

**ENHANCING ICJ PROCEDURES FOR LITIGATING IN THE COMMON INTEREST: THE ROLE OF THIRD PARTY INTERVENTION AND *AMICUS CURIAE* BRIEFS****APRIMORANDO OS PROCEDIMENTOS DO ICJ PARA O CONTRIBUTO DO INTERESSE COMUM: O PAPEL DA INTERVENÇÃO DE TERCEIROS E AS RESPONSABILIDADES DO *AMICUS CURIAE*****Paula Wojcikiewicz Almeida<sup>1</sup>****Abstract**

By developing international law, international courts can also contribute to the protection and promotion of community interests, by adjudicating inter-state claims. The aim of this project is, particularly within the International Court of Justice, to appreciate the relentless demands involving community interests and present a non-traditional response to its challenges. The main obstacle faced by the ICJ relates to the existing tension between the bilateral nature of its own proceedings and the multilateral nature of the conflicting substantive law. Whereas the rules of that protect community interests are considered to be substantive law, those guiding international adjudication are of a procedural nature. As procedure may guide and shape the application of substantive law, it should itself be interpreted and developed in a manner to ensure community interests. Our proposal is that using its power to 'frame rules for carrying out its functions' (Art. 30 of the Statute of the ICJ), independently from consent, the Court should assume expanded procedural powers in order to ensure the effective application of substantive law whenever community interests are at issue. Most procedural rules can be adjusted and tailored for multiparty aspects (enhancing participatory mechanisms) with the aim of protecting community interests and enhancing international court's legitimacy. It is up to the Court to find the balance between State's rights and commonly aspired goals, acknowledging the relation between the emergence of soft international law-making (procedure) and its role of addressing the provision of community interests (substance).

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### Resumo

Ao desenvolver o Direito Internacional, os tribunais internacionais também podem contribuir para a proteção e promoção dos interesses da comunidade internacional, ao julgar demandas interestatais. O objetivo deste projeto é, particularmente no âmbito da Corte Internacional de Justiça, apreciar as contínuas demandas envolvendo interesses da comunidade e apresentar uma resposta não tradicional aos seus desafios. O principal obstáculo enfrentado pela CIJ diz respeito à tensão existente entre a natureza bilateral de seus próprios procedimentos e a natureza multilateral da lei substantiva conflitante. Enquanto as regras que protegem os interesses da comunidade internacional são consideradas como uma lei substantiva, as que orientam a adjudicação internacional são de natureza processual. Nossa proposta é que, usando seu poder para “criar regras para o desempenho de suas funções” (Art. 30 do Estatuto da CIJ), independentemente do consentimento estatal, a Corte deveria assumir amplos poderes processuais para assegurar a efetiva aplicação da lei substantiva, sempre que interesses da comunidade internacional estiverem em questão. A maioria das regras processuais pode ser ajustada e adaptada para aspectos multilaterais (reforçando os mecanismos de participação) com o objetivo de proteger os interesses da comunidade e aumentar a legitimidade dos tribunais internacionais. Cabe a Corte encontrar o equilíbrio entre os direitos dos Estados e os objetivos comumente aspirados, reconhecendo a relação entre o surgimento da sua função legisladora - “soft law-making” - (procedimento) e seu papel na promoção dos interesses da comunidade internacional (substância).

**Palavras-chave:** Adjudicação Internacional; interesses da comunidade internacional; Corte Internacional de Justiça; intervenção de terceiros; *amicus curiae*.

## INTRODUCTION

‘Community interests’ and ‘common concern’ tend to transcend States’ individuals’ interests and ensure the protection of the international community<sup>2</sup>. Expressions of community interests can be traced in the protection of human rights<sup>3</sup>, the protection of culture and the environment, the preservation of international peace and security, the management of spaces beyond national territorial jurisdiction, the preservation of international financial stability and a multilateral trade regime, among others<sup>4</sup>. As put by Wolfrum, ‘despite an ongoing discussion about the exact features and the ways and means of their establishment, the existence of community interests is now accepted’<sup>5</sup>.

The way in which international courts and tribunals (ICTs) deal with inter-State dispute settlement procedure and community interests reflects the basic question of how courts regard the nature and scope of their own judicial function. Dispute settlement cannot solely capture the full relevance of international courts’ decisions<sup>6</sup>. Indeed, the role of international courts is not limited to the bilateral dispute settlement between States. They perform other important functions, such as the development of normative expectations – in order to achieve international adjudication’s full potential, which is the realisation of justice<sup>7</sup>. By developing international law, the role of ICTs encompasses the protection and development of the international community and its values<sup>8</sup>.

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<sup>2</sup> Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours de l’Académie de Droit International*, 233-242; Markus Benzing, ‘Community Interests in the Procedure of International Courts and Tribunals’ [2006] *The Law and Practice of International Courts and Tribunals* 5, 217–384

<sup>3</sup> The protection of human rights can be considered the most prominent among other expressions of ‘community interest’, as put by Bruno Simma, *supra*, 242

<sup>4</sup> Rüdiger Wolfrum, ‘Enforcing Community Interests through International Dispute Settlement: Reality or Utopia?’ in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011), 1132-1133; Bruno Simma, *supra*, 236-243

<sup>5</sup> Rüdiger Wolfrum, ‘Enforcing Community ...’, *supra*, 1132

<sup>6</sup> Armin von Bogdandy and Ingo Venzke, ‘*In Whose Name? A Public Law Theory of International Adjudication*’ (OUP 2014), 15

<sup>7</sup> Armin von Bogdandy and Ingo Venzke, *supra*, 15. See also Laurence R. Helfer, ‘The Effectiveness of International Adjudicators’ in Karen J. Alter, Cesare Romano and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) and José E Alvarez, ‘What Are International Judges For? The Main Functions of International Adjudication’ in Karen J. Alter, Cesare Romano and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014), 158, 464

<sup>8</sup> See Bruno Simma, *supra*; Armin von Bogdandy and Ingo Venzke, ‘*In Whose Name?...*’, 38; Lauterpacht, Sir Hersch (1958) *The Development of International Law by the International Court*, London: Stevens &

Having the ICJ as a focus, this analysis will address the Court's ability to promote community interests by adjudicating inter-State claims<sup>9</sup>. The ICJ's recognition and application of *erga omnes* obligations is in itself a patent example of its prominent role in the protection of the interests of the international community. Nevertheless, the Court's intrinsic tension between State consent and global values may undermine its capacity to promote public interest<sup>10</sup>. Indeed, the main obstacle to the enforcement of community interests is the bilateral nature of inter-State judicial dispute settlement<sup>11</sup>. Backlashes include situations where international adjudication prioritises procedures to the detriment of community interests. As far as the ICJ is concerned, the tension between the multilateral nature of the conflicting substantive law and the bilateral nature of its own proceedings may generate significant backlashes<sup>12</sup>. There were also lost opportunities in which the Court could have opted for the protection of community interests, but preferred, instead, to rely on procedure<sup>13</sup>.

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Sons Limited; Antônio Augusto Cançado Trindade, '*International Law for Humankind: Towards a New Jus Gentium*' (The Hague Academy of International Law Monographs Martinus Nijhoff 2010)

<sup>9</sup> André Nollkamper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' [2012] *The European Journal of International Law* 23 3, 769-770

<sup>10</sup> In the *South West Africa cases (Ethiopia/South Africa; Liberia/South Africa)*, the ICJ rejected the existence of an *actio popularis* or a 'right resident in any member of a community to take legal action' for vindicating a public interest. See *South West Africa (Ethiopia/South Africa; Liberia/South Africa)* (Second Phase: Judgment) [1966] ICJ Rep 6, para. 88.

<sup>11</sup> Markus Benzing, *supra*, 376; see also Jan Klabbers, 'The Community Interest in the Law of Treaties: Ambivalent Conceptions' in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011)

<sup>12</sup> The well-known *Monetary Gold* principle, as well as the *East Timor* case illustrate the prevalence of traditional bilateralism over community interests (*Monetary Gold Removed from Rome in 1943 (Italy/France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Preliminary Question: Judgment) [1954] ICJ Rep 19; *East Timor (Portugal/Australia)* (Merits: Judgment) [1995] ICJ Rep 90). See also the *Jurisdictional Immunities of the State* case, in which the Court decided to uphold State immunity, as it was qualified as procedural law (*Jurisdictional Immunities of the State (Germany/Italy, Greece Intervening)* (Merits: Judgement) [2012] ICJ Rep 99). For more details, see Paula Wojcikiewicz Almeida, 'Imunidades Jurisdicionais do Estado perante a Corte Internacional de Justiça: uma análise a partir do caso Alemanha vs. Itália' [2016] *Revista Direito GV* 12 2, 516

<sup>13</sup> See, in particular, the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case and the *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* case (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands/United Kingdom)* (Preliminary Objections: Memorial of the Marshall Islands) [2016], 51-59). See Ingo Venzke, 'Public interests in the International Court of Justice – a comparison between Nuclear Arms Race (2016) and South West Africa (1966)' '*Symposium on the Marshall Islands Case*' [2017] *The American Journal of International Law*, 68; and Vincent-Joël Proulx, 'The Marshall Islands judgments and multilateral disputes at the World Court: whither access to international justice?' '*Symposium on the Marshall Islands Case*' [2017] *The American Journal of International Law*, 96. For an analysis of other lost opportunities in which the ICJ did not further elaborate on the mechanisms provided for protecting community interests, see Rüdiger Wolfrum, 'Enforcing Community ...', *supra*, 1137-1138

This paper argues that there is a disconnection between community interests and procedure, which has not been attuned to reflect contemporary international law challenges deriving from community interests<sup>14</sup>. Procedures can be interpreted, enhanced, *voire* designed in order to ensure the promotion of community interests<sup>15</sup>. According to Art. 30 of the Statute of the ICJ, the Court possesses the power to ‘frame rules for carrying out its functions’. Considering that a relevant function is to protect community interests, the Court should assume expanded procedural powers in order to ensure the effective application of substantive law whenever community interests are at issue. Indeed, the procedural law of international judicial institutions is largely a product of their own making<sup>16</sup>. Self-regulation is considered as the prevailing system and an important source of independence of an ICT, being ‘one of the ways in which such a creature may escape its makers’<sup>17</sup>.

However, it appears that the ICJ has been very modest in utilising its powers to expand procedural rules beyond its mandate to ensure application of substantive law reflecting community interests<sup>18</sup>. If changes in substantive law are not reflected in the procedure of contentious inter-State judicial dispute settlement, there is indeed a need to expand rules permitting the standing and participation of the international community in bilateral proceedings. In cases involving litigation in the ‘common interest’, a diverse range of procedural issues may raise particular concerns<sup>19</sup>: (A) intervention of third parties<sup>20</sup> (B); and participation of non-State actors as *amici curiae* (B)<sup>21</sup>.

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<sup>14</sup> See, generally, Enzo Cannizzaro and Beatrice I. Bonafé, ‘Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights’ in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011)

<sup>15</sup> André Nollkamper, *supra*, 787-788

<sup>16</sup> Armin von Bogdandy, Ingo Venzke, ‘On the Democratic Legitimation of International Judicial Lawmaking’ [2011] *German Law Journal* 12 5, 1362; Robert Kolb, ‘General Principles of Procedural Law’ in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Christian Tams and Tobias Thienel (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006), 793, 795

<sup>17</sup> Jean-Marc Sorel, ‘International Courts and Tribunals, Procedure’ MPEPIL (2007) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e40?rskey=urzeEi&result=1&prd=EPIL>> accessed 15 July 2017

<sup>18</sup> Edward McWhinney, ‘The International Court of Justice and International Law-Making: The Judicial Activism/Self-Restraint Antinomy’ [2006] *Chinese Journal of International Law* 5 1, 3

<sup>19</sup> See André Nollkamper, *supra*, 778

<sup>20</sup> Paolo Palchetti, ‘Opening the International Court of Justice to Third States: Intervention and Beyond’ [2002] *Max Planck UNYB* 6, 139

<sup>21</sup> Other issues such as fact-finding powers and rules of evidence, which are also important in situations involving community interests will not be addressed in this article due to word-limit constraints. See Markus Benzing, *supra*, 383-384, 389; Ruth Teitelbaum, ‘Recent Fact-Finding Developments at the International Court of Justice’ [2007] *The Law and Practice of International Court and Tribunals* 6, 119;

## BROADENING THE SCOPE OF THIRD-PARTY INTERVENTION

According to Art. 62 of the Statute, a third State may request to intervene whenever it has an interest of a legal nature which may be affected by the decision in the case (1); whereas the right of a third State to intervene on a question of interpretation of a treaty of which it is party is recognized by Article 63 of the Statute<sup>22</sup> (2). We will focus on the controversial aspects of third-party intervention as provided for by the Rules of Court before identifying concrete amendment proposals in order to ensure greater participation by the international community in ICJ proceedings.

### Discretionary Intervention (Article 62, ICJ Statute)

The rules governing the so-called 'discretionary' intervention are historically unclear. This uncertainty regarding criteria for intervention has made States reluctant to ask permission to intervene in cases brought before the Court: the Court has granted permission to intervene in only 3 out of 11 cases so far<sup>23</sup>. The ICJ jurisprudence has been reluctant to further detail the requirements of intervention (b) and, as equally important, has been unable to provide the

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Natalie S. Klein, 'Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case' [1996] *Yale Journal of International Law* 21 2, 329; Caroline E. Foster, 'Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality' (Cambridge University Press 2011); Manfred H. Lachs, 'Evidence in the Procedure of the International Court of Justice: Role of the Court' in Emmanuel G. Bello and Bolasodun A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias* (Martinus Nijhoff 1993), 205

<sup>22</sup> For a general assessment, see Yuji Iwasawa, 'Third Parties Before International Tribunals: The ICJ and the WTO' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, vol 1 (Kluwer Law International 2002); and A.J.J. de Hoogh, 'Intervention Under Article 62 of The Statute and the Quest for Incidental Jurisdiction without the Consent of the Principal Parties' [1993] *Leiden Journal of International Law* 6, 17

<sup>23</sup> *Nuclear Tests (New Zealand/France)* (Application for Intervention) [1973] ICJ; *Continental Shelf (Tunisia/Libyan Jamahiriya)* (Application for Intervention) [1981] ICJ; *Continental Shelf (Malta/Libyan Jamahiriya)* (Application for Intervention) [1984] ICJ; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (Application for Intervention) [1990] ICJ; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand/France)* (Applications for Intervention) [1995] ICJ; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria)* (Application Intervention: Order) [1999] ICJ; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Application for Intervention), [2001] ICJ; *Territorial and Maritime Dispute (Nicaragua/Colombia)* (Applications for Intervention) [2011] ICJ; *Jurisdictional Immunities of the State (Germany/Italy)* (Application for Intervention) [2011] ICJ. The Court admitted the applications of Nicaragua in the Land, Island and Maritime Frontier Dispute case, of Equatorial Guinea in the Land and Maritime Boundary case, and that of Greece in the Jurisdictional Immunities of the State case.

necessary transparency of the proceedings, making it difficult for potential interveners to identify their legal interest (a).

### Ensuring greater transparency and non-confidentiality of proceedings

The question of the extent to which the Court's records should be open to third States has been hotly debated<sup>24</sup>. Article 85.1 of the Rules of Court determines that only a State that has had its request to intervene accepted by the Court shall have access to the pleadings in the case. However, this has not been so construed in practice<sup>25</sup>. This is because potential interveners may consult written arguments of the parties in advance by invoking Art. 53, para. 1 of the Rules of Court. The referred article reiterates that the Court must 'ascertain' the views of the parties before taking any decision regarding the access to the written documents of the case by third States<sup>26</sup>. A joint interpretation of Article 85.1 and 53.1 of the Rules of Court indicates that a would be intervener may apply to be furnished with the written pleadings and documents prior to filing its application to intervene only if there is no objection by the parties to the main proceedings. As a consequence, transparency and non-confidentiality of proceedings is only guaranteed if no party objects. For the Court, there is no provision in its Rules establishing 'an inextricable link' between the access to pleadings and the filing of an application for permission to intervene<sup>27</sup>.

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<sup>24</sup> Christine Chinkin, 'Article 62' in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Christian Tams and Tobias Thienel (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006), 1340

<sup>25</sup> *Territorial and Maritime Dispute (Nicaragua/Colombia)* (Application for Intervention by Costa Rica: Judgment) [2011] ICJ Rep 348, paras 7, 10 and 12

<sup>26</sup> There was much doubt on the meaning of 'ascertain', i.e., whether this means that the parties' views are determinative or not. According to its *jurisprudence constante*, the Court does not grant access to the pleadings where one of the parties objects (Christine Chinkin, 'Article 62', *supra*, 1341). For e.g., Malta's (*Continental Shelf (Tunisia/Libyan Jamahiriya)* (Application for Intervention: Judgment), *supra*), Italy's (*Continental Shelf (Malta/Libyan Jamahiriya)* (Application for Intervention: Judgment), *supra*) and the Philippines' (*Sovereignty over Pulau Ligitan and Putau Sipadan (Indonesia/Malaysia)* (Application for Intervention: Judgment), *supra*) requests for pleadings were rejected after the Court had ascertained that one of the parties objected. Conversely, Honduras and Costa Rica's requests in the *Territorial and Maritime Dispute case* were granted since no party objected (*Territorial and Maritime Dispute (Nicaragua/Colombia)* (Application for Intervention by Costa Rica: Judgment) [2011] ICJ Rep 348, paras 7 and 10).

<sup>27</sup> *Sovereignty over Pulau Ligitan and Putau Sipadan (Indonesia/Malaysia)* (Application for Intervention: Judgment), *supra*, para 22

It is evident, however, that the 'lack of access to the parties' pleadings makes it difficult for a State requesting intervention to frame its application'<sup>28</sup>. Potential interveners would have to demonstrate a qualified legal interest, as restrictively interpreted by the Court, without having viewed either parties' pleadings or documentation<sup>29</sup>. One may wonder: how can the Court impose such a burden of proof to potential interveners if they are, in practice, handicapped by their ignorance of the exact scope of the claims?<sup>30</sup> Even though the Court never specified the exact standard of proof required, because intervention is an incidental proceeding it would seem that only *prima facie* evidence would be needed<sup>31</sup>.

Therefore, an amendment to the Rules of Court could envisage a bifurcated choice depending on the assumed prevalence of community interests in the detriment of bilateralism: (i) an amendment to Article 81.1 in order to soften the burden of proof regarding the interest of a legal nature so that would be interveners would not be handicapped for not having access to the parties' pleadings; or (ii) an amendment to Article 85.1 to allow potential interveners to be supplied with copies of the pleadings and documents annexed regardless of having their application previously granted by the Court; and/or an amendment to Art. 53.1 to allow the Court to, at any time, furnish copies of the pleadings and documents as requested, regardless of the parties' views.

A State seeking to intervene that has had access to the pleadings is in a better position to comply with the requirements of intervention as prescribed by Article 81 of the Rules, namely to demonstrate a qualified legal interest<sup>32</sup>.

### Ensuring flexibility in the interpretation of the requirements of intervention

The main condition of intervention is set out in Art. 62 of the Statute and in Art. 81.2 (a) of the Rules of Court: the existence of an 'interest of a legal nature' which may be affected by a

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<sup>28</sup> Christine Chinkin, 'Article 62', *supra*, 1342

<sup>29</sup> See Malta's (*Continental Shelf (Tunisia/Libyan Jamahiriya)*) (Application for Intervention: Judgment), *supra*. See Separate Opinion of Judge Oda, ICJ Reports (1981), p. 23; Separate Opinion of Judge Schwebel, p. 35) and Philippines' application for intervention (*Sovereignty over Pulau Ligitan and Putau Sipadan (Indonesia/Malaysia)*) (Application for Intervention: Judgment), *supra*). For an analysis, see Christine Chinkin, 'Third Party Intervention Before the International Court of Justice' [1986] *The American Journal of International Law* 80 3, 505

<sup>30</sup> Christine Chinkin, 'Article 62', *supra*, 1342

<sup>31</sup> Inna Uchkunova, 'The Minotaur's Labyrinth: Third State Intervention before the International Court of Justice' [2014] *The Law & Practice of International Courts and Tribunals* 13 2, 184

<sup>32</sup> Christine Chinkin, 'Article 62', *supra*, 1342



decision in a specific case. This requirement, applicable to both States seeking to intervene as a 'non-party'<sup>33</sup> and as a 'party'<sup>34</sup>, has been interpreted by the Court in a restrictive way, limiting the scope of discretionary intervention to 'specific interests' or 'qualified legal interests' of third States capable of being affected and not only to interests in the legal rules and principles dealt with by the decision<sup>35</sup>. However, there is no definition of 'legal interest' for the purposes of discretionary intervention<sup>36</sup>.

Clarification on the requirements for intervention could be made clear in the wording of Art. 81.2 of the Rules. Neither Article 62 of the Statute nor Article 81 of the Rules of Court further details the capacity or status according to which a State may seek to intervene. This is necessarily linked to the object of intervention, which is to be defined according to the status of the intervener State, whether as non-party or as a party.

As far as intervention by non-party is concerned, an amendment to Art. 81.2 (b) could clarify 'the object of intervention' by defining its proper purpose, which is to precisely inform the Court of one's rights or claims capable of being affected<sup>37</sup>. Potential interveners are asked to show 'convincingly' that their legal interest can possibly be affected by the Court's decision – a mere interest in the applicable legal rule is not regarded as sufficient interest under discretionary intervention proceedings<sup>38</sup>. This is because the high threshold imposed by the Court demotivates potential intervening States<sup>39</sup>. If the object of the intervention is to inform the

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<sup>33</sup> *Territorial and Maritime Dispute* (Application for Intervention by Costa Rica: Judgment), *supra*, para 26

<sup>34</sup> *Territorial and Maritime Dispute (Nicaragua/Colombia)* (Application for Intervention by Honduras: Judgment) [2011] ICJ Rep 420, para. 30

<sup>35</sup> See *Continental Shelf (Tunisia/Libyan Jamahiriya)* (Application for Intervention: Judgment), *supra*, para. 29-30; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (Application for Intervention: Judgment) [1990] ICJ Rep 92, para. 76; *Sovereignty over Pulau Ligitan and Putau Sipadan (Indonesia/Malaysia)* (Application for Intervention: Judgment), *supra*, paras 52, 80, 83, 93

<sup>36</sup> A potential intervener would have to show that its 'interests' may be affected; that the referred 'interest' is the object of a real and concrete claim, based on law, to be decided by the Court; that it is connected to the subject matter of the particular dispute; and that it could possibly be affected – in its content and scope – by the Court's decision in the main proceedings. See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (Application for Intervention: Judgment), *supra*, 116, para. 58; *Territorial and Maritime Dispute* (Application for Intervention by Costa Rica: Judgment), *supra*, paras 23-26. See for further details, Beatrice I. Bonafé, 'Interests of a Legal Nature Justifying Intervention before the ICJ' [2012], *Leiden Journal of International Law* 25, 739

<sup>37</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (Application for Intervention: Judgment), *supra*, para. 90

<sup>38</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (Application for Intervention: Judgment), *supra*, para. 76

<sup>39</sup> *Territorial and Maritime Dispute*, (Application for Intervention by Costa Rica: Judgment), *supra*, Dissenting opinion of Judge Abraham, para. 27.

Court of legal rights which are in issue in the dispute, the only way for a third State to submit such information would be to make use of a sort of *amicus curiae* mechanism<sup>40</sup>.

Concerning intervention as a party, after the Chambers decision of 1990, it was 'accepted that a State may be permitted to intervene under Article 62 of the Statute either as a non-party or as a party'<sup>41</sup>. Among other requirements, a State seeking to intervene as a party 'may ask for rights of its own to be recognised by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted, pursuant to Article 59 of the Statute'<sup>42</sup>. As opposed to 'non-party' intervention, the object of 'party' intervention is to allow the third State to ask for its own rights to be recognised by the Court<sup>43</sup>.

Therefore, an amendment to the Rules of Court could envisage a bifurcated choice for third States: (i) split the two forms of intervention into separate articles and define specific rules – i.e. Article 81.*bis* – applicable to 'party' intervention alongside with its particular criteria, such as the existence of a jurisdictional link (which is to be interpreted in a flexible way)<sup>44</sup>, thereby clarifying that a 'jurisdictional link' is only applicable to 'party' intervention.<sup>45</sup>; or (ii) clarify the

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<sup>40</sup> *Territorial and Maritime Dispute*, (Application for Intervention by Costa Rica: Judgment), *supra*, Declaration of Judge Gaja, para. 5. See also Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989. Supplement 2011: Parts Eleven, Twelve and Thirteen' [2012] *British Yearbook of International Law* 82 1, 135-137, and 148

<sup>41</sup> *Territorial and Maritime Dispute*, (Application for Intervention by Honduras: Judgment), *supra*, para. 27. The Court mentioned a passage of its judgment on Nicaragua's Application for permission to intervene in the case concerning Land, Island and Maritime Frontier Dispute to confirm its approach. However, as pointed out by Beatrice Bonafé, the referred passage is rather ambiguous (Beatrice I. Bonafé, 'Discretionary Intervention (Article 62, Statute of the Court)', in Paula W Almeida and Jean-Marc Sorel (eds) *Latin America and the International Court of Justice: Contributions to International Law* (Routledge 2017), 106

<sup>42</sup> *Territorial and Maritime Dispute* (Application for Intervention by Honduras: Judgment), *supra*, para. 29

<sup>43</sup> *Continental Shelf (Malta/Libyan Jamahiriya)* (Application for Intervention: Judgment), *supra*, para. 17-26

<sup>44</sup> Beatrice I. Bonafé, 'Discretionary Intervention (Article 62, Statute of the Court)', *supra*, 107

<sup>45</sup> The 'jurisdictional link' is one of the factors that has most contributed to the confusion surrounding intervention. The judgment on Nicaragua's Application to intervene in the *Land, Island and Maritime Frontier Dispute* case gave the Court the opportunity to State that no jurisdictional link was required for States seeking to intervene as 'non-parties' (*Land, Island and Maritime Frontier Dispute*, *supra*, para. 100). The parameters of 'non-party' intervention were later confirmed by the full Court: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria)* (Application Intervention: Order) [1999] ICJ Rep 1029, and *Jurisdictional Immunities of the State*, *supra*. For the ICJ, such a requirement is only applicable to States seeking to intervene as a 'party' to the case (*Territorial and Maritime Dispute*, (Application for Intervention by Costa Rica: Judgment), *supra*, para. 39; *Sovereignty over Pulau Ligitan and Pulau Sipadan*, *supra*, para. 35; *Continental Shelf (Malta/Libyan Jamahiriya)* (Application for Intervention: Judgment), *supra*, para. 18; *Land, Island and Maritime Frontier Dispute*, *supra*, para. 99; *Territorial and Maritime Dispute* (Application for Intervention by Honduras: Judgment), *supra*, para. 68

possibility for a third State to join as a new party with all its related consequences ('joinder of parties').

### Clarifying the consequences of the intervention for third States

The Rules of Court do not clarify the status of an intervening State nor the rights and obligations incumbent upon an intervening State under Art. 62 of the Statute. The Chamber in *Land, Island and Maritime Frontier Dispute* declared that the judgment does not bind a 'non-party' intervener<sup>46</sup>. This distinction was later confirmed by the full Court in the *Territorial and Maritime Dispute* case<sup>47</sup>. Conversely, the judgment would be binding on a State seeking to intervene as a party. An amendment to Art. 81 in order to clarify the modalities and consequences of intervention for third parties would be welcome.

Current ICJ practice indicates that interveners of any kind, regardless of their status, possess a limited scope of procedural rights since they do not become parties nor acquire the rights or obligations attached to the status of a party, such as the possibility to nominate a judge ad hoc or to request the reformation of the Chamber as constituted<sup>48</sup>. An intervener can only acquire that status 'provided that there be the necessary consent by the parties to the case'<sup>49</sup>. As a consequence, the participation of third States under Art. 62 in the main proceedings is limited to the recognition of the procedural rights provided by Article 85 of the rules, *i.e.*, to submit a written statement and to participate in the hearings<sup>50</sup>.

Therefore, States admitted to intervene 'as parties' are bound by the Court's judgment but are not allowed the benefit of invoking rights usually recognized to parties to the main proceedings<sup>51</sup>. It may be expected that intervening States 'will attempt to extend their procedural right beyond those recognized by Article 85 of the Rules', otherwise party intervention would not represent a credible alternative for third States<sup>52</sup>. In this context, article 85 could also be amended so as to clarify the consequences of intervention according to the

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<sup>46</sup> *Land, Island and Maritime Frontier Dispute*, *supra*, para. 423

<sup>47</sup> *Territorial and Maritime Dispute* (Application for Intervention by Honduras: Judgment), *supra*, para. 29

<sup>48</sup> *Land, Island and Maritime Frontier Dispute*, *supra*, para. 102-103

<sup>49</sup> *Land, Island and Maritime Frontier Dispute*, *supra*, para. 99

<sup>50</sup> The right to be heard is limited 'to the extent, in the manner and for the purposes set out in its Application for permission to intervene' (*Land and Maritime Boundary between Cameroon and Nigeria*, *supra*, para. 18)

<sup>51</sup> *Land, Island and Maritime Frontier Dispute*, *supra*, para. 97

<sup>52</sup> Beatrice I. Bonafé, 'Discretionary Intervention (Article 62, Statute of the Court)', *supra*, 106-107

status of the third State intervener, as well as to eventually expand the rights of a State allowed to intervene as a party beyond the procedural provisions of Art. 85 of the Rules.

### INTERVENTION 'AS OF RIGHT' (ART. 63, ICJ STATUTE)

The filing of a declaration under Art. 63 is qualified as intervention 'as of right', referring to the State's inherent right to be part of proceedings due to its membership of a convention whose interpretation is the object of a controversy<sup>53</sup>. The interest for a third State to submit observations concerning the interpretation of multilateral treaties invoked in judicial proceedings between other States responds to the logic that ICJ judgments reach far beyond the States parties to a case, as opposed to Art. 59 of the Statute – which denies the binding effect of a decision of the Court on any State except the parties to the particular case –, and produce impacts on the international community. Article 63 seems to constitute an exception to Art. 59 since the construction of the convention given by the judgment will also bind the intervening State<sup>54</sup>.

As opposed to discretionary intervention, intervention 'as of right' has been rarely used by third States<sup>55</sup>. The resistance from third States to making use of such intervention is maybe due to the binding character of the construction given by the judgment on the intervening State<sup>56</sup>, which 'represents a significant drawback for States potentially interested in submitting

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<sup>53</sup> *Territorial and Maritime Dispute (Nicaragua/Colombia) (Application for Intervention by Honduras: Judgment)*, *supra*, 434, para 36; *Continental Shelf (Tunisia/Libyan Jamahiriya) (Application for Intervention: Judgment)*, *supra*, 15, para 26; *Haya de La Torre (Colombia/Peru) (Application for Intervention : Judgment)* [1951] ICJ Rep 71, 76; *SS 'Wimbledon' (United Kingdom and others/Germany,Poland intervening) (Declaration for Intervention: Judgment)* [1923] PCIJ Series A No. 1, 12

<sup>54</sup> Christine Chinkin, 'Article 63', in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Christian Tams and Tobias Thienel (eds) *The Statute of the International Court of Justice: A Commentary* (OUP 2006), 1390

<sup>55</sup> There were only five declarations of intervention filed on the Court's docket: Poland in the case concerning the \*S.S. "Wimbledon" (PCIJ); Cuba in the *Haya de la Torre* case; El Salvador in the case concerning *Military and Paramilitary Activities in and against Nicaragua*; Samoa, the Solomon Islands, the Marshall Islands and the Federated States of Micronesia with respect to the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France)* case; and New Zealand in the case concerning *Whaling in the Antarctic (Australia v. Japan)*. Intervention was only admitted in the first two cases and in the last case (*Haya de La Torre, supra*; and *Military and Paramilitary Activities in and against Nicaragua, supra*; and *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests, supra*; and *Whaling in the Antarctic, supra*)

<sup>56</sup> *Whaling in the Antarctic, supra*, para 9, 20

observations<sup>57</sup>. In order to make intervention ‘as of right’ more attractive to third States and to balance bilateralism and community interests, the following challenges are worth revisiting: the need to grant a hearing in all phases of proceedings (a); as well as the alleviation of the burden of proof and the necessary transparency for the identification of the particular provisions of the convention (b).

### Ensuring the need for a hearing in all phases of proceedings

An important issue is linked to phase of the proceedings in which a declaration of intervention may be filed<sup>58</sup>. In the *Military and Paramilitary Activities* case<sup>59</sup>, the Republic of El Salvador filed a declaration of intervention<sup>60</sup> during the jurisdictional phase. Nicaragua presented its written observations about the declaration of intervention by El Salvador<sup>61</sup>. After pointing out inconsistencies of both procedural and material nature, Nicaragua stated it did not wish to ‘formally’ object to El Salvador’s intervention<sup>62</sup>. Pursuant to Article 84(2) of the Rules, a hearing pertaining to the admissibility of a declaration of intervention will only be held if a party objects to it<sup>63</sup>. With Nicaragua adopting such a strategy, El Salvador was deprived of its rightful hearing under the Rules of Court.

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<sup>57</sup> Giorgio Gaja, ‘A New Way for Submitting Observations on the Construction of Multilateral Treaties to the International Court of Justice’ in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011), 669. See also Hugh Thirlway, ‘Intervention’, *The International Court of Justice* (OSAIL OUP 2016), 178 and Serena Forlati, ‘The International Court of Justice: An Arbitral Tribunal or a Judicial Body?’ (Springer 2014), 187

<sup>58</sup> Luis González García, ‘Intervention by third parties under Article 63 of the Statute’, in Paula W Almeida and Jean-Marc Sorel (eds) *Latin America and the International Court of Justice: Contributions to International Law* (Routledge 2017), 111

<sup>59</sup> *Military and Paramilitary Activities in and against Nicaragua*, *supra*

<sup>60</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America)* (Declaration of Intervention) [1984] General List No. 70 ICJ 2

<sup>61</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America)* (Declaration of Intervention: Written Observations of Nicaragua) [1984] General List No. 70 ICJ 465

<sup>62</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America)* (Declaration of Intervention: Written Observations of Nicaragua), *supra*, 466

<sup>63</sup> See, for example, hearings granted by the Court in intervention proceedings under Article 63: Poland was granted a hearing in the *SS Wimbledon* case and Cuba was granted a hearing after Peru objected to the declaration of intervention in the *Haya de la Torre* case.

In an unconventional stance, the Court rejected the declaration without a hearing and without providing the reasons for such denial<sup>64</sup>. In the words of judge Schwebel, ‘considerations of judicial propriety, of the sovereign equality of States before the law, and of fair play, required a hearing’<sup>65</sup>. The most substantial indication for such a dismissal is maybe linked to the fact that El Salvador intervened in the jurisdictional phase<sup>66</sup>, while intervention under Article 63 would implicate that the Court has jurisdiction, therefore, pertaining to the merits of the case<sup>67</sup>. However, there appears to be no reason why intervention should not be allowed on issues of jurisdiction and admissibility of a case<sup>68</sup>. The wording of Article 63 is broad enough to cover all phases of a case, which could be made clearer in the Rules of Court.

Also, observations by the main parties regarding the declaration of intervention might be interpreted more broadly and be considered as ‘objections’ for the purposes of Article 84 (2) of the Rules so as to avoid the Nicaragua case scenario. It would be unrealistic to think solely in terms of the integrity of the parties’ in dispute to the detriment of third parties rights<sup>69</sup>.

### **Alleviating the burden of proof and providing transparency for the identification of the particular provisions of the convention**

Once the Court declares the intervention admissible, the intervening State shall be supplied with copies of the pleadings and related documents, and shall be entitled to submit its written observations on the subject-matter of the intervention, as well as to submit observations in the course of the oral proceedings. Information will only be available for third States after intervention is granted.

However, in order to fulfil the requirements provided for by Art. 82 of the Rules, the would-be intervener would have to indicate the ‘particular provisions of the convention the

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<sup>64</sup> Luis González García, *supra*, 115. See also Jerzy Sztucki, ‘Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The Salvadoran Incident’ [1985] *The American Journal of International Law* 79, 1012

<sup>65</sup> *Military and Paramilitary Activities in and against Nicaragua, supra*, Dissenting Opinion of Judge Schwebel, 231

<sup>66</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America)* (Jurisdiction and Admissibility: Judgment) [1984] ICJ Rep 392, 396, para 6

<sup>67</sup> William D. Rogers, James A. Beat, and Christopher Wolf, ‘Application of El Salvador to Intervene in the Jurisdiction and Admissibility Phase of Nicaragua v. United States’ [1984] *The American Journal of International Law* 78 4, 936

<sup>68</sup> Christine Chinkin, ‘Article 63’, 1376; Luis González García, *supra*, 117

<sup>69</sup> Christine Chinkin, ‘Third Party Intervention Before the International Court of Justice’, *supra*, 511. See also D. W. Greig, ‘Third Party Rights and Intervention Before the International Court’ [1992] *Virginia Journal of International Law* 32, 317

construction of which it considers to be in question'. Considering the limited amount of information on the judicial proceedings available for third States, how can one identify precisely the provisions related to the interpretation of a multilateral treaty that are at issue? If the parties were required to identify particular provisions of a convention (Art. 82.2 (b) of the Rules of Court), there would remain no clear distinction between Articles 63 and 62 of the Statute – the latter requiring the third State to demonstrate its legal interest<sup>70</sup>. Therefore, the Rules of Court could be modified in order to alleviate the burden of proof imposed on a State wishing to intervene by allowing it not to identify the specific provisions of the convention in question.

Alternatively, the Court should ensure more transparency in its proceedings and make information promptly available for would-be interveners. If applications under Art. 63 are filed no later than the date fixed for the opening of the oral proceedings (Art. 82 of the Rules), 'it is possible that the would-be intervener would not have access to the pleadings and documents thereof at the time of its application<sup>71</sup>. According to Art. 53 of the Rules, the Court may, 'at any time', decide to make copies of the pleadings and related documents available to third States only after ascertaining the views of the parties. The Court may also decide to make such copies available to the public 'on or after the opening of the oral proceedings'. In any case, the Court's decision would be dependent upon the consent of the parties.

In this context, an amendment to the Rules of Court could provide a third State with the possibility of filing its request at a later stage. The need for an extended time limit, *i.e.* by the beginning of the oral proceedings – would also be necessary if a third State was allowed to submit its observations as *amicus curiae* by applying the procedure provided for by Art. 43 of the Rules – applicable to international organisations<sup>72</sup> -, as will be discussed below. Even if the referred deadline was extended, potential interveners would still suffer with restricted access and knowledge of the pleadings. A potential remedy could be the application of Art. 43 para 1 of the Rules: the Court could furnish directions to the Registrar concerning notifications to the State parties to a multilateral treaty in order to ensure they have sufficient information on the

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<sup>70</sup> D. W. Greig, *supra*, 313; see Luis González García, *supra*, 117

<sup>71</sup> Giorgio Gaja, 'A New Way ...', *supra*, 671

<sup>72</sup> According to Art. 69 (2) of the Rules, the time limit for an international organisation to submit information relevant to a case before the Court is fixed 'before the closure of the written proceedings'. See Giorgio Gaja, 'A New Way ...', 671 and James Crawford and Amelia Keene, 'Editorial' [2016] *Journal of International Dispute Settlement* 7, 229

issues concerning the treaty at issue<sup>73</sup>. Also, the Court could use its website to ensure more transparency<sup>74</sup>.

### Expanding possibilities to introduce *amicus curiae* briefs

The institute of *amici curiae* is also among the possibilities of expanding procedural rules, thereby opening bilateral litigation to issues of public or general interest<sup>75</sup>. Their goal is to 'introduce public interest considerations into the decision – and, indirectly, to impact on the development of international law'<sup>76</sup>. Despite being accepted and regulated by many courts and tribunals<sup>77</sup>, there remains considerable disagreement within the ICJ in this regard, which appears still reluctant to expand the dispute beyond the limits initially prescribed by the parties to the proceedings<sup>78</sup> so as to cover State submissions (1), as well as those by non-State actors, nongovernmental organisations and individuals (2), notably in cases where *erga omnes* obligations are at issue (3).

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<sup>73</sup> Giorgio Gaja, 'A New Way ...', *supra*, 671

<sup>74</sup> James Crawford and Amelia Keene, *supra*, 230

<sup>75</sup> Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' [1994] *The American Journal of International Law* 88 4, 612. See also Armin von Bogdandy, Ingo Venzke, 'On the Democratic Legitimation ...', 1366-7; Philippe Sands, Ruth Mackenzie, 'International Courts and Tribunals, Amicus Curiae' in Rüdiger Wolfrum (ed) *MPEPIL* (OUPIL 2009); Hervé Ascensio, 'L'Amicus Curiae devant les Juridictions Internationales' [2001] *Revue Générale de Droit International Public* 105, 897

<sup>76</sup> Yaël Ronen and Yael Naggan, 'Chapter 37: Third Parties' in Cesare P R Romano, Karen Alter and Yuval Shany (eds) *The Oxford Handbook of International Adjudication* (Oxford Handbooks in Law Series OSAIL OUP 2013), 821

<sup>77</sup> See, e.g., ITLOS Statute, Arts. 84.1, 84.2; WTO DSU Art. 13; ICSID Arbitration Rule 37.2.a; ECHR Art. 36.2; IACtHR Rules, Art. 2.3, 44; ICC Rules 103, 149; ICTY Rule 74; ICTR Rule 74, among others. For more details on *amicus curiae* before tribunals other than the ICJ, see Jona Razzaque, 'Changing role of friends of the court in the International Courts and Tribunals' [2002] *Non-State Actors and International Law* 1, 169-200; Lance Bartholomeusz, 'The Amicus Curiae before International Courts and Tribunals' [2005] *Non-State Actors and International Law* 5, 209-286; Dinah Shelton, *supra*, 611-642; Eric De Brabandere, 'NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes' [2011-2012] *Chicago Journal of International Law* 12 1, 85-113

<sup>78</sup> See Yaël Ronen and Yael Naggan *supra*, 823. See also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion: Separate Opinion of Judge Guillaume) [1996] ICJ Rep 287, para 5



**AMICUS CURIAE BY THIRD STATES**

The ICJ procedural law has no express provision allowing for State submissions by *amici curiae* in contentious proceedings<sup>79</sup>. The presentation of *amicus curiae* briefs before the ICJ is limited to intergovernmental organisations in contentious proceedings (Art. 34 of the Statute and 43 of the Rules)<sup>80</sup>. According to an amendment to Article 43 of the Rules, which entered into force in 2005, the Court may direct the Registrar to notify any public international organisation that is party to a convention the construction of which is at issue in a case. Therefore, any public international organisation duly notified may submit its written observations on the particular provisions of a convention before the closure of the written proceedings and, if the Court so desires, be able to supplement its observations orally (See Art. 69.2, of the Rules)<sup>81</sup>.

As far as States are concerned, the lack of an express impediment to *amici curiae* briefs does not indicate, however, that the referred practice would be proscribed by the Court, notably in contentious proceedings. Indeed, there is nothing in the Statute which could be understood as preventing the Court from accepting the views submitted by States as *amici curiae*<sup>82</sup>. The practice of the ICJ appears to support this view<sup>83</sup>. Moreover, it could not be argued that the participation of States as *amici curiae* would affect the principle of consensual jurisdiction or that of equality of States. Because such States do not become parties to the case, there would be little interference with the judicial proceedings<sup>84</sup>. It would represent 'a more flexible and less time-consuming form of participation of third States'<sup>85</sup>.

Broadening the possibilities for *amicus curiae* submissions would imply the recognition of the plurilateral nature of international disputes 'without entailing the consequences of

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<sup>79</sup> Christine Chinkin, 'Third Party Intervention Before the International Court of Justice', *supra*, 515

<sup>80</sup> For an analysis of the background and drafting history of Article 34 of the Statute, see Dinah Shelton, *supra*, 620-1. See also Lance Bartholomeusz, *supra*, 213

<sup>81</sup> The Court has only occasionally requested information from an intergovernmental organisation under Article 34 (2) of the Statute. For an example, see Lance Bartholomeusz, *supra*, 214

<sup>82</sup> Paolo Palchetti, 'Opening...', *supra*, 167; Giorgio Gaja, 'A New Way for Submitting...', *supra*, 670

<sup>83</sup> See the ICJ judgment on the Application for Intervention by Malta (*Continental Shelf (Tunisia/Libyan Jamahiriya)*) (Application for Intervention) [1981] ICJ Rep 3, para 32. See Paolo Palchetti, 'Opening ...', 167) and the judgment on the *Gabcikovo-Nagymaros* case (*Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*) (Merits: Judgment) [1997] ICJ Rep 7). As for the last case, the submissions would not be technically considered as *amicus curiae* briefs since they were included in the written submissions of a State (Eric De Brabandere, *supra*, 92)

<sup>84</sup> Giorgio Gaja, 'A New Way ...', *supra*, 670

<sup>85</sup> Paolo Palchetti, 'Opening ...', *supra*, 165

intervention'<sup>86</sup>. It would be useful for allowing States - whose request to intervene has been refused or in cases in which conditions to intervene were not fulfilled - to call the Court's attention, notably when community interests are at issue. The Court itself could benefit from such information when construing a convention<sup>87</sup>. *Amici curiae* would also be important in order to avoid possible delays to the judicial proceedings in case of multiple interveners<sup>88</sup>. This would ensure the sound administration of justice.

Therefore, alternative options could be made available for States wishing to submit useful observations to the Court. Without being bound by the interpretation rendered by the Court, a State could submit its observations by applying the same procedure provided for international organisations by Article 43 of the Rules of Court<sup>89</sup>. This article could be amended in order to allow a third State to 'submit its observations without having to appoint an agent and being formally admitted by the Court as an intervening State'<sup>90</sup>, in a sort of *amicus curiae*.

Another possibility would be to construe such a power on the basis of the autonomy enjoyed by the Court in seeking and obtaining evidence. According to Art. 62 of the Rules of Court, the Court is empowered to seek relevant information independently of the assistance of parties<sup>91</sup>. The referred autonomy to establish evidence can be linked to the power of accepting *amicus curiae* briefs: these could provide the Court with additional means for collecting evidence. As put by Palchetti, 'the power to acquire evidence *proprio motu* includes also the possibility of accepting and evaluating views submitted by third States as *amici curiae*'<sup>92</sup>. In this particular case, there would be no need to amend the Rules, except for providing further directions to third States wishing to submit *amicus curiae* briefs.

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<sup>86</sup> Christine Chinkin, 'Third Party Intervention Before ...', *supra*, 515; Giorgio Gaja, 'A New Way ...', *supra*, 670

<sup>87</sup> Serena Forlati, *supra*, 186

<sup>88</sup> Giorgio Gaja, 'A New Way ...', *supra*, 669

<sup>89</sup> Paolo Palchetti, 'Opening ...', *supra*, 166

<sup>90</sup> Giorgio Gaja, 'A New Way ...', *supra*, 669

<sup>91</sup> See Manfred H. Lachs, 'Evidence in the Procedure of the International Court of Justice: Role of the Court' in Emmanuel G. Bello and Bolasodun A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias* (Martinus Nijhoff 1993), 205 et seq.; Eduardo Valencia-Ospina, 'Evidence before the International Court of Justice' [1999] *International Law Forum* 1 4, 203 et seq.

<sup>92</sup> Paolo Palchetti, 'Opening ...', *supra*, 170; See also Rudolf Bernhardt, 'Judicial and Arbitral Settlement of International Disputes Involving more than two States' [1998] *Institute of International Law Yearbook* 68 1, 57

## AMICUS CURIAE BY NON-STATE ACTORS, NONGOVERNAMENTAL ORGANISATIONS AND INDIVIDUALS

Apart from allowing States to participate as *amici curiae*, a revision of the rules or practice directions would also be useful to allow for greater participation by non-State actors, nongovernmental organisations or corporations, as proposed by Phillipe Sands, Alina Miron, H  l  ne Ruiz-Fabri, and Judge Tomka<sup>93</sup>. The presentation of *amicus curiae* briefs by nongovernmental organisations in contentious cases is not formally envisaged in the ICJ, except in the context of advisory proceedings (Art. 66.2 of the Statute)<sup>94</sup>. However, to date, nongovernmental organisations have rarely participated in advisory proceedings before the ICJ<sup>95</sup>.

This possibility could also be expanded to cover individuals, as they have already sought to participate in proceedings before the Court<sup>96</sup>. The ICJ case law also deals with issues involving individual's rights, in particular the cases regarding diplomatic protection<sup>97</sup>. Notably, human rights cases are not only being litigated in tribunals established specifically for that purpose, *i.e.*, the ICJ has dealt with genocide, war crimes and other human rights violations in the case concerning *Application of the Convention on the Prevention and Punishment of the crime of Genocide* and also in the *Jurisdictional Immunities* case<sup>98</sup>. Environmental law cases are also

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<sup>93</sup> James Crawford and Amelia Keene, *supra*, 229

<sup>94</sup> See Practice Direction XII. 1. In practice, 'the Court has never officially requested any written submission by an NGO' (Eric De Brabandere, *supra*, 93). See also Lance Bartholomeusz, *supra*, 220-4

<sup>95</sup> See *International status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128. The ICJ has, however, rejected the submission of *amici curiae* in contentious proceedings (*Asylum* case, in particular the attempt made by the International League for the Rights of Man). See in this regard, Jona Razzaque, *supra*, 172; Lance Bartholomeusz, *supra*, 215. However, NGOs have played an informal role as far as initiation of cases before the ICJ are concerned (advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*). See Eric De Brabandere, *supra*, 91. In the *Wall* and *Kosovo's* advisory opinion, the ICJ accepted that non-State actors directly concerned could present written and oral statements before the Court. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Order) [2003] ICJ Rep 428, 239; *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Order) [2008] ICJ Rep 409, 410. The PCIJ has been more active in this regard. For an analysis of the cases in which the PCIJ permitted participation by nongovernmental organisations, see Dinah Shelton, *supra*, 622-3

<sup>96</sup> See request made by Professor Michael Reisman in the *Namibia* case to submit a kind of *amicus curiae* brief to the Court. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 1970* (Advisory Opinion) [1971] ICJ Rep 16, see 1970 ICJ Pleadings, 636-37. See also the *ELSI* case (attorney included in the US delegation) and the *Oil Platforms* case (senior legal advisor included in the Iran delegation): Jona Razzaque, *supra*, 176

<sup>97</sup> Jona Razzaque, *supra*, 175; Lance Bartholomeusz, *supra*, 216; Dinah Shelton, *supra*, 613.

<sup>98</sup> Dinah Shelton, *supra*, 614

among issues that reflect widespread concern or broad public interest; even boundary disputes may have an important impact on individuals. This illustrates the growing tendency that international litigation has rarely been a matter of private concern or interest affecting exclusively the parties in dispute<sup>99</sup> and would indirectly stimulate public interest in the work of the Court, among other advantages<sup>100</sup>. The participation of individuals directly affected as *amicus curiae* would contribute to the proper administration of international justice<sup>101</sup>.

In any case, a change of the rules would be needed in order to admit NGOs and eventually, corporations and individuals, in contentious cases<sup>102</sup>. However, even in the absence of such a revision, Article 50 of the Statute could provide a special avenue for the Court to invite 'any individual, body, bureau, commission, or other organisation' to participate as *amicus curiae* in contentious cases<sup>103</sup>. As proposed by Shelton, 'these organisations could invoke Article 50 of the ICJ Statute to offer their opinions as experts'<sup>104</sup>. Also, information submitted by such organisations could be annexed to the parties' submissions<sup>105</sup>.

#### **ERGA OMNES OBLIGATIONS: THE NEED TO ENSURE GREATER PARTICIPATION IN ICJ PROCEEDINGS**

The plurilateral nature of international adjudication requires not only the expansion of the active legitimacy of submitting *amicus curiae* briefs but also the enlargement of its scope, notably when community interests are at stake. If the goal is to 'introduce public interest considerations', the 'friends of court' could also contribute to upholding rules aimed at protecting fundamental values of the international community, such as *erga omnes* obligations. Indeed, *amicus curiae* briefs would be more suitable than intervention proceedings for cases in

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<sup>99</sup> Dinah Shelton, *supra*, 614-5

<sup>100</sup> Shabtai Rosenne, 'The Law and Practice of the International Court, 1920-1996', vol. II (Martinus Nijhoff 1997), 654-5

<sup>101</sup> Shabtai Rosenne, 'Reflections on the Position of the Individual in Inter State Litigation in the International Court of Justice', in Sanders (ed.) *International Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff 1967), 250.

<sup>102</sup> See Markus Benzing, *supra*, 401. See also Eric de Brabandere, *supra*, 85. The PCIJ has been more open in this regard: see *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* [1935] PCIJ (ser. A/B) No. 65, at 43: the PCIJ indicated it might allow direct access of individuals in advisory opinions.

<sup>103</sup> Lance Bartholomeusz, *supra*, 214

<sup>104</sup> Dinah Shelton, *supra*, 627.

<sup>105</sup> Dinah Shelton, *supra*, 628.

which an *erga omnes* obligation is at issue<sup>106</sup>. The third State's aim would be to affirm the collective character of the obligation in question, which would be an adequate and sufficient means for presenting its views to the Court. In such a case, the referred State would not have to demonstrate a legal interest of its own which would be directly in issue in the case<sup>107</sup>.

In broad terms, greater participation in proceedings should be afforded whenever needed to 'further the interests of justice, on the basis of the nature and degree of the public interest'<sup>108</sup>. In particular, the expansion of the legitimacy to submit *amici curiae* – by States, nongovernmental organisations and, eventually, individuals and corporations – would be justified where *erga omnes* obligations are at issue. The fundamental character of the interests involved would contribute to pressure on the Court to expand participation in contentious proceedings before the ICJ.

## CONCLUSION

There is no doubt that international adjudication contributes to the achievement of community interests. This is because 'community interests'<sup>109</sup> transcend states' individual interests and ensure the protection of the international community<sup>110</sup>. By developing international law within a multifunctional approach, the ICJ can directly participate in the protection of community interests. However, such a contribution is mitigated by the ICTs treatment of procedural rules, which may impose an obstacle to substantive law. The existing tension between bilateralism and community interests is duly reflected in ICJ case law. Whenever the Court deals with issues involving general interest, it tends to rest on technicalities to avoid deciding on high profile and politically charged cases.

Considering that procedure may undermine the protection of community interests, this paper addressed concrete procedural challenges and identified possible solutions for the Court

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<sup>106</sup> Paolo Palchetti, 'Opening...', *supra*, 179

<sup>107</sup> In this sense, see Paolo Palchetti, 'Opening ...', *supra*, 178-80. See, *i.e.*, the Court's considerations with regards to the application by Malta for permission to intervene (*Continental Shelf (Tunisia/Libyan Jamahiriya)* (Application for Intervention) [1981] ICJ, para 19). For other authors arguing that in cases involving *erga omnes* obligations, the protection of community interests should be a sufficient interest for the purpose of discretionary intervention (under Art. 62 of the Statute), see Rudolf Bernhardt, *supra*, 57; Markus Benzing, *supra*, 369; and Sean D. Murphy, 'Amplifying the World Court's Jurisdiction through Counter-Claims and Third-Party Intervention' [2000] *The George Washington Journal of International Law and Economics* 33, 27

<sup>108</sup> Dinah Shelton, *supra*, 627

<sup>109</sup> Markus Benzing, *supra*, 371

<sup>110</sup> Bruno Simma, *supra*, 217–384

to be attuned to this new era of international adjudication, as highlighted by dissenting Judge Weeramantry in the *Gabčíkovo-Nagymaros* case<sup>111</sup>. The proposed amendments on topics such as third-party intervention and *amicus curiae* briefs were also identified among specific reform proposals by the Counsel Survey conducted in preparation for the Seminar held on the 70th Anniversary of the Court's first inaugural sitting<sup>112</sup>. There were calls for 'greater transparency, a more interactive and less formalistic bench and increased openness to the practices and jurisprudence of other international tribunals, both on matters of substance and procedure'<sup>113</sup>.

There is indeed a tendency towards further 'multilateralisation' of procedural law whenever community interests are at stake<sup>114</sup>. As pointed out by Judge Simma, 'international law is finally overcoming the legal as well as moral deficiencies of bilateralism and maturing into a much more socially conscious legal order'<sup>115</sup>. This would enhance both the Court's 'normative' and 'democratic' legitimacy<sup>116</sup>. If ICTs fulfil certain criteria such as transparency, accountability and due process, they may be viewed as legitimate<sup>117</sup>. Transparent procedure also implies the participation of affected or interested parties in proceedings, including a dialogue between the court and the parties, third parties and *amicus curiae* briefs; while transparent reasoning concerns the decision-making process and tools according to which international courts and tribunals discuss and treat precedents<sup>118</sup>. Therefore, rules on third party intervention, and *amicus curiae* briefs are all of the utmost importance not only for protecting community interests, but also for ensuring the normative and democratic legitimation of ICTs, and in

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<sup>111</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment: Separate Opinion of Judge Weeramantry) [1997] ICJ Rep 7, 118

<sup>112</sup> James Crawford and Amelia Keene, *supra*, 225-30

<sup>113</sup> James Crawford and Amelia Keene, *supra*, 225

<sup>114</sup> Markus Benzing, *supra*, 408

<sup>115</sup> Bruno Simma, *supra*, 234. According to Judge Simma, 'classic bilateralist international law has fallen far behind the present State of consciousness of international society' (234).

<sup>116</sup> There is no authoritative or generally accepted definition of 'legitimacy' (Andreas Follesdal, 'The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory' [2013] *Theoretical Inquiries in Law* 14 2, 345). See also Daniel Behn, Ole Kristian Fauchald and Malcolm Langford, 'How to approach "legitimacy"', for the book project *Empirical Perspectives on the Legitimacy of International Investment Tribunals* (2015). For a definition of normative legitimacy, see Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (Springer 2008), 25; A. Follesdal, *supra*, 345; and Laurence R. Helfer and Karen J. Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts' [2013] *Theoretical Inquiries in Law* 14 2, 479

<sup>117</sup> See Armin von Bogdandy, 'The Democratic Legitimacy of International Courts: A Conceptual Framework' [2013] *Theoretical Inquiries in Law* 14 2, 375

<sup>118</sup> Armin von Bogdandy, 'The Democratic Legitimacy of International Courts...', *supra*, 376-7

particular of the ICJ. It reflects a broad tendency towards a democratization of systems of global governance<sup>119</sup>.

However, one may wonder how far ICTs should go in accommodating the function of protecting the interests of the international community without losing their legitimacy in the broader picture of dispute settlement<sup>120</sup>. There is indeed a fear that any expansion of procedural rules would open the floodgates and expose the ICJ to an uncontrolled number of subjects, which could compromise its function of settling bilateral disputes by undermining party equality and the efficient management of proceedings. This could demotivate states from choosing the Court as a legitimate dispute settlement *forum*, thereby generating political friction or backlashes<sup>121</sup>. The tension between the bilateral nature of ICJ proceedings and the necessary protection of community interests would also justify the overall internal reluctance to adapt ICJ Rules for 'multiparty litigation'. ICT Judges, notably from the ICJ, could fear that states could present lesser willingness to choose a *forum* considered not to fully guarantee their procedural autonomy<sup>122</sup>.

The identification and protection of community interests by international courts therefore reflects a policy choice<sup>123</sup> that must be guided by good governance and be endowed with legitimacy<sup>124</sup> in order to avoid the potential risk of incurring in 'rhetorical function'<sup>125</sup> and/or abuse<sup>126</sup>. Such policy choice has to take into account the intertemporal dimension, which is also applicable to the formation, development and interpretation of international law<sup>127</sup>. As highlighted by Judge Cançado Trindade in his dissent opinion in the *Jurisdictional*

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<sup>119</sup> Steven Wheatley, 'A Democratic Rule of International Law' [2011] *The European Journal of International Law* 22 2,526-7

<sup>120</sup> Geir Ulfstein, 'International Courts and Judges: Independence, Interaction and Legitimacy' [2014] *NYU Journal of International Law and Politics*, 865-866

<sup>121</sup> Laurence R. Helfer and Karen J. Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts' [2013] *Theoretical Inquiries in Law* 14 2, 484

<sup>122</sup> Markus Benzing, *supra*, 408

<sup>123</sup> Samuel Cogolati, Linda Hamid and Nils Vanstappen, 'Global Public Goods and Democracy in International Legal Scholarship' [2015] *Cambridge Journal of International and Comparative Law* 5 1,13-16; André Nollkamper, *supra*, 772

<sup>124</sup> Fabrizio Cafaggi and David D. Caron, 'Global Public Goods amidst a Plurality of Legal Orders: A Symposium' [2012] *The European Journal of International Law* 23 3, 645

<sup>125</sup> Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law and Legitimacy' [2012] *The European Journal of International Law* 23 3,655

<sup>126</sup> Gregory Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World' [2012] *The European Journal of International Law* 23 3, 669 674

<sup>127</sup> Paula Wojcikiewicz Almeida, 'Imunidades Jurisdicionais do Estado perante a Corte Internacional de Justiça...', *supra*, 526-7

*Immunities* case, there are no ‘immutable’ rules of international law<sup>128</sup>. There is a prevailing need to appreciate a situation in the light of contemporary legal rules<sup>129</sup>. As recognized by the ICJ in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Court considered that ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’<sup>130</sup>. If procedure and substance are necessarily intertwined, the design and interpretation of procedural law also represents a work-in-progress<sup>131</sup>, since it is not static and has to take into account evolutionary community interests, as a necessary reflection of the current era of international adjudication.

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<sup>128</sup> *Jurisdictional Immunities of the State (Germany v. Italy)* (Judgment: Dissenting Opinion of Judge Trindade), *supra*, para. 12

<sup>129</sup> *Annuaire de l’Institut de Droit International*, 1973 e 1975, cited by *Jurisdictional Immunities of the State (Germany v. Italy)* (Judgment: Dissenting Opinion of Judge Trindade), *supra*, para. 12

<sup>130</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para. 53

<sup>131</sup> Thomas Christiano, ‘Democratic Legitimacy and International Institutions’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010), 137



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