DISSENTING OPINION OF JUDGE AGO

[Translation]

1. To my great regret, I find myself compelled to disagree with the majority decision of the Court.

This does not imply any lack of appreciation on my part for the efforts made by those who drafted the Judgment to allay to some extent the fears – in my opinion fully justified – of the State which was seeking permission to intervene in this case, and also the fears of those Members of the Court itself who have expressed concern lest the interests of a legal nature of the State in question might not be adequately safeguarded if the Court were to reject its application for permission to intervene.

The assurances received on this score may indeed serve to mitigate certain apprehensions, but not to do away with the remaining grounds for disagreement in respect of the operative part of the Judgment and the reasoning on which it is based.

2. However, before turning specifically to an indication of the points on which my judgement differs from that expressed by the majority of the Court, I consider it necessary to offer a few general observations regarding intervention as an institution in the context of international procedural law.

During the long period which followed the Judgment of the International Court of Justice in the *Haya de la Torre* case, back in 1951, this institution attracted no further attention. However, a surge of interest in it suddenly became apparent in the 1970s and 1980s, first with the application for permission to intervene submitted to the Court in 1973 by Fiji with regard to the *Nuclear Tests* cases, then in 1981 with Malta's application for permission to intervene in the case of the *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)* and finally – at the end of 1983 – with the application by Italy for permission to intervene in the further case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta),* this application being the subject of the Judgment to which the present opinion is appended.

In parallel with these actual attempts by States to have recourse to the institution of intervention in international judicial practice, a renewal of theoretical interest in it has also become evident in legal literature, in particular as a result of a very recent series of studies specially devoted to the subject and, it should be emphasized, for the most part written by judges, or former judges, of the Court [1].

[1] See P. Jessup, "Intervention in the International Court", in *American Journal of International Law,* 1981, pp. 908 ff. ; T. O. Elias, "The Limits of the Right of Intervention in a Case before the International Court of Justice", in *Völkerrecht als Rechtsordnung,*

3. That said, it is a striking fact that though these analyses take the same historical and legal elements as starting points, and are based on exegesis of the same texts, yet on certain essential points they arrive at very different, if not clearly contradictory, conclusions. Even within the Court, it must also be noted that there has been persistent divergence of views as to at least some of the conditions required for permission for a State to intervene in judicial proceedings commenced by others. This difference of views is barely veiled by the concern which has been shown, or urged, that no definite position be taken on those points in specific cases ; whether the attempt to do so is successful or not is another matter.

4. One may therefore wonder whether the determining factor underlying the divergences in question may not be the existence of distinct situations of different natures, which are nevertheless still being treated together, as though they were no more than different facets of a single phenomenon ; whereas, in my view, their respective contexts are quite different. I hasten to explain that I am not here referring to the distinction, endorsed by the texts, between intervention under Article 62 of the Statute, and intervention which is the subject of Article 63. The question I am asking is rather whether it is not essential to define more precisely, specifically in relation to the terms of Article 62, the shape of intervention as an institution, and to make a clear distinction between what is an intervention, properly so called, under the provision quoted, and what is something else altogether. In this respect, I would also like to point out that there is a further risk that this essential task of clarification may not be rendered any easier if Article 81, paragraph 2 *(c),* of the Rules of Court is read in isolation from the circumstances in which the wording was adopted, and the ends which were then in view.

5. The fact is that those who drafted this provision in the revised Rules of Court, adopted on 14 April 1978, must have had present to their minds the aspects of the only concrete case in the history of the Court up to that time in which Article 62 of the Statute had been relied on by a State,—and a

Internationale Gerichtsbarkeit Menschenrechte, Festschrift für H. Mosler, Berlin, 1983, pp. 159 ff. ; E. Jiménez de Aréchaga, "Intervention under Article 62 of the Statute of the International Court of Justice", *ibid.,* pp. 453 ff. ; S. Oda, "Intervention in the International Court of Justice", *ibid.,* pp. 629 ff. ; G. Morelli, "Note sull'intervento nel processo internazionale", in *Rivista di diritto internazionale,* 1982, pp. 805 ff. Apart from these contributions by persons who are or have been directly connected with the work of the Court, mention might also be made of the article by Miller, "Intervention in Proceedings before the International Court of Justice", in *The Future of the International Court of Justice,* 1976, II ; the article of G. Cellamare, "Intervento in causa davanti alla Corte internazionale di Giustizia e *lien juridictionnel* tra interveniente e parti originarie del processo", in *Rivista di diritto internazionale,* 1983 (66), pp. 291 ff. (see also for the bibliographical references to note 1) ; and finally, the observations on intervention to be found in *Commentaire du Règlement de la Cour internationale de Justice adopté le 14 avril 1978,* by G. Guyomar, Paris, 1983, pp. 526 ff.

case which was very recent [1]. Their main concern, and a laudable one, can only have been to lay down rules which, primarily, would be appropriate to protect the institution of intervention, properly so called, from possible misuse, since there had clearly been misuse in the case in question, and there was a danger of the same happening again in the future. Thus, in paragraph 2 of Article 81, alongside the requirement laid on the State seeking to intervene to describe the interest of a legal nature which it considers may be affected by the decision in the case (subpara. *(a)*), there was added the further requirement indicating the precise object of the intervention (subpara. *(b)*). If this was done, it was clearly in order to ensure that the intention of the State seeking to intervene was genuinely solely to protect the alleged interest against any infringement which might result from the decision in the case between the main parties, and not to introduce, as an apparent intervention but in fact on a quite different basis, fresh distinct proceedings against one or other of the parties to the case in progress, or against both. Then in subparagraph *(c)*, it was required that the State seeking to intervene should mention also any basis of jurisdiction which it claimed to exist as between itself and the parties to the case in progress. This again was done in order to avoid the State in question endeavouring to introduce, by means, as I have said, of a mere purported intervention in the case in progress between other States, a new and distinct case, which that State, in the absence of a pre-established jurisdictional link with the State against which it was brought, would be unable to submit to the Court, whether entirely independently or by associating itself with parallel proceedings brought by another State, namely by acting in the same interest *(faisant cause commune)* with that State.

6. To sum up, the purpose and the effect of the reform introduced in this area in the revised Rules of Court of 1978 were, in my view, the protection of the institution of intervention, properly so called against any effort to exploit it for other purposes. However, this was its sole purpose, and it could have no other effect.

Thus, while welcoming the safeguards thus provided, one must above all not be misled with regard to provisions adopted to achieve a certain result, provisions having the advantage of avoiding in future the difficulties

[1] Mr. Virally, counsel for Italy, pointed this out in his oral statement on 25 January 1984. However, as for the conclusions which he drew, I should make it clear that my view differs from his, at least to some extent, since he appears to hold the view that, despite the differences which he has himself helped to bring out between the two clearly distinct hypotheses of action on the part of a third State in relation to proceedings in progress between two other States, those two hypotheses might nevertheless still both be related to the institution of intervention, at least intervention *lato sensu*. My own view, is, rather, that the terms of Article 62 contemplate only one hypothesis of intervention properly so called, and capable of being taken into account as such as a procedural incident. In my opinion, an application like that submitted in 1973 by Fiji, as Judge Gros stated at the time "could not in any way be regarded as a request to be permitted to intervene" and was rather the manifestation of an intention to begin main proceedings against France by the back door, in parallel to those brought by Australia and New Zealand.

caused by the application submitted by Fiji, and further having ultimately the merit of making it easier, provided they are properly interpreted, to make a clearer distinction between what may be admitted by way of intervention and what may not. What it is absolutely necessary to avoid, on the other hand, is treating the adoption of these provisions as a substantial modification of the actual institution of intervention as contemplated by the Statute – a modification which clearly could not be effected simply by means of rules – or even as a supposed "interpretation" of the statutory rule which would have the actual effect of changing its scope. By this I mean in particular that it was certainly prudent that the new text should require that a State showing an intention to be permitted to intervene should first supply the Court with all information which might, on any hypothesis, be necessary for it by way of clarification of the true position. It was necessary to prevent the Court being taken unawares by a State endeavouring to make use of Article 62 of the Statute in order in fact to submit a fresh case to the Court's jurisdiction, without having the power to do so, a case distinct from that already brought before it. It was right to hold that in a case of this kind, the admissibility of the application of that State would require – first and foremost, and apart from any other condition – the prior existence, in the light of Article 36 of the Statute, of a valid jurisdictional link between the State in question and the State or States against which the new proceedings would be brought. However, on the other hand, it would have been inadmissible to seek to extend this requirement to cases where there is no application introducing fresh proceedings, whether formally or as a matter of fact, namely to cases of applications to intervene properly so called, in which the claim of the State would be strictly contained within its proper context, – that of purely incidental proceedings.

7. I regret that it should be necessary to deal with these matters of principle at such length, but I think the examination of the point which I have just mentioned must be pursued still further if we wish to place the present case in its true perspective. As the Court recalled in its Judgment of 13 June 1951 in the *Haya de la Torre* case, "every intervention is incidental to the proceedings in a case" (*I.C.J. Reports 1951,* p. 70), that is to say, it is an incident arising during the progress of the proceedings on a case in progress and with regard to which the jurisdiction of the Court is beyond doubt. This definition of intervention as a procedural incident is the reason why Articles 62 and 63 of the Statute, concerning intervention, are included in Chapter III, entitled "Procedure" [1].

[1] It is in my opinion beyond doubt that, although it is the subject of two successive articles, the institution of intervention is none the less, as it should be, a *single institution,* two distinct hypotheses of which are provided for. This remark might itself lead to conclusions bearing on the problems under consideration here. However, since the majority Judgment did not deal with this aspect, I shall likewise refrain from doing so, to avoid burdening this opinion with excessive detail.

8. The classification of intervention as a procedural incident seems to me a crucial point which is bound to have a decisive effect.

I shall take as the starting point of my argument Article 36 of the Statute. This basic provision of the system sets out the conditions which are required in order that the Court may have jurisdiction to decide on a case brought before it relating to a legal dispute which is submitted for its consideration and decision. These conditions, as nobody will deny, are based on the fundamental criterion of the consensual nature of international jurisdiction. The consent on which they must be based may be a consent expressed in relation to a specifically identified dispute ; it may be a prior consent given in relation to an undefined series of eventualities ; or again, it may arise from a special provision of the Charter of the United Nations, of which the Statute of the Court, under Article 92, forms an integral part ; or from a clause of a treaty or convention in force [1].

9. It seems to me that the essential point for our purposes is that the conditions set out in Article 36 are those which are required in order that a given case may be submitted for the Court's decision, and in order to introduce a new contentious main proceeding in that respect. But these are not conditions which have to be fulfilled in order that incidental proceedings may be started in connection with a case already pending, and for which jurisdiction to decide has already been established. Given this situation, which is inevitably a preliminary one, the provisions in the Statute relating to the procedural development of the case, any incidental points and the incidental proceedings to which they give rise, the effects of the Judgment, the possibility of interpretation of it, etc., automatically apply. And a third State which intends to rely upon one of these provisions had no need, in order to be permitted to do so, to obtain a special act of consent on the part of the parties to the main case, nor does the Court have to verify that there is a special title of jurisdiction [2].

[1] In this connection, I should like to recall that the Vienna Convention on the Law of Treaties contains a clause conferring jurisdiction on the International Court of Justice to give a decision on a class of disputes relating to a specific subject which may be submitted to it by one of the parties to this dispute.

[2] In his oral statement of 26 January 1984, Mr. Virally was right to point out that the statement to the effect that the existence of the "right to intervene" was subject to other conditions than those set out in Article 62 is a pure theory, unsubstantiated by the wording of the article itself. For his part, Mr. Conti, in his oral statement of 25 January 1984, correctly emphasized that :

> "To accept the jurisdiction of the Court is therefore necessarily equivalent to accepting that this jurisdiction be exercised in conformity with all the provisions of the Statute. In other words, the jurisdiction of the Court can only be accepted with all the characteristics conferred upon it by the provisions of the Statute, provisions which are not at the mere disposal of the Parties. It can therefore be accepted only

With regard in particular to intervention, counsel for Italy have also asserted that Articles 62 and 63 themselves confer upon the Court "a sufficient title of jurisdiction" to deal with this procedural incident. For my own part, I would go further ; I think it should be stated more clearly – and I stress this point – that, in order to deal with an intervention, the Court does not need to be provided with a special title of jurisdiction, even by the articles in question. It is merely bound to observe the rules which govern its conduct in the supposed circumstances ; all it does is to act on the basis of the jurisdiction conferred upon it in connection with the main case, exercising in this context its functions as laid down in the Statute. Moreover, as has been observed, this is also true for other examples of incidental proceedings, such as those concerning the indication of provisional measures (Article 41 of the Statute) or the revision of the judgment following the discovery of some new fact (*ibid.,* Art. 61).

10. That said, I hasten to repeat the observation which I have already made, namely that the conclusions I have set out here are valid in so far as, in a specific case, the intervention sought by a third State is a "genuine intervention", which is, as such, made and maintained within the framework of the incidental proceedings. If, on the other hand, such application is entirely differently conceived, and if, even supposing that it is dressed up as an intervention in a given main case, it in fact betrays a clear intention of introducing a new and separate main case which must of necessity be the subject of separate and independent contentious proceedings, it is clear it does not originate within the scope of the incidental proceedings. In that event it would be essential for the Court to possess an appropriate separate title of jurisdiction, based on Article 36.

11. But – and here I come finally to the application of the principles described above to the case before us – I take the view that the theoretical example which I have just referred to has absolutely no connection with the Italian application for permission to intervene in the proceedings pending between Libya and Malta concerning delimitation of their respective portions of continental shelf.

The case of the purported application by Fiji for permission to intervene in connection with the *Nuclear Tests* cases was rightly felt to be a typical instance of misuse of the institution of intervention, a "non-intervention" put forward as an intervention, which in fact was an obvious attempt to introduce before the Court a completely new main case against one of the

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with its essential characteristic of being a jurisdiction *open,* under certain circumstances, to third States, and more precisely those States which are possessors of interests implicated in the case and capable of being affected by the Court's decision."

He went on to conclude that

> "the Court's jurisdiction in regard to intervention is therefore simply a projection of the jurisdiction which belongs to it, on the basis of one of the acts contemplated by Article 36 of the Statute, in regard to the main dispute".

parties to other proceedings, in parallel with the cases introduced by other parties, and without the necessary conditions being met. On the other hand, I am and remain convinced that the current application by Italy tallied exactly with the specifications of Article 62, which might have been tailor-made for it. This application may in my opinion be regarded as a typical example of "intervention" as an incidental proceeding.

12. The object of this application, already stated and defined in the Application itself, was spelled out to the utmost by counsel for Italy in the course of the hearings.

First, the agent, Mr. Gaja, emphasized during his oral statement on 25 January 1984 (morning) :

(a) that the Italian application was in no way seeking to modify, extend or put at issue the Special Agreement between Libya and Malta, on which the dispute submitted to the Court is based ;

(b) that Italy was in no way asking the Court to proceed to a delimitation between itself and Libya, or between itself and Malta ; and

(c) that Italy was in no way asking the Court to take a decision with regard to the areas in which Italy considered itself to possess interests of a legal nature.

Subsequently the co-Agent, Mr. Monaco, re-asserted at the outset of his statement that an application for permission to intervene only acquires its *incidental* character if it is related to the subject-matter of the pending case. Having thus reiterated and further elucidated the points already stated by the Agent, his main concern was to show that the Italian Government did not intend to alter the subject-matter of the case currently pending before the Court ; still less did it intend to institute before the Court proceedings distinct from those instituted by the main Parties. In no way was it seeking to introduce, under the guise of an intervention, a case between Italy and Malta and between Italy and Libya, in parallel with the case already in progress between the two countries, or to change this bilateral process into a tripartite one. Recalling, in the negative, the terms of the Malta/Libya Special Agreement, he too made clear that Italy was in no way asking the Court to proceed to a delimitation between the areas of continental shelf appertaining to Italy and the areas appertaining respectively to Malta and Libya, or to state the principles according to which such a delimitation was to be carried out.

Having thus cleared the field of everything deemed irrelevant, the Italian co-Agent referred to the existence, already amply demonstrated by Mr. Arangio-Ruiz, among others, in the central Mediterranean of a certain number of areas of continental shelf affected by the delimitation with which the Court was to deal under the Special Agreement between Malta and Libya, and in which there was an overlap not only between the claims of Malta and Libya, but also between the claims of these two States and Italy. Mr. Monaco then explained, this time in positive terms, the object of the intervention sought by Italy, namely the protection of interests of a

legal nature which Italy considered itself to possess in the region in which Malta and Libya were seeking a delimitation of their respective areas, this being within the strict limits of an intervention procedure properly so called.

Subsequently, Mr. Virally again returned to these points (26 January 1984), and in particular he summarized them in his final reply. He stated that the Italian intervention was grafted on to a case in progress before the Court between two other States. Without the prior existence of that case, and other than as an intervention, namely as an incidental proceeding, it could not have occurred. It related exclusively to the subject-matter of the case submitted to the Court by the main Parties. In other words, he concluded, the Italian intervention, in the form in which it was presented did not, and could not, relate to a distinct dispute to which Italy would be a party.

13. The reason why I have been obliged to refer at such length to the way in which the Italian application was expounded before the Court is that, to my mind, it was essential that this application should be understood for what it was, and not for what it surely was not.

The situation as I see it, on the basis of all the facts before us and after due reconsideration, is that, without a doubt, the intention of the Government seeking to intervene was that the nature of the task entrusted to the Court by the Maltese/Libyan Special Agreement should remain totally unchanged by its intervention should intervention be permitted. The States in respect of which the Court was to discharge that task would remain the same two States ; the delimitation to be carried out under the auspices of the Court, according to the criteria and within the limits set by the Court, would remain none other than the delimitation of the respective areas of the continental shelf between Libya and Malta. There would be no need to add to this a delimitation of areas found to appertain to Italy. Italy was not seeking to have its rights recognized, but solely to have the fact noted that it considered itself to possess such rights.

14. Thus I conclude that Italy, assuming I have correctly understood its approach, was seeking to be present at the operation which has begun to take place in implementation of the Special Agreement between Malta and Libya, in order that, before the Court had finally completed its task, it might be in a position :

(a) to point out – both with greater accuracy and with more supporting material than it has been allowed to submit so far, given the refusal to communicate the pleadings to Italy – that in some of the areas of continental shelf of the central Mediterranean which may be taken into consideration by Libya and by Malta for the purposes of the delimitation to be carried out between those two States, Italy possesses interests of a legal nature, and to state what those interests are ;

(b) to indicate the extent of its claims and the legal foundations on which Italy bases them, with the sole purpose, however, of demonstrating

that those claims deserve to be taken seriously, and certainly not of obtaining a definitive recognition of them by the Court ;

(c) to ensure that the Court's decision in the main case should not, for want of adequate information on these various matters, prejudge rights which Italy might legitimately assert in other contexts ; and more specifically to ensure that, in the indications to be given by the Court to the Parties for the purposes of the delimitation between them of the areas of continental shelf "appertaining" respectively to Malta and Libya, there be no encroachment upon areas where the claims of those two countries are intermingled with claims of Italy, since these areas, in the opinion of the latter country, should be reserved for other delimitations.

Here one must be careful, and I apologize if I seem to be repeating myself, on a point which seems to me essential : nowhere, as it seems to me, has Italy requested that the rights which it considers itself to possess should be *recognized* by the Court at present. It seems to me to follow unarguably from the way in which its whole case was presented that Italy is saying that only later, and once the delimitation between Libya and Malta has been carried out according to the criteria set by the Court and made public, will Italy seek, in respect of that portion of the continental shelf at issue which remains outside the delimitation, to obtain a subsequent delimitation of the areas which may have to be treated as appertaining to itself or appertaining to Libya and Malta, whether by means of negotiation and agreement, or by means of arbitration or a decision by the Court.

15. In the light of these conclusions, it will be clear that I am quite unable to endorse the argument contained in paragraph 29 of the Judgment.

That argument begins, in fact, by expressly admitting that Italy states that it is not introducing before the Court any distinct dispute between itself and one or other of the two main Parties, and that it is not requesting the Court either to delimit those areas of continental shelf appertaining to Italy, nor to state in its decision the principles and rules of international law which apply to such a delimitation. The Court duly points out that "Normally, the scope of a decision of the Court is defined by the claims or submissions of the parties before it" and that

> "in the case of an intervention it is thus by reference to the definition of its interest of a legal nature and the object indicated by the State seeking to intervene that the Court should judge whether or not the intervention is admissible".

However, recalling a passage from a previous decision which stated that "the Court must ascertain the true object and purpose of the claim", it points out that "in the case of the present application for permission to intervene, the Court must take all these circumstances into account" (the application as a whole, the arguments of the applicant before the Court, the diplomatic exchanges) "as well as the nature of the subject-matter of

the proceedings instituted by Libya and Malta", and it proceeds directly to the somewhat surprising conclusion that :

> *"While formally Italy requests the Court to safeguard its rights, it appears to the Court that the unavoidable practical effect of its request is that the Court will be called upon to recognize those rights, and hence, for the purpose of being able to do so, to make a finding, at least in part, on disputes between Italy and one or both of the Parties."* (Emphasis added.)

Thus, by this means, something which appeared to have all the characteristics of an intervention in the strict sense of the term, and which the Party concerned no doubt conceived of as such, is transformed at a stroke – and somewhat hastily, one must grant – into something quite different. It becomes no more and no less than a request to decide on disputes between Italy and Malta, and between Italy and Libya, which it would introduce before the Court in this way, of course without the necessary consensual basis between those Parties.

16. Subsequently, the majority judgment continues in paragraph 33 to treat as a "fact" that Italy is requesting the Court to "make a finding as to Italy's rights". To substantiate this assertion, the judgment then sees fit to quote, for lack of anything better, from certain passages in the oral argument of counsel for Italy. But here there merges, in my opinion, the ambiguity at the heart of the position which I venture to criticize. It is true that, in the passages in question, reference is made to the "existence of rights possessed by Italy" ; it is stated that there are areas in which Italy is invoking rights in addition to those invoked by Libya and Malta, and it is suggested that in future those areas may be "the subject either of delimitation between Italy and Malta or of delimitation between Italy and Libya, or of a delimitation agreement as between all three countries".

However, I feel it is being overlooked here that the fact of a third State asserting the existence of a right of its own (an interest of a legal nature being nothing other than a right) in a field constituting the subject-matter of a dispute between two other States, is the very essence and *raison d'être* of the institution of intervention in its strictest and most uncontroversial sense. It was for the very purpose of protecting the potential rights of third parties that the institution was devised and enshrined in Article 62 of the Statute.

In the present case, there is no doubt that Italy is requesting the Court to "protect", and to "safeguard" the rights which it claims to possess over specific areas of continental shelf, in order to ensure that they are not affected by the decision which the Court is to take in the Malta/Libya case. Thus far, the majority Judgment does not differ from me ; it seems to me that if one went no further, the majority itself would agree that one would be within the limits of a "genuine" intervention, requiring no special acts of consent on the part of the main parties for it to be accepted. But what more is Italy asking ? What exact form is the requisite "protection" to take ? Clearly, the rights which Italy believes itself to possess would not be

safeguarded if, in the decision on the main case, no heed were paid to the Italian claims, and if subsequently the areas to which those claims related were to be simply assigned either to Malta or to Libya. Indeed I feel that the Court must consider itself bound to ensure that the future fate of rights which Italy considers itself to possess should not be prejudiced in that way. This it can only ensure by taking action to prevent the delimitation between Libya and Malta being effected in areas where it is not specifically said that only those two countries possess rights, and where it is at least possible that Italy may possess rights. These "grey areas", so to speak, should be reserved for future delimitations among all the parties concerned ; otherwise there would be a risk that today Malta or Libya would be allocated sovereign rights over portions of continental shelf which tomorrow, after a more detailed analysis in which Italy would be able to participate, would prove to be the legal entitlement of Italy.

However, to ask the Court to safeguard, by this simple act of prudence and caution, the rights which Italy considers itself to possess, *in no way* signifies – let me emphasize this – that the Court is being requested to "recognize" these rights, to make an immediate judgment on them, to decide that certain areas of continental shelf of the central Mediterranean *are* in fact subject to the sovereign rights of Italy, and thus to resolve judicially the disputes between Italy and Malta or between Italy and Libya. In my view, there are no grounds for saying that, in seeking to intervene in the proceedings between Libya and Malta, Italy was applying to introduce "a fresh dispute" (para. 34), namely proceedings for immediate settlement of disputes separate from that which, according to its explicit assertions, remains the only one before the Court.

17. It is true that at one point, the Judgment to which the present opinion is appended seems to come close to what I feel to be the truth of the Italian application. This is in paragraph 30, where it is said that Italy is requesting the Court "to pronounce only on what genuinely appertains to Malta and Libya" and to "refrain from allocating to these States any areas of continental shelf over which Italy has rights". But if we pay due heed we will note that, here again, the scope of the Italian application has been to some degree "misconstrued" to make it fit the preconceived theory that Italy was requesting the Court to *adjudicate on the existence of its rights.* A correct description of the position of the State seeking to intervene would have been that "Italy *claims to possess rights*" and not that it *"possesses* rights" ; despite appearances to the contrary, the difference between the two is more than a shade of meaning. For it is only on the basis of this "re-definition" of the question at issue that the Judgment can continue, as it does, to argue that "for the Court to be able to carry out such an operation, it must first determine the areas over which Italy *has rights* and those over which *it has none*". These, I regret to say, are wholly arbitrary conclusions, since Italy, as seems quite clear to me, was in no way requesting the Court to go so far as to establish what portion of the "grey areas" should in the final analysis be treated as white, black or green. Its purpose was, and is, solely to ensure that those areas should remain grey, that they

should remain areas to be treated for the moment as areas in dispute among the three countries, and which are not to be divided solely between two of them.

Once permitted to intervene, Italy's task would essentially have been, in my view, to specify, on the basis of information at last obtained as to the current claims of Libya and Malta, the areas in which its claims co-exist with the claims of the two other countries, in other words, the areas which it considers should be excluded, as I have just said, for the time being at least from a purely bilateral delimitation between Libya and Malta. As I have said, I also feel that Italy would deem itself bound to state to the Court, at that time, the legal foundations on which it believes the said claims can be based, but solely with a view to illustrating the "legal" nature of the "interests" which it considers itself to possess in the region, and which, as such, justify its having recourse to Article 62 of the Statute. On the other hand, I do not envisage that Italy would request the Court, even at this new stage, to give an immediate judgment on its claims as opposed to those of Libya and Malta, to allocate to it certain distinct portions of the continental shelf, or to recognize the possession by Italy of sovereign rights over them. It need hardly be said that the Court would not do so on its own initiative. Thus I cannot see on what basis the Judgment is relying when it states, in paragraph 31, that

> "if Italy were permitted to intervene in the present proceedings in order to pursue the course it has itself indicated it wishes to pursue, the Court would be called upon, in order to give effect to the intervention, to determine a dispute . . . between Italy and one or both of the principal Parties."

18. The tendentious and, in my view, wholly incorrect interpretations which I regret to note in the Judgment are none the less the foundation *sine qua non* of the conclusions reached in the Judgment which I must decisively reject. In saying this, I nevertheless note that further on, in paragraph 32, the Judgment makes an express admission, almost in contradiction with its previous observations, that

> "The distinction which Italy has endeavoured to make is between a request that the Court take account of, or safeguard, its legal interests, and a request that the Court recognize or define its legal interests, which would amount to the introduction of a distinct dispute."

Further on, in paragraph 36, the Judgment also concedes that the Italian argument has shown Italy's manifest intention of placing its application in the first category, that Italy considered that its application "unquestionably falls within the bounds of intervention *stricto sensu* . . . regarding which . . . Article 62 in itself provides the requisite title of jurisdiction". But the Judgment then seeks to escape from these embarrassing concessions by the following astonishing, and sibylline, remark in paragraph 32 :

"But this distinction is in any event not valid in the context of the task conferred on the Court by the Special Agreement in the present case." After which, as if the opinion expressly given by Italy as to the significance and scope of its own application was totally unimportant, the Italian application to intervene is arbitrarily, and contrary to the intention of the applicant, classified as the other type of intervention, namely that of applications by means of which the State seeking to intervene is attempting to

> "seek endorsement of a right vis-à-vis the parties to the proceedings, in conditions comparable to what it would have done by itself instituting a principal case against those two States" (para. 36).

These words naturally seal the fate of the Italian application, which is thus transformed into a mainline application.

19. This is clear from the "consequences" to be drawn from the reasoning in paragraph 34 of the Judgment. According to the text, these consequences "can be defined by reference to either of two approaches to the interpretation of Article 62 of the Statute". I am somewhat chary of venturing into the hazy meanderings – if I may use that expression – of the explanations given in the Judgment for the dual approach to which it refers in this connection. Unless I am wrong, the point of departure of these explanations is a requirement that the principles of consent, and of the reciprocity and equality of the parties, should be respected. On this joint basis, there are thus two possible approaches, both however leading to the same conclusion in the present instance. According to the first, an application for permission to intervene which in fact introduced a distinct case might nevertheless be granted, but on condition that there was a prior jurisdictional link between the State introducing the application in question and the States parties to the main case. According to the second, such an application cannot be granted, whether there is a jurisdictional link or not, because it would be outside the scope of the provisions of Article 62 relating to the intervention.

Within the majority, it is thus on this basis that a reconciliation is achieved between the two traditionally conflicting views as to the "jurisdictional link".

I think I have grasped the argument, but if that is not its meaning, I do not think it would influence my conclusions. Whatever the exact purport of the Judgment on this point, the only comment which I can make remains as follows : the two possible consequences contemplated by the Judgment for the Italian application, both negative, are only valid in so far as the essential premise on which they are both based is correct. This premise is that Italy's application for permission to intervene must be treated as a "mainline case" instituted by Italy against Libya and Malta, and that this case requires the Court to "*decide* on the rights" which Italy has claimed against the two countries "and not merely to ensure that these rights be not affected" (para. 35). As I think I have clearly shown, this premise is entirely unfounded, in my view, and is flatly contradicted by both the form and the

substance of Italy's application to intervene. To me it follows that the dual consequence which the Judgment seeks to draw collapses along with it.

20. There is one minor point which I should like to make in parenthesis to this commentary and its conclusions. If it were the case that any inappropriate terminology, any exaggerations or ambiguities used by any of the spokesmen for the Italian Government in their oral statements, might have excited apprehension among certain judges, or again if some expression, open to various interpretations, in the reply of the Agent for the Italian Government to the question put by Judge de Lacharrière, might have raised any doubts in the judges' minds, the remedy would have been quite simple. It would have been an easy matter for the Court, when granting Italy permission to intervene on the basis of Article 62 of the Statute, to remind it of the limits of the provisions contained in that article, and the need for the intervening party to comply strictly with them. I really do not believe that it can be objected that it is not for the Court to amend the wording of a State's application, especially when the intention of the applicant is clear. The reminder to which I refer would not constitute an "amendment" as such of the application ; it would be perfectly legitimate, serving as a timely clarification, and much more legitimate than the fanciful structure which I feel has been created in order to "transform" the Italian application into something other than what Italy expressly intended it to be.

21. My duty of objectivity induces me to add that I have nevertheless duly noted the passage in paragraph 32 stating that :

> "If the Court is to perform that task [the task assigned to the Court by the Special Agreement], and at the same time to safeguard the legal interests of Italy (more than would result automatically, as will be explained below, from the operation of Article 59 of the Statute), then when giving any indication of how far the Parties may extend their purely bilateral delimitation, it must take account, so far as appropriate, of the existence and extent of Italian claims."

I shall not stop to consider the significance of the words "so far as appropriate", since I am convinced that they cannot have any restrictive meaning. No one could contest that a court of justice has the duty of safeguarding *in their entirety,* and to the greatest extent open to it, rights whose existence is brought to its attention ; it has a duty not to collude in a process whereby, under the pretext of the purely bilateral nature of the dispute being adjudged by the court, the parties to this dispute in fact encroach upon the rights of another.

But nor do I wish to give the impression of failing to appreciate the concern shown in certain passages of the Judgment – especially in paragraphs 32 and 43 – to give certain assurances to the party which has sought without success to intervene in a proceeding where it is much exercised by the possible outcome. In this I am glad to note an evident anxiety to ensure

that the decision taken by the Court should not be the cause of grave injustice to the country which is excluded from the bar of the Court, and whose absence seems, at the end of the day, to be the cause of some regret. For the Judgment recognizes in paragraph 40 that

> "if the Court were fully enlightened as to the claims and contentions of Italy, it might be in a better position to give the Parties such indications as would enable them to delimit their areas of continental shelf 'without difficulty', in accordance with Article I of the Special Agreement, even though sufficient information as to Italy's claims for the purpose of safeguarding its rights has been given to the Court during the proceedings on the admissibility of the Italian Application. But the question is not whether the participation of Italy may be useful or even necessary to the Court ; it is whether, assuming Italy's non-participation, a legal interest of Italy is *en cause,* or is likely to be affected by the decision. In the absence in the Court's procedures of any system of compulsory intervention, whereby a third State could be cited by the Court to come in as party, it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case . . ."

I hope that the Italian Government will find in that remark some consolation for the deep disappointment which it must certainly feel at being refused permission to intervene, and moreover for reasons which must seem to it to be artificial.

22. Having said that, I can only conclude this opinion on a note of regret, not only with regard to the final fate of the present application, but also and more importantly, for the wider consequences which may flow from it.

The Court had a unique opportunity to grant permission to intervene to a country which was seeking to state its case in a proceeding in progress between two other countries, and which clearly relates to an object which is, in fact, physically common to all three. Apart from the formal objections which have been raised, with their highly dubious foundation, I may say that this was a classic example of a situation for which the institution of intervention was devised and enshrined in the Statute. In its present Judgment the Court – and I take no pleasure in saying this, as I would have been more than happy to be able to concur with its decision, as on so many other occasions – has failed to take an opportunity, and has thus let slip the chance offered to it of resolving once and for all the legal problems which have always arisen in connection with the institution in question, and which continue to give rise to contradictory views within the Court. In so doing, it believes itself to have acted prudently ; I am not sure that its view will be widely shared in international legal circles.

I can, moreover, only note with great perplexity the tendency of the Court – disclosed, in my opinion by the present Judgment – to feel convinced that the aims which the procedure of intervention properly so

called was intended to achieve, would in fact already be practically attained by the mere holding of the preliminary proceedings on the question of admission of the intervention. Quite apart from the soundness of this conviction, which appears to me to be highly controversial, for example in relation to the present case, it is above all the legal aspect which disturbs me. For to substitute for a procedure expressly provided by the Statute, which has to follow the appropriate formal course, a sort of provisional and summary procedure, leading in fact to hit-and-miss results, seems to me to be an absolutely arbitrary distortion of Article 62, and in fact an indisputable breach of that text.

The decision on the present case may well sound the knell of the institution of intervention in international legal proceedings, at any rate of this institution as it was intended and defined by the relevant texts. After this experience which, to say the least, does not suggest a favourable attitude towards this form of incidental procedure, and after the temporary renewal of interest to which I referred at the beginning of this opinion, this avenue, which was theoretically still open, towards a wider and more liberal conception of international judicial proceedings, will probably fall into oblivion. The Court seems to prefer a prudent confinement within the sheltered precincts of a purely bilateral, and relativist, notion of its task. I doubt whether this really meets the present-day needs of an international community which is becoming ever more inter-dependent ; I also doubt whether it reflects the wishes and hopes which presided at the Court's inception, and later at its confirmation, in the Charter, as the principal judicial organ of the United Nations.

(Signed) Roberto AGO.