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1. CAN THE ICJ (RE)QUALIFY INTERVENTION?

Declaration of intervention of the State of Libya

Request for intervention and declaration of intervention of the State of Palestine

1. *Introduction*

Two recent requests submitted by Libya and Palestine in relation to the *South Africa v Israel* proceedings raise the same question concerning the precise form of intervention that the third State intends to apply for under the ICJ Statute. Under the Statute, third States have three options at their disposal: interpretive intervention under Article 63 (when the dispute before the Court requires the interpretation of a multilateral convention to which both the litigating parties and the third State are parties); intervention as a party under Article 62 (when the third State wants to ask the Court to rule on its legal interests that could be affected by the future decision on the dispute between the parties); and intervention as non-party under Article 62 (when the third State wants to inform the Court of its legal interest that may be similarly affected so that the future decision would not affect them).

The main legal issue the two recent requests entail is whether the Court has the power to settle the uncertainties concerning the applicable form of intervention, to identify the appropriate form and to grant accordingly the procedural rights that correspond to that form.

The two requests will be briefly presented below. However, the purpose of this contribution is not to provide clarifications, that only States can give and will probably give before the Court, concerning their "real" intentions. Rather it is to discuss the mentioned legal issue. It will be maintained that as long as (re)qualification of the form of intervention is a procedural issue it falls under the Court's power to decide it.

2. *The request of Libya*

On 10 May 2024 Libya submitted a very short request to intervene in the proceedings instituted by South Africa against Israel relating to the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip. Formally, the request is a "declaration" of intervention under Article 63 of the Court's Statute. The request refers to this provision as well as Article 82 of the Court's Rules that contains the conditions that

interpretive intervention must meet in order to be admissible; it is also structured around these conditions and, in particular, it illustrates Libya's participation to the Convention as well as the provisions whose construction is before the Court. So far so good. But the request contains a few elements that may raise doubts as to its exact qualification, especially as to whether the real purpose of Libya was to intervene under Article 62 of the Statute rather than Article 63.

The request makes reference to Libya's intention to «intervene as a party» (declaration of intervention of Libya, p. 2). This might be nothing else than a slip of the tongue or a mere typo. Indeed, in the next page it is asserted that Libya «does not seek to become a party to the case». Either one or the other. Only the second option is consistent with a declaration of intervention under Article 63 of the Statute.

More relevant as a source of doubt are two other substantive aspects. First, Libya's document does not contain a proposed construction of the identified provisions of the Genocide Convention, which would have been required by Article 82 of the Rules of Court. Instead, under the heading «Provisions of the convention the construction of which the state of Libya considers to be in question» the request for intervention begins by identifying a number of relevant provisions but mainly contains claims of breaches thereof allegedly committed by Israel. In brief, instead of a suggested interpretation of these provisions the document put forward accusations of alleged violations. This rather corresponds to the language of a "party" intending to intervene under Article 62 of the Statute. Second, Libya explicitly states that it supports South Africa and that «its intention [is] to intervene "in support of the Palestinian people"» (*idem*, p. 3). The impression is that Libya's request for intervention is more justified by an intention to defend a private interest (of Palestine) rather than a general interest. Accordingly, Article 62 could be a more appropriate framework for the request. It remains to be seen whether the required, qualified interest under Article 62 is met.

3. *The request of Palestine*

On 3 June 2024 Palestine filed with the Court a document containing two requests for intervention in the same contentious case opposing South Africa and Israel. The document formally includes both a declaration under Article 63 of the ICJ Statute and a request under Article 62 of the Statute. The former declaration is pretty clear. However, the latter request is more ambiguous because nowhere does it state whether Palestine intends to intervene as a party or as a non-party.

Half of the document is dedicated to a description of the relevant facts of the case, leaving little room to the discussion of the conditions surrounding intervention before the Court. With respect to intervention under Article 62, the emphasis is on the requirement of a legal interest. Although Palestine underscores that it is as affected as the applicant, if not more, this requirement is common to both forms of intervention under Article 62.

Similarly inconclusive is the description of the purpose of its request for intervention. Palestine says it intents both «to inform the Court regarding its legal interest which is at the core of the dispute presented to the Court» and «to protect its interests of a legal nature that will be affected in those proceedings». While the second purpose is common to both forms of intervention under Article 62, the first purpose can clearly be considered as corresponding to a non-party intervention.

The only reference that seems to hint at intervention as a party is the very last statement of this second part of the document where Palestine affirms that it «also wishes to participate

as intervenor in any subsequent provisional measures proceedings where issues that concern its interests of a legal nature may arise» (request for intervention of Palestine, p. 20). One may deduce from this statement that Palestine considers it should be entitled to exercise all procedural rights that normally pertain to the "parties". In that case, it could be argued that the request implicitly refers to intervention as a party.

4. *The legal issue*

The request submitted by Libya shows the hesitancy in qualifying a request for intervention in a contentious case when it is not clear whether the requesting State acts under Article 62 or 63 of the ICJ Statute. In this case the requesting State is explicit in formally choosing one type of intervention (ie Article 63) but its request indicates elements that substantially point at another qualification (Article 62) that better describes its possible participation in the contentious proceedings.

The request submitted by Palestine shows a similar hesitancy but with respect to the alternative between intervening as a party or as a non-party under Article 62 of the ICJ Statute. In this case, no formal choice is made in the request and, while some elements hint at intervention as a party, other elements point in the opposite direction.

In both cases, interpretation of the requests for intervention alone does not lead to a conclusive result. The requesting States would have to clarify their intentions. Otherwise, the third State risks to be allowed procedural rights of participation that do not (entirely) correspond to the purpose of its request. Uncertainties and vague formulations in the request/declaration may derive from doubts of the third State concerning the precise scope of each form of intervention – and the sometimes-inconsistent case law of the Court does not facilitate the task of submitting intervention demands – or from the intention of the third State to exploit the blurring contours of intervention and broaden the scope of its participation in the proceedings. In both cases the expectations of third States risk to be frustrated because the Court is increasingly rigorous on the precise limitations of intervention, and they will not be able to do what they expected.

The legal issue that arises is in any case the same, namely, whether the Cour has the power – as long as uncertainties are not spelled out – to decide which is the proper form of intervention for the third State, especially when this qualification is different from the one formally advanced by that State in its request.

5. *The different situation of Poland*

A third case deserves to be mentioned. Poland submitted two separate requests to intervene in the *genocide case* between Ukraine and Russia, both under Article 63 (declaration of intervention of Poland) and Article 62 of the Statute (request for intervention of Poland). These two requests, especially the latter, raise some concerns because there is a certain blurring of the forms of intervention before the Court.

The uncertainties of Poland's request to intervene as a non-party under Article 62 relate not so much to the existence of the legal requirement of the legal interest (for a similar request to intervene under Article 62 based on the interest in the respect of *erga omnes* obligations see the request for intervention of Nicaragua in *South Africa v Israel*; for a legal analysis of that issue see B. BONAFÈ and L. MAROTTI, *Profili evolutivi dell'intervento nel processo*

davanti alla Corte internazionale di giustizia, *Jus*, 2023, pp. 175-202) but to the reasons given by Poland to justify the fact that its interest "may be affected" by the future decision of the Court.

First, Poland considers that the future judgment of the Court could affect its interests because it "has provided Ukraine with significant assistance, including humanitarian aid and support delivered by military, law enforcement and emergency personnel to Luhansk and Donetsk Oblasts, where the alleged genocide was supposedly committed» (request for intervention of Poland, para. 37). However, in legal terms it is difficult to see how this kind of assistance could be the object of a judicial determination by the Court, its jurisdiction being limited to the legal dispute between the parties and the intervention of Poland not being intended to expand that dispute.

Second, Poland maintains that its «legal interest is linked with the need to secure a correct interpretation of the [Genocide] Convention» and that the future decision of the Court may affect it as concerns both the dispositive and the reasons (*idem*, para. 39). Poland «wishes to raise fundamental questions of international law on behalf of the international community concerning» the scope of the Convention (*idem*, para. 42). This general interest could justify Article 63 intervention but does not seem to be sufficiently qualified for intervention under Article 62 which requires the legal interest "to be the object of a real and concrete claim of that State, based on law» (*Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene*, Judgment of 4 May 2011, ICJ Reports, 2011, para. 26).

The situation of Poland is nonetheless different from that of Libya and Palestine examined above. If the requirement of the necessary legal interest is not met, the solution here would be straightforward: the request under Article 62 will be declared inadmissible. In other words, the Court would not have the opportunity to "save" the request of Poland by requalifying it.

6. *The power of the Court to qualify intervention*

Turning to the issue of the Court's power to (re)qualify intervention, the situation is unprecedented. In the jurisprudence of the two courts, the closer situation was that of Poland in the Wimbledon case. Initially, Poland submitted a request for intervention under Article 62 but during the oral stage of the admissibility proceedings it asked to avail itself of its right to intervene under Article 63. There is thus no requalification precedent in the Courts' case law.

However, its undeniable that it is for the Court to decide procedural issues (including intervention) and, to that end, to interpret the unilateral acts of third States asking to intervene. If that interpretive exercise proves inconclusive, and the intention of the requesting party remains unclear, the Court can only decide admissibility of intervention on the basis of the stated object and purpose of intervention so that the latter can be matched with the proper form of participation.

Under its Statute, the Court is clearly the master of procedure. Articles 30 and 48 provide respectively for a general law-making power concerning procedural rules and for the ad hoc power to organize individual proceedings. It can hardly be questioned that the Court can qualify intervention in case of doubt and apply the procedural rules so to administer justice in the best way. More generally, the principle iura novit curia can be understood as covering both substantive and procedural rules.

Confirmation of the power to requalify a request of intervention can be found in the similar power the Court has to interpret and requalify questions submitted for advisory opinions. This position has been constantly maintained in its case law (see in general B.

BONAFÈ, *Il potere della Corte internazionale di giustizia di riformulare la domanda di parere consultivo*, in L. GRADONI, E. MILANO (eds), *Il parere della Corte internazionale di giustizia sulla dichiarazione di indipendenza del Kosovo. Un'analisi critica*, Padova, Cedam, 2011, pp. 31-57).

Thus, the requalification by the Court does not seem to be in contrast with the voluntary character of intervention. The Court would simply be clarifying the form of intervention that better suits the request of the third State. For example, the Court could interpret the declaration of Libya as in reality falling under Article 62 and clarify that Libya's stated purpose better corresponds to intervention as non-party.

If the uncertainties in the intervention requests leave open the precise content of the parties' intention concerning the appropriate form of intervention, the Court should be able to 'requalify' the request/declaration of intervention so to identify the best procedural instrument for ensuring a purposeful intervention of third participants. For example, the Court could decide that Palestine should intervene as a non-party because this procedural status better describes the object and purpose of the Palestinian request. As in the previous example, the Court will determine the actual intention of the third State as expressed in the request for intervention.

In the end, the real issue seems to be whether the Court can go against the will of the requesting parties, that is essentially exclude intervention – and declare the request inadmissible – because it does not correspond to intervention's statutory purpose. Somehow the Court already did that in the past with the requests of Malta (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene*, Judgment, ICJ Reports 1981, p. 3) and Italy (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene*, Judgment, ICJ Reports 1984, p. 3) under Article 62 that were declared inadmissible because they were aiming in reality at intervening as a party … but that was a time when the forms of intervention falling under Article 62 had not yet been clarified by the Court (see in general B. BONAFÈ, *La protezione degli interessi di Stati terzi davanti alla Corte internazionale di giustizia*, Napoli, Editoriale scientifica, 2014, p. 30 ff). What would be more problematic in our examples is that the request of Palestine be, for example, declared inadmissible. In the end, requalification is a much better alternative than inadmissibility because it ensures participation even if in a form that was not (clearly) envisaged by the third State. This shows that the drafting of the requests/declarations of intervention is crucial and they should contain all relevant information and cover the different applicable forms of intervention.

The recognition of the Court's requalification power may have important impacts. For sure, its outcome, especially if too rigorous, can deter future intervention requests. This is a risk to be duly considered especially at a time when the protection of public interests is developing, and States show a previously unexpressed willingness to intervene before the Court. At the same time, it is a confirmation of the independence of the Court and its commitment to apply in a consistent manner procedural rules. The power to (re)qualify requests for intervention serve in the end the best interest of justice, not just for allowing third States to participate in the most appropriate way but also more generally to ensure the best administration of the contentious proceedings. The possible encroachment of the voluntary nature of intervention is limited to specific cases of inadmissibility decisions and seems to be excluded in the two cases under examination where requalification is possible. In any case, a clarification of the scope of the various forms of intervention would be very welcomed and can foster effective participation in future cases.

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