SEPARATE OPINION OF JUDGE ODA

1. I have voted in favour of the Judgment in deference to the competence conferred upon the Court by the second paragraph of Article 62 of its Statute. That paragraph expressly entrusts the Court with the authority to decide upon a request for permission to intervene. In exercising that authority, the Court may take into account considerations of judicial propriety. Furthermore, I believe that the legal interests of Malta, which it has sought to protect by intervention in the *Tunisia/Libya* case, will be sufficiently safeguarded by the Court, the more so because Malta has by its argument brought its understandable preoccupations to the Court's attention. In my view, however, the Court's reasoning places too restrictive a construction upon the first paragraph of Article 62. I regret that the institution of intervention is afforded so narrow a focus on essentially the first occasion of its application.

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2. Intervention within the meaning of Article 62 of the Statute should in my opinion be considered to have a far broader scope than the Court's Judgment allows (paras. 32-34). The records of the proceedings of the Advisory Committee of Jurists of 1920 which prepared the Statute of the Permanent Court of International Justice shed little light on what kind of functions a third State permitted to intervene under Article 62 of the Statute (which was identical to Article 62 of the Statute of the International Court of Justice as far as the French text is concerned) can exercise, and on what kind of effects may flow from its intervention. Although the Rules of Court adopted in 1922 at the preliminary session of the Permanent Court of International Justice contained provisions governing the application for permission to intervene, they did not deal with the scope of intervention, or the way in which the intervention of a third party, once granted, should be conducted. As the Court properly states in the present Judgment (paras. 23 and 27), the Permanent Court of International Justice and its successor left such questions of intervention to be decided in the light of the particular circumstances of each case. In 60 years, there has hardly been a case before the Court in which Article 62 could be said to have been a key issue, but the time has now come for the Court to grapple with the problem of intervention.

3. I do not share the Court's evaluation of the fact that the English text of Article 62 of the Statute of the Permanent Court of International Justice spoke of intervention "as a third party", and that these words were omitted

when the Statute of the International Court of Justice was drafted in 1945 by the United Nations Committee of Jurists. From the outset, the French text of the Statute of the Permanent Court of International Justice did not contain any phrase corresponding to "as a third party". Article 62 of the Statute, when redrafted for the present Court in 1945, did not undergo any change as far as the French text was concerned, and the report of the Committee expressly stated :

> "[T]he formal emendations made in the English text of . . . Article 62, paragraph 1 (elimination of the words : 'as a third party') do not change the sense thereof." (*Documents of the United Nations Conference on International Organization,* San Francisco, 1945, Vol. XIV, p. 676.)

It is true that both the English and the French texts of the Statute of the Permanent Court of International Justice are authentic, as expressly mentioned in the Protocol of Signature of that Statute. On the other hand, the Preface to the *Procès-verbaux* of the Proceedings of the Advisory Committee of Jurists clearly indicated that :

> "As all the members of the Committee, with the exception of Mr. Elihu Root, spoke in the French language, the English text of the Procès-Verbaux is to be looked upon as a translation, except in so far as concerns the speeches and remarks of Mr. Root." (P. IV.)

The reason why, in 1920, the phrase "as a third party" was introduced into the English text, as a translation from the French text, is not known. At all events, this introduction would not seem to have been explicable on the basis of the change in the French text from "un intérêt d'ordre juridique le concernant est en cause" to "un intérêt d'ordre juridique est *pour lui* en cause" (Judgment, para. 22). There is in the records of the discussions no suggestion that in 1920 the drafters had specifically in mind the idea of intervention "as a party". Given this want of information, it does not seem justified to draw conclusions about the meaning of intervention "as a third party" based essentially on the English text of the Statute. Thus I cannot agree with the Court that any debates in the Permanent Court showed that "it seems to have been assumed that a State permitted to intervene under Article 62 would become a 'party' to the case" (para. 24).

4. It is far from clear that participation *qua* party is a *conditio sine qua non* of the institution of intervention. Moreover, the question of whether or not the institution of intervention under Article 62 of the Statute requires the participation of a third State solely "as a party" is closely interrelated with two further questions : first, whether or not a jurisdictional link which connects the intervening State with the original litigant States in the principal case should be required ; and, second, whether or not the judgment of the Court in the principal case should also be binding upon the intervening State. Although the Court does not pass upon the question of jurisdiction in these proceedings (para. 36), it is difficult to discuss the

institution of intervention without taking into account these two further questions, which are so closely interrelated with the nature of the institution under Article 62.

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5. I believe it is arguable that a jurisdictional link between the intervening State and the original parties to the case would be required if the intervening State were to participate as a full party, and that, in such a case, the judgment of the Court would undoubtedly be binding upon the intervening State. Such a right of intervention is basically similar to that provided for in the municipal law of many States. As a result of the participation of the third party as a full party in the principal case, the case will become a litigation among three parties. In the case of municipal law, of course, the link of jurisdiction between the third party seeking intervention and the original litigants is not at issue. This municipal institution has existed for many years to protect the right of a third party which might otherwise be affected by the litigation between two other parties and to promote economy of litigation. In such circumstances two or three causes of action concerning the same set of rights or obligations are dealt with as a single case.

6. Similarly, before the International Court of Justice, there may be cases in which the third State seeking intervention to secure its alleged right, which is involved in the very subject-matter of the original litigation, is linked with the original litigant States by its acceptance of the compulsory jurisdiction of the Court under the optional clause of the Statute or through a specific treaty or convention in force, or by special agreement with these two States. In such cases the third State may participate as a plaintiff or a defendant or as an independent claimant. Probably, in fact, this third State would in such circumstances also be entitled to bring a separate case on the same subject before the Court. On the other hand, participation in the proceedings by a third State as a full party without having any jurisdictional link with the original parties, while remaining immune from the binding force of the judgment, would certainly be tantamount to introducing through the back door a case which could not otherwise have been brought before the Court because of lack of jurisdiction. This seems inadmissible prima facie, because the jurisdiction of the International Court of Justice is based on the consent of sovereign States and is not otherwise compulsory.

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7. Nevertheless, it is by no means clear that the only hypothesis contemplated when the draft of Article 62 was under discussion was the hypothesis of the intervening State being connected by a jurisdictional link with the original litigants in the principal case. When the Permanent Court

of International Justice met in 1922 for its preliminary session to discuss, among other things, the Rules of Court, the Committee on Procedure prepared questionnaires in which the Court was asked, in connection with intervention : "Have third parties interested in a case the right of intervention only when the original parties to a dispute have accepted the compulsory jurisdiction of the Court ?" (*P.C.I.J., Series D, No. 2,* p. 291). As was pointed out in the argument in the current proceedings and in the Court's Judgment (para. 23), the Court in 1922 was divided in its answer and did not come to any definite conclusion. Yet it must be noted that the President, Judge Loder, ruled at the seventeenth meeting on 24 February 1922 that he

> "could not take a vote upon a proposal the effect of which would be to limit the right of intervention (as prescribed in Article 62) to such States as had accepted compulsory jurisdiction. If a proposal in this sense were adopted, it would be contrary to the Statute" (*ibid.,* p. 96).

8. The possibility in respect of Article 62 of a somewhat broader scope of overall interpretation is traceable in the proceedings of the preliminary session of the Permanent Court of International Justice. In this respect, it may be pertinent to quote from the *Summary of Previous Discussions on the Question of the Right of Intervention,* submitted by Judge Beichmann, also at the seventeenth meeting on 24 February 1922. In the circumstances of Article 62, he said :

> "no State has a right to intervene, but may only ask the Court for permission to do so ; permission shall only be given if the Court considers that the State in question has an interest of a legal nature in the case. This condition, however is not necessarily the only one, and its fulfilment does not necessarily involve the right of intervention. Even though the Court is of opinion that this condition is fulfilled, it may refuse the request.
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> Article 62 of the Statute lays down that the question shall be decided in each particular case as it arises ; there is therefore no need to adopt any decision at the moment either with regard to the interpretation of the words 'interest of a legal nature which may be affected by the decision', or with regard to the question whether the right of intervention is subject to other conditions of a legal nature, for example, the acceptance of the compulsory jurisdiction of the Court by the original parties and the party desiring to intervene, or the consent of the original parties. The question whether, when the right to intervene has been admitted and exercised, the intervening State is to be bound by the judgment, as well as the original parties, must also remain open.
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> Nevertheless, the discussion has shown that intervention may be based on other grounds : the intervening State may have a subjective right, which is incompatible with the claims of the original parties or

of one of them, or again it may be to the interest of the intervening State that opinions contrary to its own should not prevail as regards the rules to be applied. The last named reason for intervention might be regarded as sufficient, at all events in the circumstances contemplated in Article 63. The question whether this reason would also suffice in other circumstances remains open." (*Ibid.*, p. 349.)

9. The situation where a right *erga omnes* is at issue between two States, but a third State has also laid a claim to that right, is a hypothesis which here merits consideration. For instance, in the case of the sovereignty over an island, or the delimitation of a territorial boundary dividing two States, with a third party also being in a position to claim sovereignty over that island or the territory which may be delimited by this boundary, or in a case in which a claim to property is in dispute, an unreasonable result could be expected if a jurisdictional link were required for the intervention of the third State. If this link is deemed at all times indispensable for intervention, the concept of intervention in the International Court of Justice will inevitably atrophy. Accordingly, in my submission, if the third State does not have a proper jurisdictional link with the original litigant States, it can nevertheless participate, but not as a party within the meaning of the term in municipal law. The role to be played by the intervening State in such circumstances must be limited. It may assert a concrete claim against the original litigant States, but that claim must be confined to the scope of the original Application or Special Agreement in the principal case. The intervening State cannot seek a judgment of the Court which directly upholds its own claim. The scope of the Court's judgment will also be limited : it will be bound to give judgment only within the scope of the original Application or Special Agreement. The intervening State cannot, of course, escape the binding force of the judgment, which naturally applies to it to the extent that its intervention has been allowed. The intervening State will have been able to protect its own right merely in so far as the judgment declines to recognize as countervailing the rights of either of the original two litigant States. On the other hand, to the extent that the Court gives a judgment positively recognizing rights of either of the litigant States, the intervening State will certainly lose all present or future claim in conflict with those rights. In this light, it does not seem tenable to argue that unless the intervener participates as a party on an equal footing with the original litigant States, it would unreasonably benefit without putting itself in any disadvantageous position.

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10. Intervention in the International Court of Justice is not necessarily limited to the situation concerning some well-defined right which is in

dispute between litigant States. Relevant in this respect is Article 63 of the Statute. The subject-matter of the dispute between the original parties in the case of Article 63 will certainly be concrete rights claimed by both sides. But if any third State were to intervene, it would be because that third State was concerned with the interpretation of the convention falling to be construed in the judgment of the Court, but not with the subject-matter itself. This kind of intervention is unique in international law and, unlike Article 62, was borrowed from the provisions of Article 84 of the 1907 Convention for the Pacific Settlement of International Disputes, which was inherited, with some minor modifications, from Article 64 of the 1899 Convention for the Pacific Settlement of International Disputes. This was confirmed by the President of the Advisory Committee of Jurists in 1920 (*Procès-verbaux,* p. 594), although in fact no extensive discussions on this point have been reported from that time.

11. In the application of Article 63, no jurisdictional link is apparently required between the intervening State and the original litigant States. The third State may participate in the case, but not "as a party" on an equal footing with the orginal litigant States because the object of the intervention is not necessarily connected with the claims of the original parties. The third party participates, but not as a plaintiff or defendant or even an independent claimant. This seems to be clear from some precedents of the Court. In the *Haya de la Torre* case, the delivery of Haya de la Torre, who was enjoying asylum at the Colombian Embassy in Peru, was the subject-matter of the case, in which Cuba was not directly concerned. There is no reason to maintain that Cuba's intervention was assumed to be a participation "as a party" in the sense I have described above (although in the list of participants in the case Cuba was mentioned as the "intervening party"). In fact, Cuba's participation consisted simply in presentation of its interpretation of the Havana Convention. Similarly, in the *S.S. "Wimbledon"* case, the subject-matter was not the cargo in which Poland was interested but the right of access of the vessel in question to the Kiel Canal. In neither case was the intervention thought to be conditional on the presentation of any concrete claim against both or either of the original litigant States.

12. The judgment of the Court will certainly be binding upon the litigant States, but all that will be binding upon the intervening State is, as paragraph 2 of Article 63 provides, "the construction [of a convention] given by the judgment". In other words, the intervening State will be bound by the Court's interpretation of the convention if it becomes involved in a case involving the application of that instrument.

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13. In this respect it seems pertinent to examine the meaning of Article 59 of the Statute, which provides for the binding force of the judgments of the Court, particularly since the meaning of that Article is sometimes discussed in connection with Article 63. Article 59 was not contained in the draft prepared by the Advisory Committee of Jurists in June/July 1920. It stemmed from comments of the British delegate at the Council of the League of Nations in October 1920. Mr. Balfour submitted a note on the Permanent Court of International Justice, a passage of which read :

> "There is another point on which I speak with much diffidence. It seems to me that the decision of the Permanent Court cannot but have the effect of gradually moulding and modifying international law. This may be good or bad ; but I do not think this was contemplated by the Covenant ; and in any case there ought to be some provision by which a State can enter a protest, *not* against any particular decision arrived at by the Court, but against any ulterior conclusions to which that decision may seem to point." (*P.C.I.J. Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant,* p. 38.)

The report of Mr. Léon Bourgeois of France, who had also once submitted a report on the draft scheme of the Advisory Committee of Jurists at the Council meetings at San Sebastian in August, was presented at the Council on 27 October 1920. It starts with these words : "The following are the points which I propose that you should consider : . . .", and continues :

> "8. The right of intervention in its various aspects, and in particular the question whether the fact that the principle implied in a judgment may affect the development of international law in a way which appears undesirable to any particular State may constitute for it a sufficient basis for any kind of intervention in order to impose the contrary views held by it with regard to this principle." (*Ibid.,* p. 46.)

Apparently taking into account the observation which had been made by Mr. Balfour, the report continued in connection with the institution of intervention in the case of the construction of a convention, as follows :

> "This last stipulation establishes, in the contrary case, that if a State has not intervened in the case the interpretation cannot be enforced against it. No possible disadvantage could ensue from stating directly what Article 61 [now Article 63] indirectly admits. The addition of an Article drawn up as follows can thus be proposed to the Assembly : *'The decision of the Court has no binding force except between the Parties and in respect to that particular case'* [now Article 59]." (*Ibid.,* p. 50.)

It may accordingly be concluded that the drafters of the Statute apprehended that the interpretation which the Court would place on international law would be shaped by prior judgments of the Court, and that, by adding this provision, they intended to inhibit the extension of a modified interpretation of international law to those States which had not participated in the case.

14. If Article 59 is interpreted against this background, it does not add much to what was contemplated under Article 63, and thus has no direct bearing on it. It may be asked, however, what significance it may have to state, as implied by Article 63, that the construction of a convention will not be binding on States not party to a case before the Court. For regardless of such a postulate there is little doubt that, in a case where the construction of a particular convention is in dispute, the construction placed upon it by the Court in a previous case will tend to prevail. It is submitted that in this sense there will not be much difference between those States which have intervened in a case and those States which have not intervened, so far as the practical effect of the Court's construction of an international convention is concerned. It is questionable whether the intention of the founders – i.e., not to make the interpretation of a convention by the Court binding upon the States which have not participated in the case – was really given effect by the formulation of Article 59.

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15. If an interpretation of a convention given by the Court is necessarily of concern to a State which is a party to that instrument, though not a party to the case, there seems to be no convincing reason why the Court's interpretation of the principles and rules of international law should be of less concern to a State. If, therefore, the interpretation of an international convention can attract the intervention of third States under Article 63 of the Statute, it may be asked why the interpretation of the principles and rules of international law should exclude a third State from intervening in a case. Lack of jurisdiction is not a sufficient reason for preventing a State from intervening as a non-party in a principal case in which the application of the principles and rules of international law is at issue, for the interpretation given by the Court of those principles and rules will certainly be binding on the intervening State. What is more, as in the case of Article 63, the provisions of Article 59 do not in fact guarantee a State which has *not* intervened in the principal case any immunity from the subsequent application of the Court's interpretation of the principles and rules of international law.

16. I am not of course suggesting that such an intervention would fall within the meaning of Article 63 of the Statute. I am simply saying that such a type of intervention – i.e., non-party intervention in the case in which a jurisdictional link is absent, but the interpretation given by the Court is binding – was introduced under Article 63. And if such a type of

intervention is therefore possible, I submit that Article 62, if looked at in the light of Article 63, can also be viewed as comprehending this form of intervention as well, providing that the interest of a legal nature is present. That is to say, intervention under Article 62 encompasses the hypothesis where a given interpretation of principles and rules of international law is sought to be protected by a non-party intervention. In this hypothesis, the mode of intervention may be the same as under Article 63, so that the third State neither appears as a plaintiff or defendant nor submits any specific claim to rights or titles against the original litigant States.

17. It may be objected that the States which may be affected by the interpretation of such principles and rules by the Court will be without number, and that, if an interpretation of the principles and rules of international law can open the door of the Court to all States as interveners, this will invite many future instances of intervention. This problem should be considered from the viewpoint of future judicial policy, and more particularly from the viewpoint of the economy of international justice. Yet this cannot be the reason why a request for intervention which is actually pending should be refused when the requesting State claims that its legal interest may be affected by the Court's rulings on the principles and rules of international law. The possibility of an increasing number of cases invoking Article 63 may likewise not be avoided. The fact that in the past Article 63 has been rarely invoked does not guarantee that the situation will remain unchanged in the future. Thus the problem is related not only to Article 62, but also to Article 63.

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18. However, unlike Article 63 dealing with the case of the interpretation of an international convention, Article 62 comprises certain restrictions. Paragraph 2 of Article 62 provides that : "It shall be for the Court to decide upon this request." This means that the Court has certain discretionary powers to allow or not to allow any requesting State to intervene in the litigation. Still more important is the restriction of paragraph 1 of Article 62. This paragraph requires the State requesting intervention to show that "it has an interest of a legal nature which may be affected by the decision in the case". Thus any danger of expansive application of Article 62 will certainly be restricted by the Court's exercising its discretionary power, more particularly to determine whether the requesting State has such an interest. In the present case, as it happens, the Court has taken this line and come to a negative conclusion on this point, imposing what is in my view an unduly severe test.

19. In fact, on the question whether Malta "has an interest of a legal nature which may be affected by the decision in the case" or not, my

conclusions differ from the Court's. The present *Tunisia/Libya* case has a quite distinctive characteristic. It is not concerned with a general interest in the development of international law in an abstract form ; the mere interpretation of principles and rules of international law is not at issue. Otherwise the Court, which on such points may be requested simply to perform an advisory or doctrinal function, would not be able to entertain this case. The case being contentious, conflicting claims between Tunisia and Libya should certainly exist. Yet, as is evident from the Special Agreement, the subject-matter of this case does not concern any contractual right disputed solely between two States or well-defined rights *erga omnes* such as the sovereignty over an island or any specific land area or even continental shelf area ; neither of the principal Parties puts forward a claim to a right or a title to any continental shelf area as precisely specified. Hence the claims of the original litigant States, Tunisia and Libya, against each other were themselves not quite clear, at least at the intitial stage of the submission of the case to the Court. Therefore, if Malta has failed to assert its own claims against either or both of the litigant States, or to seek as plaintiff or defendant any substantive or operative decision against either Party or to try to obtain any form of ruling or decision from the Court concerning its own continental shelf boundary with either or both of the orginal litigant States, or, then again, to submit its own claims to decision by the Court and not to expose itself to counter-claims, this cannot be any reason to question the admissibility of Malta's request. More cannot be demanded of Malta than of Tunisia and Libya.

20. Both Parties in this case wish to secure a statement from the Court of what the appropriate law will be for the delimitation of the respective areas of the continental shelf of Tunisia and Libya. On the face of the Special Agreement, what will be argued before the Court by these two countries will remain confined to the principles and rules of international law to be applied in the delimitation of the continental shelf and not relate to the concrete claim to any title. Thus the object of the request for intervention may properly consist, as stated by Malta, in presenting views on the principles and rules of international law during the proceedings in the principal case (as intended by Cuba in the *Haya de la Torre* case under Article 63). That being so, the position of Malta is certainly different from that of Fiji in the *Nuclear Tests* cases, in which the subject-matter was clearly defined in terms of specific claims. Aside from the question of jurisdiction, Fiji could have identified its own interests with those of Australia and New Zealand in specifying the legal interests which might have been threatened by the action taken by France, the legality of which was in dispute. Thus, although Fiji might have been required to specify its own claim as a plaintiff together with Australia and New Zealand against France, this requirement would have arisen out of the very nature of the

case. The *Tunisia/Libya* case, however, is of a completely different nature.

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21. It has been contended by both Libya and Tunisia that the Court is required to confine itself to the applicable principles and rules for the delimitation of the area of the continental shelf of Libya and the area of the continental shelf of Tunisia, in which, *ex hypothesi,* no third State can be interested. However, this contention is unconvincing. The Special Agreement provides in the beginning of Article 1 :

> "The Court is requested to render its judgment in the following matter :
>
> What principles and rules of international law may be applied for the delimitation of the area of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and to the area of the continental shelf appertaining to the Republic of Tunisia, and the Court shall take its decision according to equitable principles, and the relevant circumstances which characterize the area, as well as the new accepted trends in the Third Conference on the Law of the Sea." (Certified English translation filed by Libya.)

The "area" of the continental shelf appertaining to Libya and the "area" of the continental shelf appertaining to Tunisia are of course different. The object of the principal case is to determine the principles and factors governing delimitation of that line by the Parties, i.e., the dividing line between these two "areas". These two "areas" themselves as a whole have not been defined in the above request by Tunisia and Libya.

22. If the "area" as to which the relevant circumstances to be taken into account by the Court is to be simply an aggregate of the "area" appertaining to Libya and the "area" appertaining to Tunisia, so that it does not affect any third State but only concerns these two States, how can one identify that whole "area" without possessing any precise definition of that aggregate ? Is it not logical to suggest that when these two States mention "the relevant circumstances which characterize the area", this "area" must necessarily have a different connotation from what is implied by the mere aggregate of the "area" appertaining to Libya and the "area" appertaining to Tunisia to be delimited as a result of the Court's judgment ? This is borne out by the use of the words "propres à la région" (not "zone") in Tunisia's certified French translation of the Special Agreement, where the English has "which characterize the area". Certainly the delimitation of the two "areas" is essentially a bilateral matter to be settled by agreement between Tunisia and Libya. That delimitation ought not to intrude upon the area-to-be of the continental shelf of any third State. Yet is it possible to assume that when account is taken of the characteristics of the *area as a*

whole, an area in which a third State may have some legal title to a portion of continental shelf, there will be no legal interest of such a State which may be affected by the decision of the Court aimed at the principles and rules of international law applicable in that area ? Furthermore, is it proper to state that no conclusions or inferences may legitimately be drawn from the findings or the reasoning with respect to rights or claims of other States not parties to this *Tunisia/Libya* case (Judgment, para. 35) ? If any consideration is given by the Court to the effect which, for example, the existence of an island or islands in this "area" may have in the delimitation of the continental shelf between Tunisia and Libya, how can Malta remain unaffected by a decision of the Court indicating the principles and rules therein involved ?

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23. Without scrutinizing the details of the case, the Court cannot now define the "area" of which the relevant circumstances to be taken into account by the Court are characteristic. The Court cannot take a position in advance in this respect without dealing with the principal case. Since this "area" actually is not limited to the expanses in which it is evident that no third State may have a claim, the possibility or probability of an adverse effect upon a third State is not excluded. Theoretically, a number of States may have a claim to the continental shelf in the "area", invoking any justification which they may prefer for this purpose, because the criteria for delimitation of the continental shelf have not yet been firmly settled. Yet, in the light of developments in the law of the sea, it would not have been difficult for the Court to exercise its discretionary powers under Article 62, paragraph 2, and allow the intervention of the third State particularly concerned, depending on the Court's evaluation of the imminent and grave interests prima facie at stake and considering the relevant factors. In this case, I cannot agree that Malta, which prima facie belongs to the very "area" in issue, will escape any legal effect of the judgment of the Court. This distinguishes Malta from all other countries (except perhaps a few neighbouring States), many of which may of course be interested *in abstracto* in the judgment of the Court concerning the interpretation of the applicable "principles and rules of international law".

(Signed) Shigeru ODA.