SEPARATE OPINION OF JUDGE JIMÉNEZ DE ARÉCHAGA

1. I have voted against the Italian Application because of the absence of a jurisdictional link between Italy and each one of the original Parties to the case. The lack of a jurisdictional link, which results from the opposition of both Libya and Malta to Italy's participation in the case, constitutes a decisive obstacle for the admission of this application, according to the text and context of the Court's Statute, the principles of law which constitute the basis of that instrument and the circumstances of the case.

I. The Text and Context of the Statute

2. Article 62, like all provisions in a treaty, must be interpreted and applied, not in isolation, but in the context of the Statute as a whole. This basic principle of treaty interpretation must be particularly observed in the case of an instrument which is so well organized from a systematic point of view, having a first chapter dealing with the Organization of the Court, a second one on Competence and a third one on Procedure. Article 62, which appears in the third chapter, was never intended to stand by itself, as a self-sufficient and autonomous provision. In the original draft prepared by the Advisory Committee of Jurists, Article 62 (then Article 60) was part of an instrument which provided in its Chapter II for compulsory jurisdiction. Thus, from the very beginning, Article 62 had to be read and applied in conjunction with the provisions of the Statute regulating the Court's competence ; its application was complemented by the juridical effect of what was provided in Chapter II of the original draft.

3. It follows that when the Council and the Assembly of the League of Nations altered the provisions corresponding to the present Article 36, substituting consensual and optional competence for compulsory jurisdiction, this radical change could not fail to affect the interpretation and application of Article 62. The impact on Article 62 of such a fundamental change was automatic ; it was not necessary to introduce any modification or amendment in the text of the pre-existing Article 62, since its application had always depended, in 1920 as well as in 1945, on Article 36 on competence, whatever were the avatars of the fundamental political issue of compulsory versus optional jurisdiction, and whatever form Article 36 finally assumed. Consequently, there is no question of oversight or of negligence on the part of the draftsmen who, in the League of Nations or at the San Francisco Conference, put the final touches to the Statute of the Court.

4. In other terms, Article 62, appearing in the chapter on Procedure, never granted to the Court anything other than the limited jurisdiction required for the Court to be competent to decide whether to admit or refuse a State's request for permission to intervene in a pending case. Any jurisdiction to deal with the merits of the case raised by the intervening State depended on, and had to derive from, Article 36, since this article is the *sedes materiae,* the provision which exclusively regulates the full or plenary jurisdiction of the International Court of Justice to deal with the merits of any international dispute. A textual argument, based on the English wording of Article 62, confirms this contextual interpretation. Paragraph 2 of Article 62 only gives the Court competence to decide "upon this request" and nothing else : that is to say, upon "the request to be permitted to intervene". It grants jurisdiction only to decide the preliminary issue of the admissibility of the application, not to pronounce on the merits of the claims or legal interests advanced by the State seeking to intervene.

(a) *Incidental and not Principal Jurisdiction*

5. It results from the foregoing that what Article 62 confers on the Court is what has been described as "incidental jurisdiction" and not principal or substantive jurisdiction, such as might empower the Court to pronounce upon the merits of the claims or legal interests advanced by a State appearing before the Court. Such substantive or principal jurisdiction only exists when the conditions of Article 36 have been fulfilled. Rosenne, in his treatise on the Court, defines principal jurisdiction as "the jurisdiction of the Court to decide on the merits of the case, that is to say, the claim brought before it" (*The Law and Practice of the International Court,* Leyden, 1965, p. 318). And incidental jurisdiction, comprising the power of decision on competence, interim measures, intervention, revision and interpretation, refers to "other matters with which the Court may be called upon to deal in connexion with or derived from the decision on the merits" (*op. cit.,* p. 319). He adds that :

> "The characteristic feature of the incidental jurisdiction is that it depends not upon the specific consent of the parties but upon some objective fact, such as the existence of 'proceedings' before the Court." (*Op. cit.,* p. 422.)

The Italian Application admits that Article 62 of the Statute belongs to that group of provisions which confers incidental jurisdiction, such as Articles 36 (6) and 41. The Application points out that these provisions grant "jurisdictions which are directly established by the Statute . . . It is precisely in the same category of direct rules of jurisdiction that Article 62 falls." (Para. 21.) But all these provisions merely authorize the Court to reach the decisions which are directly envisaged by them : to determine, under Article 36 (6), whether or not the Court has jurisdiction ; under

Article 41, whether or not interim measures are to be granted ; and under Article 62, whether or not permission to intervene should be allowed. Moreover, the statutory requirement of "consent by the Respondent" extends and applies to all these decisions ; this fundamental principle cannot be ignored, nor can jurisdiction be asserted under Article 36 (6), interim measures be granted under Article 41 or intervention be permitted under Article 62 when the consent of the respondent to jurisdiction on the merits is manifestly lacking.

6. A fundamental objection against the thesis that Article 62 (2), in itself confers principal jurisdiction, or jurisdiction to entertain the merits of the claims submitted by the intervening State, regardless of the respondent's consent, is that this would constitute an implicit and indirect way of conferring principal jurisdiction on the Court. Judge Morelli, one of the foremost experts on the international law of procedure, has written :

> "It does not seem possible to base on an implicit rule in the Statute the Court's jurisdiction with respect to all eventual claims submitted through intervention. Such a rule, which in view of its substance would have the characteristics of a general rule, is not in accordance with the system followed on the subject by the Statute. This instrument abstains from establishing itself the jurisdiction of the Court, but refers instead, for such purposes, to rules adopted by various procedures (Article 36). It is difficult to see in fact how the Statute would have departed from such a system, setting up instead directly and what is even more difficult to accept, implicitly, a rule designed to confer jurisdiction to the Court in respect of all cases of intervention. In substance, it cannot be seen for which reason a dispute, the solution of which could not be submitted to the Court in an autonomous litigation because of absence of jurisdiction, could be submitted instead, on the basis of the Statute, by means of an application presented in the form of an intervention." ("Note sull'intervento nel processo internazionale", *Rivista di diritto internazionale,* Vol. LXV, 1982, p. 813.)

7. A textual argument serves to confirm the correctness of Judge Morelli's opinion. Article 36 of the Statute confers principal jurisdiction to the Court in all matters "*specially provided for* in the Charter of the United Nations or in treaties and conventions in force". An implicit attribution of jurisdiction cannot be held to be something "specially provided for" in a treaty.

(b) *The Comparison between Articles 53, 62 and 63 of the Statute*

8. A textual argument advanced in support of the thesis that no jurisdictional link is required is the comparison between Articles 62 and 63. It has been observed that :

> "Article 63 apparently does not require a demonstration of jurisdiction even where the party invoking the treaty under construction has not acceded to the Court's jurisdiction to decide disputes over that treaty's interpretation or application ; why such jurisdiction should be required in the complementary case of Article 62 accordingly is the less clear." (Judge Schwebel, *I.C.J. Reports 1981,* p. 40.)

9. The assumption that Article 63 does not require a demonstration of jurisdiction has never been put to the test. But even conceding the correctness of Judge Schwebel's assumption, two points must be taken into account. First, the jurisdictional scope of the intervention permitted under Article 63 is limited : it is not full or plenary jurisdiction on the merits of the case. It does not extend, for instance, to the remedies claimed by the main party as a result of the violation of the convention ; it only concerns the construction of the treaty in issue. This is the lesson to be derived from the *Wimbledon* case, where the Permanent Court accepted intervention under Article 63 only after taking note that "Poland does not intend to ask the German Government for any special damages" (*Series A, No. 1,* p. 13). For this reason, the Registrar Hammarskjöld described intervention under Article 63 as "quasi-intervention" (Series 3, 49 *Revue de droit international et de législation comparée,* No. 2-3, p. 143). And the second point is that the two Articles 62 and 63, although dealing with similar subjects, operate under different legal régimes and attribute functions of a diverse nature to the Court. One function is intervention as of right ; the other is permissive intervention. Whereas Article 63 confers an unqualified right on the State party to the convention, and the Court merely performs the function of verifying formal admissibility, under Article 62 the Court must reach a judicial decision, by means of a judgment, as to whether permission "should be granted" in accordance with Rule 84. It seems indisputable that in delivering a judgment, in reaching a judicial decision which will open the merits of the case, the Court is obliged to act in accordance with its Statute, which naturally includes the fundamental principle of consent to jurisdiction.

10. And this must be so because the relevance of Chapter II of the Statute to Article 62 has not been affected or abrogated by any express and exceptional provision in the text of the corresponding article, as may be said to have occurred with Article 63. In any case, the differences in the legal régime and in the texts of Articles 62 and 63 are so clear and significant that it does not seem possible to treat them as complementary, nor is it a convincing method of interpretation to invoke the text of one of these articles by arguments *a pari* or *a contrario* in order to reach a certain conclusion in respect of the other provision.

11. The argument derived from Article 53 is not convincing either. For a favourable decision this provision requires not only the existence of jurisdiction, but also a finding that the claim is "well founded in fact and in

law". Consequently, it would seem to be going too far to compare the text of Article 53 with that of Article 62 and conclude that one has to interpret *a contrario* the latter provision as omitting any of the requirements which are reiterated *ex abundante cautela* in Article 53.

II. The Fundamental Principles of the Statute

12. To allow intervention under Article 62 in the absence of a jurisdictional link would violate three basic principles of the Statute ; the principle of consent to jurisdiction ; the principle of reciprocity of obligations, and the principle which prescribes the equality of the parties before the Court.

(a) *The Principle of Consent by the Respondent*

13. The principle of consent to the exercise by the Court of jurisdiction on the merits of a case, or principal jurisdiction, arises from the fact that the States parties, in both 1921 and in 1945, failed to agree on compulsory jurisdiction. As a consequence, the principle was established that no State may become a respondent before the Court unless it has consented, by one means or another, to submit to its jurisdiction.

14. This principle was categorically laid down both by the Permanent Court of International Justice and by the present Court. In the *Mavrommatis* case, the Permanent Court asserted that its jurisdiction

> "is invariably based on the consent of the respondent and only exists in so far as this consent has been given" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 16).

And in the *Monetary Gold* case, the present Court referred, as the basis of its decision, to a

> "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (*I.C.J. Reports 1954,* p. 32).

15. It will be seen in paragraph 35 below that, vis-à-vis Italy, and in the light of the statements made by its representatives in the oral proceedings and the written reply of its Agent to the question put by Judge de Lacharrière, both the original Parties to the case, Libya and Malta, would inevitably become respondent States, having to defend themselves against various Italian legal claims. Now, neither Libya nor Malta have consented to be placed in that position ; on the contrary, they have expressly opposed the Court's exercise of jurisdiction over them in respect of Italian legal claims. Much has been said in the oral proceedings about the need to

protect Italian rights, and this should be done without such protection calling for the grant of the application to intervene. But the Court, in accordance with the fundamental principle of the Statute, is under a clear duty to give priority to the existence or absence of obligations of a respondent, rather than to the rights of an intervener. And in this case there are no obligations upon the original Parties to the case to become respondent States vis-à-vis Italy.

(b) *The Principle of Reciprocity*

16. The Statute establishes a fundamental principle of reciprocity of rights and obligations between the States parties which have accepted the compulsory jurisdiction of the Court. This principle is expressly proclaimed in respect of declarations of acceptance of the Court's jurisdiction under Article 36 (2), but it has a wider scope and applies *a fortiori* to the jurisdiction deriving from Special Agreements which submit to the Court particular disputes between two States.

17. Article 36, paragraph 2, lays down this principle of reciprocity both *ratione materiae* and *rationae personae.* As to the first type of reciprocity, Article 36 (2) provides that the acceptance of compulsory jurisdiction must always be made "in relation to any other State accepting the same obligation". A corollary of this principle is that a State cannot be obliged to submit to the jurisdiction of the Court to a greater extent than the other party is itself subject. This is the reason why the two declarations must coincide and any of the parties is entitled to invoke the reservations of its adversary.

18. The principle of reciprocity *ratione personae* derives from another provision of Article 36 (2) : the phrase providing that the acceptance of compulsory jurisdiction may be made "on condition of reciprocity on the part of . . . certain States". This phrase resulted from an exchange between the two architects of the optional clause : Sr. Raoul Fernandes of Brazil and Judge Huber, then the delegate of Switzerland. When the Assembly of the League of Nations discussed the text of what became Article 36 (2), Sr. Fernandes expressed the opinion that "it was inadmissible for a State to accept the principle of compulsory jurisdiction without knowing exactly towards whom it accepted such an obligation". Judge Huber observed that :

> "The draft of the Statute provided for reciprocity *ratione materiae,* whereas Mr. Fernandes wished a stipulation establishing reciprocity *ratione personae* : both things could without difficulty be combined." (*Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant,* Document 44, p. 107.)

In the light of this discussion it was decided to add the clause quoted above, allowing States the option of subjecting their acceptance to the suspensive

condition that the jurisdiction should equally be accepted by a certain State or certain other States.

19. It follows that the reciprocity established in the Statute refers not only to the scope of compulsory jurisdiction, but also the election *intuitu personae* of the other States in respect of which jurisdiction is accepted. For this reason Rosenne refers to "a complete and individualized reciprocity of obligation" (p. 304), which is "inherent in the very notion of the jurisdiction of the Court" (p. 387). And this principle of individualized reciprocity of obligations, while proclaimed expressly in respect of unilateral declarations of acceptance under Article 36 (2), applies *a fortiori* in the case of Special Agreements by which two States define the scope of the dispute they have decided to submit to the Court. As Hudson has said in his book on the Permanent Court :

> "If two States are before the Court by reason of declarations made under paragraph 2 of Article 36 of the Statute, it would seem to be a derogation from the condition of reciprocity in their declarations to allow intervention by a third State which has made no similar declaration ; the situation is not essentially different, however, when two States are before the Court under a special agreement and it allows intervention by a third State which is not a party to the agreement." (*The Permanent Court of International Justice 1920-1942, A Treatise,* New York, 1943, p. 420.)

20. If intervention were to be permitted in the present case, there would be a clear and flagrant violation of the principle of reciprocity of obligations. Whereas Italy would be submitting legal claims against Malta and Libya for judgment by the Court, there would never have been the slightest possibility, by reason of the absence of jurisdiction, for Malta or Libya to submit to the judgment of the Court any legal claims vis-à-vis Italy. Consequently, it may be asserted, on the basis of the principle of reciprocity, in both its aspects, that a State which cannot be brought to Court as a defendant by another State, cannot become an applicant vis-à-vis that State, nor can it become an intervener against that same State, entitled to make independent submissions in support of an interest of its own.

(c) *The Principle of Equality*

21. Finally, the Statute proclaims, in Article 35 (2), the principle of equality when it provides that "in no case" should the parties be placed "in a position of inequality before the Court". While this phrase refers to States adhering to the Statute, the words "in no case" signify that the principle of equality in the position of parties before the Court is one of general scope. This principle would be violated if Italy's intervention were permitted. Italy would thus be allowed to make legal claims against Libya and Malta, whereas these States could never have made claims against Italy or sue it before the Court. Furthermore, by reason of the limited

geographical scope of the case, as defined in the Special Agreement, Malta and Libya would be prevented from submitting certain defences, claims and counter-claims against Italy, as explained in paragraph 30 below.

III. The Circumstances of the Present Case

22. During the drafting of the first Rules of Court in 1920, conflicting views were held regarding the need for a jurisdictional link. Some of the judges who held the opinion that no link was required were reflecting the views which had been expressed at the time by representatives of the Great Powers on the need to facilitate intervention. Their aim was to give the more influential States

> "the right to come before the Court in suits instituted by the Smaller Powers, for the purpose of obtaining the decision of the Court on main principles of International Law" (Judge Bassett Moore, *Acts and Documents concerning the Organization of the Court, Series D, No. 2,* p. 91).

This idea reflected the concern voiced in the Council of the League by the representative of the United Kingdom, Mr. Balfour (as he then was) as to the need to allow intervention by the most influential States, which feared that the decisions of the Court, having "the effect of gradually moulding and modifying international law", would diminish the predominant influence they then exercised over the development of international law. Mr. Balfour stated that the most populous States

> "cannot be expected to take their views on international law from the Court's decision" (*Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant,* Document No. 28, p. 38).

Those arguments, and the ideology behind them, are today completely out-moded. One of the tenets of contemporary international law is that medium and small States possess, by means of multilateral conferences and organizations, an equal voice in "the effect of gradually moulding and modifying international law".

23. The opposite view, arguing the need for a jurisdictional link, was expressed by Judges Anzilotti and Huber, the second and third Presidents of the Permanent Court, and by Judge Altamira of Spain. In interpreting the Statute, they took into account the change from compulsory to consensual jurisdiction which had been introduced in Chapter II of the Statute by the Assembly of the League of Nations, a fundamental change which, in their view, applied to the Statute as a whole.

24. The outcome of the discussion

> "was that it was agreed not to try to resolve in the Rules of Court the various questions which have been raised, but to leave them to be decided as and when they occurred in practice and in the light of the circumstances of each particular case" (*I.C.J. Reports 1981,* para. 23, p. 15).

It was in this sense that President Loder made a presidential ruling (*Series D, No. 2,* p. 29) and not when he expressed his own personal opinion (p. 96), an opinion which it would be wrong to interpret as a ruling from the chair. In 1981, in the Maltese application, the Court was able to avoid making a decision on a question which now, after 62 years, seems inescapable.

(a) *The Special Agreement and the Principle of Reciprocity*

25. The first relevant circumstance to be taken into account in deciding whether to grant or refuse Italy's intervention in the present case, is that the competence of the Court is based on a Special Agreement entered into between Malta and Libya. It seems superfluous to recall the essential features of a Special Agreement of this kind : both parties have come jointly to the Court, hand in hand as it were, after carefully considering who would be their adversary in the judicial proceedings ; they have done so after protracted negotiations, first on the merits of the dispute, later on the peaceful method chosen for its settlement. They have thus exercised what Article 33 of the Charter of the United Nations and the Declaration of the General Assembly on Friendly Relations describe as the sovereign right of each State to have recourse to "peaceful means of their own choice". A Special Agreement embodies the accord of both parties that a particular subject-matter is ripe for judicial settlement. To admit the intervention would oblige the original parties to litigate before the Court vis-à-vis Italy, despite the fact that they have not exercised a free choice of the judicial means of settlement with respect to Italy ; it would force them to go directly into judicial proceedings without previous negotiations to define the dispute, and without even determining whether a dispute in fact existed. This would be contrary to the customary law established by the Court on continental shelf delimitations which requires that settlement should first be attempted through meaningful negotiations.

26. Furthermore, in their Special Agreement the Parties have defined carefully the terms of the question they have submitted to the Court ; they have specified the task they expect the Court to perform and have provided that, following the final decision, negotiations are to be conducted with a view to concluding an agreement in accordance with the judgment ; they have even fixed, by a separate instrument, their order of appearance in the oral proceedings. It is difficult to foresee how Italy's intervention, if accepted, would affect all these matters.

27. To permit intervention in a case brought to the Court in such a manner would not only ignore the exclusivity of the relationship emerging

from the Special Agreement, but would also violate basic principles of law as to the free choice of means and the reciprocity *ratione personae* established by the Statute ; it would submit to the Court a dispute not previously defined by prior negotiations, and would allow the intervening State, after close scrutiny of the public Special Agreement, unilaterally to impose the terms that Malta and Libya have chosen for their mutual relations in respect of Italy's continental shelf delimitation with each of the original Parties.

28. Certain considerations have been advanced as to the advisability of granting intervention despite the absence of a jurisdictional link, to the effect that a negative decision would "confine the institution of intervention to marginal limits" (Judge Schwebel, *I.C.J. Reports 1981,* p. 40). And Judge Oda has written :

> "If this link is deemed at all times indispensable for intervention, the concept of intervention in the International Court of Justice will inevitably atrophy." (*Ibid.,* p. 27.)

Matters of judicial policy of this kind should not be decisive as regards the interpretation of the text and the spirit of the Statute ; moreover, even for the sake of convenience, permitting intervention in this type of case would have serious disadvantages for the future work of the Court. Judge Anzilotti has already commented on the impediment which would be created to the use of the Court's facilities if intervention were permitted in cases brought by Special Agreement. He said : "States would hesitate to have recourse to the Court if they had reason to fear that third parties would intervene in their cases" (*P.C.I.J., Series D, No. 2,* p. 87). This risk would be all the greater in the case of maritime delimitations, so that States might prefer the institution of arbitration, or the Law of the Sea tribunal, where the intervener and the original parties must all have accepted its jurisdiction (Article 287, paragraphs 1, and 3 to 5, of the Law of the Sea Convention).

(b) *The Geographical Scope of the Case and the Principle of Equality*

29. Another very important relevant circumstance is that any intervention takes place within the framework of the existing proceedings and thus its object must be limited by the scope of the main case. Consequently, Italy's intervention would be permitted "in the case concerning the continental shelf between Malta and Libya" (first paragraph of the Application). Thus, the area in dispute between the three Parties would continue to be that geographical area which is relevant for the delimitation between the original Parties. This has been recognized by counsel for Italy. For instance, Professor Monaco said that Italy's intervention "falls precisely within the circle of questions put to the Court in Article I of the Special Agreement (Hearing of 25 January 1984, afternoon). And Professor Arangio-Ruiz admitted that there were large sections of the continental shelf

between Italy and each of the original Parties which were not *sub judice* in the present instance because there could be no dispute over such areas between Malta and Libya, such as, for instance, the shelf between Sicily and Malta. Accordingly, to grant Italy's intervention would not enlarge the geographical scope of the case, which would remain confined to the area relevant for delimitation between Malta and Libya. Thus, the Court would not be competent to pronounce on Italian rights and obligations on its own side of the continental shelf area, which would remain outside the scope of the Court's jurisdiction in the case.

30. From a general point of view such a situation seems inadmissible, since it would give third States the option of deciding unilaterally which sections of their continental shelf they will submit to judicial settlement, omitting the remainder of their maritime areas. In this particular case, a restriction of this kind would run counter to the legitimate rights and interests of Malta and Libya, creating a situation of unacceptable inequality before the Court. To give only one example, Libya and Malta might have to defend the closing lines of their gulfs and bays, which determine the point of departure of their continental shelf, against Italian objections, but they would be denied the possibility of obtaining a decision of the Court against any baselines which, on similar or different criteria, might have been established by Italy for the delimitation of its own territorial waters. The Italian Application already infers that it does not accept certain Libyan baselines, since it states that the line of equidistance between Italian and Libyan land-masses lies to the south and south-east of Malta,

> "whether or not account be taken of the straight baselines claimed by Libya, although its exact position does of course depend on whether or not one accepts that those lines should be taken into account" (para. 9).

And Italy's opposition to the Libyan claim concerning the Gulf of Sirte was made clear in the oral proceedings, when Professor Arangio-Ruiz stated that Italy is "unable . . . to accept that claim" (Hearing of 25 January 1984, morning). Regardless of the merits of such a claim, an unacceptable situation would be created by this challenge. By reason of the geographical boundaries of the case, whereas both Libya's and Malta's maritime claims would become vulnerable to legal attack, criticism and adverse submissions on the part of Italy, the reverse would not be true. For instance, Libya could not challenge Italian closing lines in the Gulf of Taranto, if they exist. Another inadmissible consequence of this piecemeal approach is that the criterion of proportionality, which is designed to test the equitableness of any maritime delimitation, would not apply. Moreover, the geographical limitation on the scope of the case would exclude the possibility of any compensations and trade-offs which the Parties might exchange in the course of diplomatic negotiations.

(c) *The Italian Claims and the Principle of Consent*

31. We have seen how the particular circumstances of the case – the existence of a Special Agreement and the geographical limitation of the area – violate respectively the principles of reciprocity and of equality laid down in the Court's Statute. But the most decisive and relevant circumstance which argues for refusal of permission to intervene in this case is the fact that the principle of consent to jurisdiction by the respondent State would be seriously violated if Italy is permitted to intervene.

32. In its written observations, the applicant State was somewhat cryptic in setting out "the precise object of the intervention". This presentation gave rise to observations by the original Parties alleging that the Italian statement did not indicate the exact purpose which it sought to achieve through the intervention, and thus did not meet the requirements of Rule 81 (2) of the Rules of Court. The Italian Application referred to "the rights which it claims over some of the areas claimed by the Parties" (para. 16) without specifying precisely the location of those areas. It stated however that, if permitted to intervene, Italy would "specify the position of those areas, taking into account the claims of the two principal Parties and the arguments put forward in support of those claims".

33. The oral presentation and, in particular, the written answer submitted by the Agent of Italy, made clear the specific claims to be advanced by Italy if permitted to intervene. This written answer indicated with some precision two zones over which Italy considers that it has rights, one on the eastern side of the area in dispute in the case, the other on its western side. As regards the first zone, the Italian Agent stated that "Italy considers that it has the right to participate in the determination of a tripoint which simultaneously concerns Malta, Libya and Italy", this being "the same point which would constitute the eastern extremity of the delimitation line between Malta and Libya". In respect of the second zone, the Italian Agent stated that :

> "It is within this zone that the second tripoint (which could also be a quadripoint), which will constitute the western end-point of the Malta-Libyan demarcation line, must be located. Italy obviously has the right to participate in the determination of this point."

It is obvious that in announcing as the object of its intervention a claim to participate in the determination of these tripoints (or quadripoints) as part of the indications to be given by the Court as to how in practice the principles and rules of international law can be applied by the Parties "in order that they may without difficulty delimit such areas by an agreement", Italy is in fact asking the Court to pronounce and decide on its rights, and conversely on the contrary claims made by the main Parties. For instance, the establishment of a tripoint in the first zone would require the Court to confirm Italian rights, and to exclude or reject Maltese claims

to the east and Libyan claims to the north of that tripoint. It follows that, as the Judgment correctly points out, Italy will not be satisfied with having its purported rights safeguarded ; it wants them to be judicially recognized. Its purpose is not to ensure that the Court does not infringe upon its rights ; it seeks to have the latter endorsed and enforced by the Court. It is not content if the Court refrains from *prejudging* Italian rights ; it wants the Court to *adjudicate* upon them, that is to say, either to accept or reject its claims with respect to the location of the tripoints. Even if Italy does not ask the Court to trace a complete delimitation line between Italy and each original Party, its abstention on that point does not modify the essence and the conclusive effects vis-à-vis the original Parties of the judicial decisions to be requested by Italy. The determination of the exact location of these *triplex confinium,* the points at which three boundaries meet, would establish the point of departure and of arrival of any future delimitation lines between Italy and Libya and Italy and Malta. Tripoints are the most difficult and delicate issues in any delimitation, and their establishment by a judicial decision would predetermine the outcome of subsequent negotiations between Italy and each one of the main Parties. Furthermore, the determination of these tripoints would require the Court to consider and pronounce on the Italian arguments as to the principles and rules of law to be applied in the area such as natural prolongation, equidistance, proportionality, etc. These Italian submissions would be legal claims of a precise and concrete character, different from the pretensions advanced by Malta and Libya, but no less specific than their claims. This is the precise object of the Italian intervention. An observation which may be made at this stage is that the present Judgment of the Court, with all the importance it attaches to this requirement, eloquently demonstrates the wisdom of the amendments introduced in 1978 to Article 81 of the Rules of Court on Intervention, requiring the applicant to set out the precise object of the intervention and, in connection with this, to set out any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case.

34. Thus, what Italy will be submitting to the Court is something described in municipal law as a principal or "competing" intervention, or, as the Latin has it more aptly, an intervention *ad excludendum,* since Italy wants the Court to exclude or reject Maltese and Libyan claims with respect to certain sectors of the area in dispute in the case. An intervention *ad excludendum* is to be distinguished from an intervention *ad adjuvandum* such as the one filed by Fiji in the *Nuclear Tests* cases, in support of Australia and New Zealand against France. To a greater extent even than this latter type of supporting intervention, a competing intervention *ad excludendum* of the kind sought by Italy has the inevitable consequence that not just one, but both original parties would automatically become respondent States vis-à-vis Italy. The renowned Italian professor Chiovenda, an expert on the law of civil procedure, in describing this form of intervention, taught that "vis-à-vis the third party, the two original parties

find themselves in the position of defendants" (*Principii di diritto processuale civile,* Vol. II, para. 89, III *(d)*).

35. This being the legal position, in passing from municipal to international law, one encounters a most formidable obstacle to the Italian intervention, namely the "well-established principle of international law embodied in the Court's Statute", that the consent of the respondent State is necessary for the Court to be able to exercise jurisdiction over that State. The respondent States vis-à-vis the Italian claims referred to above would clearly be Libya and Malta, which would be liable to suffer defeat as to part of their claims if the Italian claims are accepted by the Court.

(d) *The Remedy to the Situation*

36. It may well be that there are Italian rights in certain parts of the area which are claimed by one or the other of the original Parties to the case. But this fact is not sufficient to confer jurisdiction on the Court. In its Application, Italy invokes the analogy with private procedural law when it says that :

> "Its position is, even in procedural law, an absolutely classic case for intervention, and one in which intervention in practice is always admitted : the situation in which the intervener relies on rights as the true *dominus* of the object which is disputed, or a part thereof." (Para. 11.)

But here there is a confusion between municipal and international law. In the system of international judicial settlement established in 1921 and again in 1945, it is not enough for a State to claim – and even to possess – a legitimate or undeniable right, in order that the Court may pronounce on the existence of such a right. It is also necessary for the State having the corresponding obligation – that is to say for the Respondent State – to have consented to the exercise of jurisdiction by the Court. The resulting situation has been described as unreasonable (Judge Oda, *I.C.J. Reports 1981,* p. 27) especially when compared with the position under municipal law, but this is the position deriving from the Statute as it was adopted.

37. The remedy to that situation is different from granting intervention without a jurisdictional link : it is to be found in the lack of competence of the Court to dispose of the rights of a State which is not before it, and in the relative effects of the Court's judgment as provided in Article 59 of the Statute. In the light of the terms of Article I of the Special Agreement, the judgment of the Court will provide the basis for an agreement which is to be reached by the parties through negotiations, and thus the judgment, as well as the subsequent agreement, would constitute for third States *res inter alios acta.* It is quite common in maritime delimitation, and even in the drawing of land boundaries, for two States to reach an agreement which other States may consider as impinging on their rights. A case in point is the agreement between Tunisia and Italy to which Malta objects, asserting

that it comprises areas where it has legitimate claims (paragraph 8 of Malta's written observations). Unless a tripoint has been established by trilateral agreement, those treaties do not affect, or detract from, the rights that may subsequently be claimed by third States.

38. Consequently, it is wrong to assert, as the Application does, that for Italy a judgment of the Court in a suit between Malta and Libya "would *de facto* and *de jure* effect the attribution to the Parties of the areas of continental shelf delimited by that line". As the Court said in the Maltese application case :

> "No conclusions or inferences may legitimately be drawn from [a judgment] with respect to rights or claims of other States not parties to the case." (*I.C.J. Reports 1981,* p. 20, para. 35.)

It could be said, however, that a judgment of the Court which gave guidelines for assigning to Malta or to Libya areas claimed by Italy, would have more force than the agreement between the two countries, since its authority could be invoked in diplomatic negotiations, and in a future litigation it might be difficult for the Court to reach different conclusions. But the answer to this problem lies in the prudence shown by the Court in similar circumstances, after having been made aware of the third State's claims in the course of the hearing concerning the application for intervention.

39. There are various answers to the problem. The first, adopted by the Court in 1982, is to recognize its lack of competence to pronounce on sectors where rights of third States may exist. In the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* the Court was careful not to prejudge adversely the rights that could be invoked by third States. It stated, at page 42, paragraph 33 : "The Court has no jurisdiction to deal with such problems in the present case and must not prejudge their solution in the future." And in the operative part of the Judgment, at page 94, paragraph C (3), the Court concluded :

> "The extension of this line northeastwards is a matter falling outside the jurisdiction of the Court in the present case, as it will depend on the delimitation to be agreed with third States."

It is true that if this precedent is followed the dimensions of the case between Malta and Libya would be considerably reduced. However, since the written answer of the Italian agent recognizes that there is an intermediate area between the two zones it describes which is free from Italian claims, there would be still a maritime zone where the Court would be competent to adjudicate if it decided to follow strictly the Tunisian-Libyan precedent.

40. A second approach is that adopted by the Anglo-French arbitration tribunal, which consists in recalling the relative effects *inter partes* of any judicial decision or arbitral award. This Court stated that its award

"will be binding only as between the Parties to the present arbitration and will neither be binding upon nor create any rights or obligations for any third State, in particular for the Republic of Ireland for which the decision will be *res inter alios acta*".

41. But the Court might also, after weighing and comparing the titles invoked by the original Parties, decide that only one of them is called upon, by geographical or other relevant circumstances, to negotiate a delimitation with Italy or with other third States along certain lines or in certain sectors of the area in dispute. This would be a judgment which, despite its relative effect, would also project its consequences *erga omnes* and would constitute a most useful and significant contribution to the resolution of the dispute which was brought before the Court by the Special Agreement concluded between Malta and Libya. It is obvious that these different approaches could be followed in the judgment, depending on the sectors, on the appreciation by the Court of geographical factors and configurations, and on other relevant circumstances.

(Signed) Eduardo JIMÉNEZ DE ARÉCHAGA.