervene, and to whom *they may* have objected.

Despite the concept of *non-party intervention* being strongly supported by Oda J in a minority judgment in the *Case Concerning Sovereignty over Pulau Litigan and Pulau Sipandan (Indonesia/Malaysia)*[11] case its development has been slow through ICJ jurisprudence. In the latter case the Philippines' application to intervene as a non-party was *rejected*. Further *rejections* of applications to the ICJ to intervene as a non-party have been Malta in the *Tunisia-Libya (Continental Shelf)*[12] case; Italy in the *Libya-Malta*[13] case; several states in the Pacific (such as Australia and Samoa) in the *Nuclear Tests II*[14] case; Costa Rica in the *Nicaragua/Colombia*[15] case and Honduras in the same *Nicaragua/Colombia*[16] case.

These rejections by the ICJ of the applications by states to intervene as a non-party were based on the court's view that the rejected states did not sufficiently indicate their *interests of a legal nature* in the dispute before the court. In the *Jurisdictional Immunities of the State (Germany v Italy)*[17] case the ICJ was adamant that the function of intervention was underpinned by the state's 'duty to inform the court of its legal nature which may be affected.'[18] In this case, Greece's intervention as a non-party was *admitted*. This principle was emphasised in the *Land and Maritime Boundary between Cameroon and Nigeria*[19] case and the *Land, Island and Maritime Frontier Dispute*[20] case. In the latter two cases Equatorial Guinea and Nicaragua respectively were *permitted* to intervene as non-parties.

It must be emphasised that where a state *intervenes as a party* under Article 62, in contrast to *non-party* intervention, the intervening state *participates in the proceedings*

11 [2001] ICJ Rep 2010 paras 2–8.

12 [1982] ICJ Rep 18. What led the ICJ to reject the request of Malta to intervene was that Malta sought permission to attach to its request an express reservation that its intervention was not to have the effect of putting in issue its own claims vis-á-vis Tunisia and Libya.

13 [1985] ICJ Rep 113. The ICJ held that if Italy were permitted to intervene the court would find itself deciding disputes between Italy and the main parties in circumstances in which no jurisdiction had been established and the request was dismissed.

14 [1995] ICJ Rep 288.

15 [2011] ICJ Rep 206.

16 ibid.

17 [2012] ICJ Rep 34.

18 ibid para 29.

19 [2002] ICJ Rep para 5.

20 *El Salvador/Honduras* (n 10).

of a particular case *as a full party*. To date *no* state has been admitted under Article 62 to intervene in a case as a full party.

The precise wording of Article 62(1) of the ICJ statute that 'should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene' raises three issues: (i) defining an interest of a *legal nature*, (ii) determining a *jurisdictional link* between the intervener and the initial litigating parties and (iii) the *legal effect* of the ICJ's *ultimate decision* in the case on the intervening state.

Interest of a Legal Nature

The existence of an *interest of a legal nature* is obviously the main element of an Article 62 intervention. In the *Land, Island and Maritime Frontier Dispute*[21] case it was held by the ICJ 'that it is for the State seeking to intervene to identify the interest of a legal nature which it considers may be affected by the decision in the case, and to show in what way that interest may be affected.' According to Tanaka[22] while the language of Article 62 appears to preclude political, social economic and factual interests, legal and extra-legal interests may often be intertwined and an 'interest' under Article 62 need not be exclusively legal. However, it is for the ICJ to decide on the request to intervene, and if so, the limits of such intervention.

The ICJ jurisprudence is not clear as to what constitutes an *interest of a legal nature* and one would at this stage of the Court's history have expected greater clarity. Certain indications given by the court do however give some guidance.

In the *Nicaragua/Columbia*[23] case the ICJ held that the intervener needs to establish that it is its *interest* that is affected and *not* necessarily its *rights* too. This was also the view of the court in the *Land, Island and Maritime Frontier*[24] case. The ICJ in the *Sovereignty over Pulau Litigan and Pulau Sipadan*[25] case held that an *interest of a legal nature* must be established by the state seeking to intervene. In the same case the ICJ held that the interest of a legal nature must be concrete and not general or hypothetical.[26] This is also the view of Kolb.[27]

---

21 ibid para 58.

22 Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018) 206.

23 (n 15) para 26.

24 *El Salvador/Honduras* (n 10) para 61.

25 *Indonesia/Malaysia* (n 11) para 47.

26 ibid para 59.

27 Kolb (n 4) 706.

It was held in the *Tunisia/Libya (Continental Shelf)*[28] case that a third-party's interest must not be the same kind as that of other states within the region. By implication the interest must be *specific* and *unique* and of a legal nature. In this case, Malta's request to intervene was refused because Malta's interest was of the same kind as that of other states in the region.[29] It was also decided in the *Tunisia/Libya* case that a state applying to intervene may not introduce a *new dispute* in the proceedings before the court. Because this case concerned the *delimitation* of the central Mediterranean continental shelf and Malta applied to intervene and claimed *sovereign* rights over certain areas of this continental shelf, Malta's application was rejected because it introduced a new dispute in the proceedings.[30] It was similarly held in the *Land, Island and Maritime Frontier Dispute*[31] case that Article 62 'is not intended to enable a third state to take on a new case.' This is also further implied in the *Land, Island and Maritime Frontier Dispute*[32] case where it was held that the intervening state may not make excursions into other aspects of the case. It was emphasised in the *Tunisia/Libya (Continental Shelf)*[33] case that the aim of a third state intervening under Article 62 must not be to influence the court to prejudge the merits of the case before it. This was also decided in the *Land, Island and Maritime Frontier Dispute*[34] case.

Out of the above decisions of the ICJ it is possible to condense some broad principles when it comes to determining what constitutes an 'interest of a legal nature' allowing a state to request to intervene in a dispute before the court: The state requesting intervention bears the onus of proving its interest of a legal nature which may be affected by the dispute. The opposition of either or both of the disputing parties is not a bar to permitting third-party intervention. The purpose of intervention is to inform the court that the legal rights of the intervener may be prejudiced and *not* to trigger a *binding* judicial determination of the intervener's rights. The object of Article 62 is primarily preserving, protecting and safeguarding legal rights or interests (in a broader sense than just protecting the third state from any executory effect of the decision of the court, which in any event is already excluded by Article 59 of the Statute of the ICJ); and secondary of informing the court of the nature and scope of the legal rights and interests of the third state. A would-be intervener need not make an exhaustive presentation of its case but need only to indicate its legal interests which would be affected in general terms.

28 *Tunisia/Libya* (n 12) para 15.
29 ibid para 15.
30 ibid para 15.
31 *El Salvador/Honduras* (n 10) para 97.
32 ibid para 58.
33 *Tunisia/Libya* (n 12) para 31–37.
34 *El Salvador/Honduras* (n 10) para 61.

The Jurisdictional Link

In determining the necessary jurisdictional link between the original parties to a dispute before the ICJ and an intervening third-party state, a distinction must be made between *non-party* intervention and *party* intervention. In the former instance, intervention can be permitted even though there is no jurisdictional link. In the *Jurisdictional Immunities of the State*[35] case it was held that it is not necessary to establish the existence of a basis of jurisdiction between the parties to the proceedings and the state seeking to intervene as a *non-party*.[36] In contrast, a jurisdictional link *is* needed between the intervening state and the original parties if the intervening state aims to become a *party* to the case.[37]

If the intervening state does not become a *party* to the dispute, questions of a jurisdictional link with the actual parties to the dispute do not thus arise and that state is not bound by the court's final judgment. The intervener cannot even agree to be bound by the judgment unilaterally. It must *formally become a party* if it wishes to be bound, either via a pre-existing jurisdictional link or with the consent of the disputants.

A vexed question thus has been resolved. Title of jurisdiction does not have to be produced unless the third state is intervening as a *principal* for the purposes of becoming a *party* to the case. Where the third state intervenes simply to participate, on an accessory basis as it were, but not as a party, a title of jurisdiction does not have to be produced. An autonomous jurisdictional justification is not needed unless the third party is to be a party to the case, claims to exercise certain rights and declares that it will be subject to the duties of a party to the case. Legally it would be irrational if a state's capacity to present its arguments and wishes to protect its interest were to be subject to the same conditions as applied to it becoming a full party to the proceedings before the ICJ. This point is also emphasised by Chinkin who states that a *non-party* state intervener need not have a jurisdictional link to the case nor is its right to intervene conditional on the acceptance of its intervention by the original parties to the dispute.[38]

It remains a moot point if it is realistic in all circumstances that an intervening state who intervenes as a *non*-party is not bound by the ICJ's final determination. Is it really so that in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*[39] case for example (discussed above) that Nicaragua as intervening state was not for all

35 *Germany/Italy* (n 17) para 31. See Shigeru Oda, *The International Court of Justice* (Tokyo Nikon Hyoronsha 2011) 81.

36 Hugh Thirlway, *The International Court of Justice* (Oxford University Press 2016) 182; Tanaka (n 22) 210.

37 Hugh Thirlway, *The Law and Procedure of the International Court of Justice* Vol 1 (Oxford University Press 2013) 995.

38 Chinkin, 'Article 62 and Article 63' (n 1) 1356. See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea Intervening*) [2002] ICJ Rep 303 para 15; *Certain Phosphate Lands in Nauru (Nauru v Australia)* [1992] ICJ Rep 240 para 55.

39 (n 10) para 443.

practical purposes *bound* by the court's determination as to the sovereignty of various islands and the delimitation of various maritime zones in the disputed area? To hold that it was not, simply ignores the real force which a binding judicial determination of the ICJ has in practice.

Legal Effect of Judgments under Article 62 on Intervening States

The legal effect of the ICJ's judgments on an intervener under Article 62 of the ICJ statute clearly differs according to the type of intervention. In the case of *non-party* intervention, the ICJ's decision is *not* binding on the intervening state. In the case of *party intervention*, the decision of the court *is* binding on the intervening state as a party to the case.

It is clear that the pronouncements of the court in the principal proceedings regarding the *legal interest* invoked by the *intervener* who intervened as a *party* will be binding on that intervener. An accessory intervener who however intervened as a *non-party* is not bound by the *totality* of the judgment. But what is the position regarding that part of the court's judgment that is connected with the *rights and interests* of the non-party intervener that motivated it to intervene? Would that part of the court's judgment be legally binding on the *non-party* intervener? Here a difference of opinion exists. Thirlway[40] holds a contrary view to that of Kolb.[41] As seen by Kolb[42] the very purpose of intervention is to put rights and interests of the intervening state into play. The result is that a non-party intervening state cannot take the benefits without bearing any burdens. It cannot intervene solely to inform the court of its rights and so to protect them, without incurring any consequences.

It is a moot point if the silence of Article 62 on this issue does not militate against this conclusion of Kolb. It may be suggested that the court will be wise if, whenever it appears necessary in the future, to specifically state, in the operative parts of its judgments, the precise consequences of its judgment for intervening *non-party* third states.

Analysis of Article 63 of the ICJ Statute

According to Article 63(2) every member state of a multilateral treaty has the *right* to intervene under Article 63 after being notified by the Registrar of the Court that the interpretation of that treaty will be before the court. It does not follow however that such intervention shall automatically be admitted by the ICJ as it is for the court to decide in each case whether all the *conditions* for such an intervention as laid down in Article 63 have been *complied* with. In the *Military and Paramilitary Activities in and Against*

40 Thirlway, 'Law and Procedure of the International Court of Justice' (n 1) 73.
41 Kolb (n 4) 728.
42 ibid.

Nicaragua (Nicaragua/United States)[43] case for example, El Salvador's request to intervene was rejected. The United States successfully argued that issues related to the *use of force* should be dealt with by the political organs of the UN and are not covered by Article 63.

The concept of intervening in cases which involve the *interpretation* of *multilateral treaties* originated in the 1899 and 1907 Hague Regulations and Conventions for the Pacific Settlement of International Disputes.[44] This concept was incorporated into the Statute of the PCIJ in 1920 as Article 63 and was succeeded to as Article 63 in the Statute of the ICJ. The only successful application to intervene under Article 63 of the Statute of the PCIJ was in the *SS Wimbledon* case.[45] Article 63 has no mention of a 'legal nature' of a third state as a prerequisite to apply to intervene but it arguably is implied. Theoretically, an intervention could be on a mixed basis in that a state could apply under Article 62 presenting arguments about its interests of a legal nature and under Article 63 presenting its arguments about the interpretation of a multilateral convention.

To date, there have been only two successful requests for intervention before the ICJ under Article 63. In the *Haya de la Torre Columbia/Peru* case[46] Cuba's intervention was admitted. *In Whaling in the Antarctic* (*Australia v Japan*)[47] New Zealand's intervention was admitted. In this instance New Zealand was allowed to intervene as supportive of Australia's submissions. Tanaka indicates that in coming to these decisions the ICJ interpreted Article 63 strictly.[48]

The object of Article 63 is to promote unity in the understanding of multilateral conventions and to prevent disputes between states about the interpretation and application of such conventions. Article 63 can only lead to greater legal certainty

---

43 [1984] ICJ Rep 14. See Jerzy Stucki, 'Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The Salvadorean Incident' (1985) 79 American J Intl L 1005.

44 The 'Law of the Hague' determines the rights and duties of belligerents in the conduct of their military operations and limits the choice of doing harm. This body of law is founded on the Hague Conventions of 1899 as revised in 1907. The text of the Hague Regulations and Hague Conventions of 1907 appear in Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (Oxford University Press 2000). For the relationship of South Africa and the Hague Regulations and Hague Conventions see Dunstan Smart, 'The Municipal Effectiveness of Treaties Relevant to the Executive Exercise of Belligerent Powers' (1987) 13 South African Y Intl L 33.

45 *Wimbledon* case (n 5) where Poland's intervention was permitted. See Hercules Booysen, *Volkereg* (Juta 1981) 111.

46 [1951] ICJ Rep 83.

47 *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* [2014] ICJ Rep 226. This case is discussed extensively by Sonia Roland, 'International Convention for the Regulation of Whaling – Moratorium in the Southern Ocean Sanctuary' (2014) 108 American J Intl L 496. See Jan Klabbers, *International Law* (Cambridge University Press 2017) 174.

48 Tanaka (n 22) 206.

regarding multilateral conventions. The prerequisite, however, remains that application to intervene under Article 63 belongs only to states being a party to the relevant multilateral convention. The intervention under Article 63(1) must concern 'the construction of a convention to which states other than those in the case are parties.' This indicates that the convention in question must be either plurilateral (various parties) or multilateral (a great number of parties). Bilateral treaties are thus excluded even if the interpretation of such a treaty could be relevant for other non-party states.[49]

Article 63 presupposes that the third states that are parties to the plurilateral or multilateral convention will have been informed of the situation entitling them to intervene. Article 63(1) requires such notification by the Registrar of the Court to be given 'forthwith'. The term 'forthwith' can be interpreted in various ways. The ICJ has followed a general approach in that it is satisfied if the notification is done during or after the provisional-measures proceedings.[50]

Legal Effect of Judgments under Article 63 on Intervening States

As stated in Article 63(2) the judgment is 'equally binding' on the intervening state. However, this provision *only* covers the *interpretation* that is concerned with the *subject* of the *intervention*. The whole judgment as such does not have the force of *res judicata*, either as regards form or substance, so as to bind the intervener. It is only the court's pronouncements on the interpretation of the convention that are binding on the intervening third-party state. From a practical point of view however, the court's interpretation of a multilateral convention regarding an intervening state would be binding beyond that particular case on all members states of the convention. This issue has not yet been clarified in an adequate way and it would be most valuable for the court to clarify the law on this point.

General guidelines for successful intervention under Article 63 appear to be: First, that the intervention under Article 63 must relate to the interpretation of a treaty 'to which states other than those in the case are parties.' This eliminates bilateral treaties as no intervention can be envisaged under Article 63 where there are no other states parties to the treaty. Also excluded would be a multilateral treaty to which the prospective intervening state is not a party. Second, the treaty must be the *principal subject* in the proceedings before the court. Third, the intervention is limited to submitting *observations* only on the construction of the treaty to which states other than those concerned in the case are parties. Fourth, no jurisdictional link is required between the intervening state and the original litigant states. The intervener thus need not be an

49 Kolb (n 4) 733.

50 *Pakistan Prisoners of War* case [1998] ICJ Rep 253; *Case of Lockerbie* [1992] ICJ Rep 8; *Breard* case [1998] ICJ Rep 253; *Le Grand* case [2001] ICJ Rep 470.

applicant, respondent or claimant in the case. Lastly, the *interpretation* of the treaty by the ICJ will be *equally binding* on the original parties to the case *and on the intervener.*

Conclusion

As it appears from above, at present the over-all picture as it were, regarding the *successful* applications of Articles 62 and 63 of the ICJ Statute to intervene as third parties in disputes between states before the ICJ is not promising. Successful applications to intervene as a non-party state under Article 62 have been Nicaragua in the *El Salvador/Honduras* case,[51] Equatorial Guinea in the *Cameroon/Nigeria* case[52] and Greece in the *Germany/Italy* case.[53] Successful applications to intervene as a third party under Article 63 have been Cuba in the *Haya de la Torre Columbia/Peru*[54] case and New Zealand in the *Australia/Japan* case.[55]

It could be that the ICJ is wary of becoming involved in issues of third-party intervention due to possible political consequences as happened with El Salvador's application to intervene in the *Nicaragua/United States* case[56] where the United States argued that issues related to use of force should rather be dealt with by the political organs of the UN. International political developments have, however, been swift since the *Nicaragua/United States* case in 1986 and in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[57] in 2004, in which the ICJ was categorical in holding that it cannot accept the view that has no jurisdiction because of the political character of the question posed.

Supporters of the idea of state autonomy in international adjudication would prefer to restrict intervention. This view sees third-party intervention as being counter-productive as it may discourage a state from commencing with a contentious proceeding before the ICJ for fear that it may be unable to control the course of the proceedings due to the possibility of third-party intervention. A state may also feel that if the dispute is widened beyond the initial direct concerns by third-party intervention, the state is still more uncertain as to the eventual outcome. Despite the obvious merits of this view it is also true that at this stage of history with the advent of globalism, the ICJ as the pre-eminent

51 *El Salvador/Honduras* (n 10).
52 *Cameroon/Nigeria* (n 19).
53 *Germany/Italy* (n 17).
54 *Haya de la Torre Columbia/Peru* (n 46).
55 *Australia v Japan* (n 47).
56 *Nicaragua v United States* (n 43).
57 [2004] ICJ Rep 87 para 17. See George Barrie, 'The Neglected ICJ's *Wall Opinion* on the Consequences of International Wrongful Acts' (2004) XLVII CILSA 129.

international adjudicative body must settle international disputes between states—many involving highly political issues.[58]

The ICJ's policy towards third-party state intervention should be more flexible so as to promote its aim to administer efficient administration in achieving international peace, security and justice as embodied in Article 2(3) of the Charter of the United Nations. The intervention procedure in Articles 62 and 63 of the Statute of the ICJ is indicative of a realisation that international disputes rarely fit into a bilateral pattern. It stands to reason that events which culminate in international adjudication before the ICJ will in most instances affect various states in different ways and with varying intensity.

By being more flexible in allowing the possibility of the third-party state intervention the ICJ can avoid the possibility of duplication of proceedings and can gain a broader perspective on all the motivations leading to the litigation besides those presented by the original parties. The fact that it is for the ICJ in an Article 62 application to decide whether or not to allow third-party intervention allows the court a wide discretion.[59] Not to allow it could in many instances risk jeopardising the successful resolution of the original dispute between the *original parties* where interested third parties have problems in accepting the decision.

Chinkin[60] persuasively argues that a flexible approach by the ICJ toward third-party states intervention not only promotes economy of litigation but ultimately leads to the efficient administration of justice. If the ICJ had followed a more flexible approach to the interpretation of Article 62 of the ICJ Statute in the past, it is most conceivable that third parties would have been more inclined to apply to intervene in the following disputes: The NATO bombing in Yugoslavia;[61] the military intervention of Uganda[62]

---

58 Andrew Coleman, 'The International Court of Justice and Highly Political Matters' (2003) 4 Melbourne J Intl Law 29*;* Rosalyn Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 Intl Comp L Quarterly 58; Takane Sugihara, 'The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues' in AS Muller (ed), *The International Court of Justice: Its Future Role after Fifty Years* (Kluwer 1997) 117.

59 Martin Dickson and Robert McCorquodale, *Cases and Materials in International Law* (Blackstone Press 1991) 625.

60 Chinkin (n 1) 'Third Party Intervention before the International Court of Justice' 495.

61 *Case Concerning the Legality of the Use of Force* [2004] ICJ Rep 1307.

62 *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168.

and Rwanda[63] in the Democratic Republic of the Congo; allegations of genocide against Serbia[64] and the intervention in Georgia by Russia.[65]

It is submitted that for the ICJ to achieve its mandate for peacefully resolving international disputes, this situation calls for a drastic reassessment.[66] A more flexible approach to the interpretation of Articles 62 and 63 of the Statute of the ICJ by the ICJ appears to be imperative. The court's decision does have an impact wider than simply on the parties to the case. Most cases brought before the court by two states are formulated in a bilateral manner. These formulations do not always reflect the multifaceted interests involved. If the court's decisions are based on principles of international law, they must be based on a full appreciation of the legal situation. Interventions should thus have to be allowed more frequently. In this way, the ICJ can only in settling disputes peacefully operate more effectively, better promote international peace and justice, and in that way further the development of international law.

63 *Case Concerning Armed Activities on the Territory of the Congo, Preliminary Objections (DRC v Rwanda)* [2006] ICJ Rep 6.

64 *Case Concerning the Application of the Convention of Genocide (Bosnia v Serbia)* [2007] ICJ Rep 43.

65 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* [2008] ICJ Rep 353.

66 To observe how the approach to Article 62 and 63 of the ICJ Statute has developed through the years compare Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* Vol II (Cambridge Grotius Publications 1986) 550–555 with Rosalyn Higgins, *Oppenheim's International Law* Vol II (Oxford University Press 2017) 1157–1159.

References

Barrie G, 'The Neglected ICJ's *Wall Opinion* on the Consequences of International Wrongful Acts' (2004) XLVII CILSA.

Booysen H, *Volkereg* (Juta 1981).

Coleman A, 'The International Court of Justice and Highly Political Matters' (2003) 4 Melbourne J Intl Law.

Chinkin C, 'Third Party Intervention before, the International Court of Justice' (1986) 80 American J Intl L <https://doi.org/10.2307/2201772>

Chinkin C, *Third Parties in International Law* (Oxford University Press 1993).

Chinkin C, 'Article 62 and 63' in Andreas Zimmerman and Christian Tomuschat (eds), *The Statute of the International Court of Justice* (Oxford University Press 2006).

Dickson M and McCorquodale R, *Cases and Materials in International Law* (Blackstone Press 1991).

Dugard J, Du Plessis M, Maluwa T and Tladi D, *Dugard's International Law: A South African Perspective* (Juta 2018).

Evans M, 'Note' (1992) 41 Intl Comp L Quarterly.

Fitzmaurice G, *The Law and Procedure of the International Court of Justice* Vol II (Cambridge Grotius Publications 1986).

Greig D, 'Third Party Rights and Intervention before the International Court' (1992) 32 Virginia J Intl L.

Harris D and Swakumaran S, *Cases and Materials in International Law* (Cambridge University Press 2015).

Higgins R, 'Policy Considerations and the International Judicial Process' (1968) 17 Intl Comp L Quarterly <https://doi.org/10.1093/iclqaj/17.1.58>

Higgins R, *Oppenheim's International Law* Vol II (Oxford University Press 2017).

Jessup P, 'Intervention in the International Court' (1981) 75 American J Intl L <https://doi.org/10.2307/2201357>

Klabbers J, *International Law* (Cambridge University Press 2017).

Kolb R, *The International Court of Justice* (Hart Publishing 2013).

MacDonald R, 'Intervention before the International Court of Justice' (1993) 5 African J Intl and Comp L.

McGinley G, 'Intervention in the International Court' (1985) 34 Intl Comp L Quarterly <https://doi.org/10.1093/iclqaj/34.4.671>

Merrills J, International Dispute Settlement (Cambridge University Press 2002) <https://doi.org/10.1017/CBO9781139165488>

Oda S, *The International Court of Justice* (Tokyo Nikon Hyoronsha 2011).

Roberts A and Guelff R (eds), *Documents on the Laws of War* (Oxford University Press 2000).

Roland S, 'International Convention for the Regulation of Whaling – Moratorium in the Southern Ocean Sanctuary' (2014) 108 American J Intl L.

Rosenne S, Intervention in the International Court of Justice (Brill 1993).

Ruda J, 'Intervention before the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) <https://doi.org/10.1017/CBO9780511560101.029>

Smart D, 'The Municipal Effectiveness of Treaties Relevant to the Executive Exercise of Belligerent Powers' (1987) 13 South African Y Intl L.

Stucki J, 'Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The Salvadorean Incident' (1985) 79 American J Intl L <https://doi.org/10.1017/S0002930000214425>

Sugihara T, 'The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues' in Muller A (ed), *The International Court of Justice: Its Future Role after Fifty Years* (Kluwer 1997).

Tanaka Y, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018) <https://doi.org/10.1017/9781316687062>

Thirlway H, 'The Law and Procedure of the International Court of Justice 1960 – 1989' (2003) 74 British Y Intl L <https://doi.org/10.1093/bybil/74.1.7>

Thirlway H, *The Law and Procedure of the International Court of Justice* Vol 1 (Oxford University Press 2013) <https://doi.org/10.1093/law/9780199673377.001.0001>

Thirlway H, *The International Court of Justice* (Oxford University Press 2016) <https://doi.org/10.1093/obo/9780199796953-0125>

Cases

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) [2008] ICJ Rep 353.

Case Concerning the Legality of the Use of Force [2004] ICJ Rep 1307.

Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda) [2005] ICJ Rep 168.

Case Concerning Armed Activities on the Territory of the Congo, Preliminary Objections (DRC v Rwanda) [2006] ICJ Rep 6.

Case Concerning the Application of the Convention of Genocide (Bosnia v Serbia) [2007] ICJ Rep 43.

Case Concerning Sovereignty over Pulau Litigan and Pulau Sipandan (Indonesia / Malaysia) [2001] ICJ Rep 2010.

Certain Phosphate Lands in Nauru (Nauru v Australia) [1992] ICJ Rep 240.

Continental Shelf (Libyan Arab Jamahiriya/Malta) [1985] ICJ Rep 13.

SS Wimbledon (UK v Japan) 1923 PCIJ Rep Series A No 1.

Haya de la Torre (Columbia v Peru) [1951] ICJ Rep 83.

Tunisia-Libya (Continental Shelf) [1982] ICJ Rep 18.

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua / United States) [1984] ICJ Rep 14.

Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) Application to Intervene case [1990] ICJ Rep 92.

Case of Lockerbie [1992] ICJ Rep 8.

Nuclear Tests II (France v New Zealand) [1995] ICJ Rep 288.

Pakistan Prisoners of War case [1998] ICJ Rep 253.

Breard case [1998] ICJ Rep 253.

Le Grand case [2001] ICJ Rep 470.

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea Intervening) [2002] ICJ Rep 303.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJ Rep 87.

Territorial and Maritime Dispute (Nicaragua v Colombia) [2011] ICJ Rep 206.

Jurisdictional Immunities of the State (Germany v Italy) [2012] ICJ Rep 34.

Whaling in the Antarctic (Australia v Japan, New Zealand Intervening) [2014] ICJ Rep 226.