# DISSENTING OPINION OF JUDGE ODA

## Opening Remarks

1. To my great regret I find myself unable to concur in the Court's Judgment. In the Maltese intervention proceedings, I stated that :

> "the Court's reasoning [for rejecting the Maltese Application] places too restrictive a construction upon the first paragraph of Article 62. I regret that the institution of intervention is afforded so narrow a focus on essentially the first occasion of its application." (*I.C.J. Reports 1981,* p. 23, para. 1.)

I also stated :

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

2. The Court has now again avoided dealing with the most essential points of intervention, thus justifying its rejection of Italy's application for what appear to be secondary reasons. It seems that the Court presupposes *a priori* the scope of the kind of intervention it deems genuine (a procedure

which I do not think is correct), and then draws the conclusions that Italy's application does not fall into this category.

## I. Scope of the Intervention under Article 62 of the Statute

### *Introduction*

3. The Court has hitherto hesitated to take a clear position on whether, in order to be permitted to intervene under Article 62 of the Statute, a State must be linked with the original parties to the case by the acceptance of the compulsory jurisdiction of the Court or by a Special Agreement. The other questions as to whether the would-be intervener has to have had prior negotiations with one or both of the original parties to settle a pre-existing dispute, or should or should not make any concrete claim against one or both of them, or should or should not participate in the original case as a party, are all related to this basic issue concerning the jurisdictional link which the intervener may or may not have with the original parties. I remarked at one point in the previous intervention proceedings as follows :

> "It is far from clear that participation *qua* party is a *conditio sine qua non* of the institution of intervention. Moreover, the question of whether or not the institution of intervention under Article 62 of the Statute requires the participation of a third State solely 'as a party' is closely interrelated with two further questions : first, whether or not a jurisdictional link which connects the intervening State with the original litigant States in the prinicipal case should be required ; and, second, whether or not the judgment of the Court in the principal case should also be binding upon the intervening State. Although the Court does not pass upon the question of jurisdiction in these proceedings (para. 36), it is difficult to discuss the institution of intervention without taking into account these two further questions, which are so closely interrelated with the nature of the institution under Article 62." (*I.C.J. Reports 1981,* p. 24, para. 4.)

4. I believe that the question of a jurisdictional link, together with related issues just noted, is important and cannot properly be avoided when dealing with the institution of intervention. If a jurisdictional link is a prerequisite for intervention under Article 62 of the Statute, the fact that Italy has neither accepted the Court's compulsory jurisdiction nor secured any pertinent agreement from the principal Parties to its intervention would certainly have barred its application.

5. In the present case, the Court appears to admit to having avoided grappling with the basic issue of intervention by stating that :

> "the Court considers that it should not go beyond the considerations which are in its view necessary to its decision, the various other questions raised before the Court in these proceedings as to the conditions for, and operation of, intervention under Article 62 of the Statute need not be dealt with by the present Judgment. In particular the Court, in order to arrive at its decision on the Application of Italy to intervene in the present case, does not have to rule on the question whether, in general, any intervention based on Article 62 must, as a condition to its admission, show the existence of a valid jurisdictional link" (Judgment, para. 38) ;

and

> "the Court finds it possible ... to reach a decision on the present Application without generally resolving the vexed question of the 'valid link of jurisdiction' " (*ibid.*, para. 45).

Yet, by speaking of "the basic principle that the jurisdiction of the Court to deal with and judge a dispute depends on the consent of the parties thereto" (*ibid.*, para. 34), "the fundamental principles underlying its jurisdiction ; primarily the principle of consent" (*ibid.*, para. 35) ; "the consensualism which underlies the jurisdiction of the Court" (*ibid.*, para. 37) ; "the element of the will of States, expressed in a special agreement or other instrument creative of jurisdiction, to define the extent of a dispute before the Court" (*ibid.*, para. 46), and by interpreting Italy's application as presenting a distinct or additional dispute with the principal Parties (which the Court seems to see as the only way of intervention), the Court appears to indicate that a jurisdictional link would be required for a third State to intervene.

### *1. A Case Where a Jurisdictional Link Exists*

6. There could certainly be a case in which the third State is connected with the original litigants by mutual acceptance of the Court's compulsory jurisdiction or by the conclusion of a Special Agreement, thus making it possible to bring separate disputes with both of the parties before the Court. In this particular situation, intervention at the International Court of Justice may well be useful because it will serve to decrease the number of similar litigations ; such intervention could be assimilated to intervention in a municipal judicial system. I made this point in my separate opinion attached to the Judgment on the Maltese application :

> "I believe it is arguable that a jurisdictional link between the intervening State and the original parties to the case would be required if the intervening State were to participate as a full party, and that, in such a case, the judgment of the Court would undoubtedly be binding upon the intervening State. Such a right of intervention is

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

Similarly, before the International Court of Justice, there may be cases in which the third State seeking intervention to secure its alleged right, which is involved in the very subject-matter of the original litigation, is linked with the original litigant States by its acceptance of the compulsory jurisdiction of the Court under the optional clause of the Statute or through a specific treaty or convention in force, or by special agreement with these two States. In such cases the third State may participate as a plaintiff or a defendant or as an independent claimant. Probably, in fact, this third State would in such circumstances also be entitled to bring a separate case on the same subject before the Court. On the other hand, participation in the proceedings by a third State as a full party without having any jurisdictional link with the original parties, while remaining immune from the binding force of the judgment, would certainly be tantamount to introducing through the back door a case which could not otherwise have been brought before the Court because of lack of jurisdiction. This seems inadmissible prima facie, because the jurisdiction of the International Court of Justice is based on the consent of sovereign States and is not otherwise compulsory." (*I.C.J. Reports 1981,* p. 25, paras. 5-6.)

7. Thus intervention under international law, like that in a municipal judicial system, could also serve to promote economy of litigation by joining a distinct litigation by a third State against one or both of the original litigants into one proceeding, should the necessary jurisdictional link exist.

*2. The Jurisdictional Link Is not Always Indispensable*

8. We must bear in mind a number of different hypotheses in connection with intervention. I again quote from my previous opinion :

"[I]t is by no means clear that the only hypothesis contemplated when the draft of Article 62 was under discussion was the hypothesis

of the intervening State being connected by a jurisdictional link with the original litigants in the principal case." (*I.C.J. Reports 1981,* p. 25, para. 7.)

I also pointed out :

"The situation where a right *erga omnes* is at issue between two States, but a third State has also laid a claim to that right, is a hypothesis which here merits consideration. For instance, in the case of the sovereignty over an island, or the delimitation of a territorial boundary dividing two States, with a third party also being in a position to claim sovereignty over that island or the territory which may be delimited by this boundary, or in a case in which a claim to property is in dispute, an unreasonable result could be expected if a jurisdictional link were required for the intervention of the third State. If this link is deemed at all times indispensable for intervention, the concept of intervention in the International Court of Justice will inevitably atrophy." (*Ibid.,* p. 27, para. 9.)

9. It is stated in the present Judgment that Article 59 of the Statute can properly safeguard the rights and legal interest of a third State without the need for its participation. Yet the fact is often overlooked that Article 59 of the Statute was not contained in the draft prepared by the Advisory Committee of Jurists in the summer of 1920. It stemmed from comments of the British delegate at the Council of the League of Nations in October 1920, who apparently had in mind intervention under Article 63 only. The meaning of Article 59 will later be discussed (para. 27 below) but at this point I would simply say that what the Court states regarding Article 59 does not lessen the concern of the third State, particularly where a right *erga omnes* is at issue between the original litigants.

10. It was thus my conclusion in 1981 that the Court had overlooked the real scope of intervention. In the present Judgment it has continued, in my view, to confine this institution within too narrow a compass. Believing as I did in 1981, that the Court's attitude stemmed from insufficient regard for the process by which the institution of intervention was brought into international law, I presented some historical analysis of this process, which need not be reproduced here *in toto.* The persisting majority view of the Court now impels me, however, to single out certain aspects of the genesis of intervention, whilst attempting as far as possible to avoid repetition of what I have previously stated.

*

*(Historical Outline of the Drafting of Article 62)*

11. The concept of intervention under Article 62 of the Statute was introduced for the first time in 1920, when the Statute of the Permanent Court of International Justice was prepared by the Advisory Committee of Jurists (chaired by Baron Descamps of Belgium) appointed by the Council of the League of Nations. Prior to this Committee meeting, certain projects prepared with an eye to the future plan of the League of Nations suggested a type of intervention in international judicial proceedings borrowed from municipal law [1]. While the draft prepared in advance by the drafting group of the Advisory Committee of Jurists did not contain such a concept, some members of the Committee suggested the insertion of a new concept of intervention along the lines proposed in the projects submitted prior to the meeting as mentioned above, though, as far as we can gather from the *procès-verbaux,* hardly any substantive discussions were held among the members of this concept.

12. The draft suggested by the President, Baron Descamps, was adopted, and the text read as follows :

> "[Article 62 as finally adopted] – Lorsqu'un Etat estime que dans un différend un intérêt d'ordre juridique est pour lui en cause, il peut adresser à la Cour une requête, à fin d'intervention. La Cour décide." (Permanent Court of International Justice, *Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee,* p. 669.)
>
> (*English text* : "Should a State consider that it has an interest of a legal nature in a certain case, it may submit a request to the Court to be permitted to appear as a third party. The Court shall decide.")

The English version, "it may submit a request to the Court to be permitted to appear as a third party" simply as a translation of the French text, "il

[1] Avant-projet de convention relative à une organisation juridique internationale, élaboré par les trois comités nommés par les gouvernements de la Suède, du Danemark et de la Norvège: "31. ... Si [une affaire soumise à la Cour] concerne d'une autre manière les intérêts d'un Etat tiers, ce dernier aura le droit d'intervenir dans l'affaire." (Permanent Court of International Justice, *Advisory Committee of Jurists, Documents Presented to the Committee relating to Existing Plans for the Establishment of a Permanent Court of International Justice,* p. 180.)

Projet de convention relative à une Cour permanente de Justice internationale, préparé par une commission gouvernementale suédoise, 1919: "21. Lorsqu'un différend soumis à la Cour ... concerne à d'autres égards les intérêts d'un Etat tiers qui n'est pas partie dans le litige, ce dernier aura le droit d'intervenir dans l'affaire." (*Ibid.,* p. 242.)

Projet relatif à l'établissement de la Cour permanente de Justice internationale (projet des cinq Puissances neutres), 1920: "*Article 48.* Lorsqu'un différend soumis à la Cour touche les intérêts d'un Etat tiers, celui-ci a le droit d'intervenir au procès." (*Ibid.,* p. 320.)

peut adresser à la Cour une requête, à fin d'intervention", led to a great deal of confusion in understanding the true sense of intervention under Article 62. The use, in particular, of the expression in the English text "as a third party", which did not find any corresponding concept in the original French text, was a case of misconception with regard to the mode of the intervener's participation in the principal case [1].

13. In the Council of the League of Nations at its tenth session in October in Brussels, Léon Bourgeois, as the French delegate, praised the merits of this type of intervention under Article 62 :

> "The Hague Jurists . . . have, indeed, given to non-litigant States the right to intervene in a case where any interest of a judicial nature which may concern them is involved." (Permanent Court of International Justice, *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court,* p. 50.)

This statement followed a passage in which, being fully aware of the strong objections of many member States to making the Court's jurisdiction compulsory, he suggested the complete revision of the provisions relating to the jurisdiction of the Court. Thus it cannot properly be argued that the provision of Article 62 was carelessly retained by the drafters of the Statute in the face of the change in the nature of that jurisdiction.

14. When the new Statute of the International Court of Justice was being prepared by the Committee of Jurists, convened in Washington in 1945, there was practically no discussion of Article 62 and the French text did not undergo any change. A change was made only in the English text to eliminate the words "as a third party" without involving any change in the sense of the article, as stated in the report of the Committee (*Documents of the United Nations Conference on International Organization,* 1945, Vol. XIV, p. 676). As suggested above, the reference to "as a third party" in the English text of the Statute of the Permanent Court of International Justice was from the outset misleading, particularly in view of the fact that in 1920 the French text could be seen as more authoritative.

15. Apart from some judgments either of the Permanent Court of International Justice or of the International Court of Justice in which the scope of intervention was only referred to in passing, and from the work of the present Court in 1978 leading to the revision of the Rules of Court of draft Article 81 as it stands, there was only one occasion on which the

[1] As I quoted in the Maltese intervention proceedings :

> "the Preface to the *Procès-verbaux* of the Proceedings of the Advisory Committee of Jurists clearly indicated that :
>
> > 'As all the members of the Committee, with the exception of Mr. Elihu Root, spoke in the French language, the English text of the *Procès-Verbaux* is to be looked upon as a translation, except in so far as concerns the speeches and remarks of Mr. Root.' (P. IV.)" (*I.C.J. Reports 1981,* p. 24, para. 3.)

subject of intervention was substantially examined by the Court, in 1922 when the Rules of Court were being prepared. The discussions which took place among the Judges of the Permanent Court of International Justice are correctly summarized in the Judgment of the Court in 1981, and this summary is repeated in part in the present Judgment :

> "The outcome of the discussion was that it was agreed not to try to resolve in the Rules of Court the various questions which had 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." (Judgment, para. 44.)

16. As I observed in my opinion in the previous case, it is important, however, to note too that the President of the Court, Judge Loder, ruled at the end of the discussion that he :

> "could not take a vote upon a proposal the effect of which would be to limit the right of intervention (as prescribed in Article 62) to such States as had accepted compulsory jurisdiction. If a proposal in this sense were adopted, it would be contrary to the Statute." (*I.C.J. Reports 1981,* p. 26, para. 7.)

It is also interesting to note a memorandum submitted by Judge Beichmann summarizing the discussions of the Court as follows :

> "Article 62 of the Statute lays down that the question shall be decided in each particular case as it arises ; there is therefore no need to adopt any decision at the moment either with regard to the interpretation of the words 'interest of a legal nature which may be affected by the decision', or with regard to the question whether the right of intervention is subject to other conditions of a legal nature, for example, the acceptance of the compulsory jurisdiction of the Court by the original parties and the party desiring to intervene, or the consent of the original parties. The question whether, when the right to intervene has been admitted and exercised, the intervening State is to be bound by the judgment, as well as the original parties, must also remain open." (*I.C.J. Reports 1981,* p. 26, para. 8.)

*

17. Thus there is no ground for believing the Court has ever concluded that either a jurisdictional link, or proof of a prior dispute or negotiations with either of the original litigants, is an implicit prerequisite for intervention under Article 62. Furthermore, to the best of my knowledge, no record of the drafting of the Statute either of the Permanent Court of International Justice or of the International Court of Justice lends any credence to the view that such a belief can be sustained on the mere ground that Article 62 was, and is, included not in Chapter II, concerning the competence of the Court, but in Chapter III, concerning procedure.

Despite the suggestions of the Court in the present Judgment, the lack of detailed provisions in the Rules of Court concerning intervention does not result from "the wisdom" of the preceding Court in 1922, but was simply a result of its failure to reach an agreement. It is not wise to postpone dealing with these basic issues when the Court is faced with a genuine request for intervention.

18. Where a would-be intervener is not connected with the parties in dispute by a jurisdictional link, the type of intervention would certainly be different from what would be possible under a municipal legal system where judicial economy is promoted by a number of litigations being joined into one proceeding. Intervention in such circumstances is simply intended to protect the legitimate interest of a third State which might otherwise be affected by a judgment in the principal case. Thus the scope of such an intervention may not be the same as that under municipal law, inasmuch as the third State would not be expected to present a separate litigation parallel to the principal case against one or both of the original litigants. In 1981 I reasoned as follows :

> "[I]f the third State does not have a proper jurisdictional link with the original litigant States, it can nevertheless participate, but not as a party within the meaning of the term in municipal law. The role to be played by the intervening State in such circumstances must be limited. It may assert a concrete claim against the original litigant States, but that claim must be confined to the scope of the original Application or Special Agreement in the principal case. The intervening State cannot seek a judgment of the Court which directly upholds its own claim. The scope of the Court's judgment will also be limited : it will be bound to give judgment only within the scope of the original Application or Special Agreement. The intervening State cannot, of course, escape the binding force of the judgment, which naturally applies to it to the extent that its intervention has been allowed. The intervening State will have been able to protect its own right merely in so far as the judgment declines to recognize as countervailing the rights of either of the original two litigant States. On the other hand, to the extent that the Court gives a judgment positively recognizing rights of either of the litigant States, the intervening State will certainly lose all present or future claim in conflict with those rights. In this light, it does not seem tenable to argue that unless the intervener participates as a party on an equal footing with the original litigant States, it would unreasonably benefit without putting itself in any disadvantageous position." (*I.C.J. Reports 1981,* p. 27, para. 9.)

19. The Court should examine how the institution of intervention would function in the event of there being no jurisdictional link between the third State and the principal parties. Instead, by tacitly taking it for

granted that the intervention by a third State was meant to bring a distinct and additional dispute before the Court, the Court seems to proceed to the conclusion that the jurisdictional link is necessary for intervention in all cases. Thus the Court appears to fall into a vicious circle of logic.

*3. Impact of Article 63*

20. Attention should also be paid in this respect to Article 63, another article of the Statute which provides for a different type of intervention. The subject-matter of the dispute between the original parties in the case of Article 63 may well be concrete rights claimed by both sides, but if any third State were to intervene it would be because that third State was concerned not with that subject-matter itself, but with the interpretation of the convention to be construed in the judgment of the Court, and this kind of intervention is unique in international law.

21. With regard to the interpretation of Article 63, I also have to repeat what I stated in the previous case :

> "In the application of Article 63, no jurisdictional link is apparently required between the intervening State and the original litigant States. The third State may participate in the case, but not 'as a party' on an equal footing with the original litigant States because the object of the intervention is not necessarily connected with the claims of the original parties. The third party participates, but not as a plaintiff or defendant or even an independent claimant. This seems to be clear from some precedents of the Court. In the *Haya de la Torre* case, the delivery of Haya de la Torre, who was enjoying asylum at the Colombian Embassy in Peru, was the subject-matter of the case, in which Cuba was not directly concerned. There is no reason to maintain that Cuba's intervention was assumed to be a participation 'as a party' in the sense I have described above (although in the list of participants in the case Cuba was mentioned as the 'intervening party'). In fact, Cuba's participation consisted simply in presentation of its interpretation of the Havana Convention. Similarly, in the *S.S. 'Wimbledon'* case, the subject-matter was not the cargo in which Poland was interested but the right of access of the vessel in question to the Kiel Canal. In neither case was the intervention thought to be conditional on the presentation of any concrete claim against both or either of the original litigant States.
>
> The judgment of the Court will certainly be binding upon the litigant States, but all that will be binding upon the intervening State is, as paragraph 2 of Article 63 provides, 'the construction [of a convention] given by the judgment'. In other words, the intervening State will be bound by the Court's interpretation of the convention if

it becomes involved in a case involving the application of that instrument." (*I.C.J. Reports 1981,* p. 28, paras. 11-12.)

*

*(Historical Outline of the Drafting of Article 63)*

22. It may be pertinent in this respect to look at how Article 63 was brought into the Statute of the International Court of Justice. Unlike the concept of Article 62, the rule it embodies was first adumbrated in 1899, when the Convention for the Pacific Settlement of International Disputes was being drafted at the first Peace Conference in The Hague. While the Third Committee (chaired by Léon Bourgeois) was assigned the preparation of a project for a court of arbitration, Mr. Asser (a Dutch jurist) proposed the insertion of a new article, which did not in fact relate to any other provision in the proposed draft of that court's Statute ; the proposal was adopted without any discussion. The text thus proposed and adopted became Article 56 of the 1899 Convention and read as follows :

> "La sentence arbitrale n'est obligatoire que pour les parties qui ont conclu le compromis.
>
> Lorsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres Puissances que les parties en litige, celles-ci notifient aux premières le compromis qu'elles ont conclu. Chacune de ces Puissances a le droit d'intervenir au procès. Si une ou plusieurs d'entre elles ont profité de cette faculté, l'interprétation contenue dans la sentence est également obligatoire à leur égard." (Conférence internationale de la paix, *Sommaire général, première partie, annexes,* p. 14.)

In his report to the Third Commission the Chevalier Descamps, President and Rapporteur on the *Comité d'Examen,* explained the background of this provision :

> "Il peut arriver qu'une convention ait été conclue entre un très grand nombre de Puissances et que deux Etats seulement soulèvent entre eux une question d'interprétation. M. Asser a estimé qu'il y avait lieu dans cette hypothèse, d'appeler les autres Etats à intervenir au procès, afin que l'interprétation contenue dans la sentence puisse éventuellement devenir obligatoire à l'égard de ces Etats." (Conférence internationale de la paix, *Sommaire général, quatrième partie,* p. 14.)

23. At the second Peace Conference, held again at The Hague in 1907, a suggestion was made in the First Commission (chaired by Léon Bourgeois) to change slightly the first sentence of Article 56 of the 1899 Convention because of the fact that there might be arbitration without a *compromis.*

The report of Baron Guillaume, Rapporteur for the First Sub-Commission of the First Commission, read as follows :

> "L'article 56 n'a pas été modifié dans son essence ; il a subi seulement de légères transformations de forme, motivées par le fait qu'il peut y avoir arbitrage sans compromis." (Deuxième conférence internationale de la paix, *Actes et documents,* tome premier, p. 439.)

Article 84 of the 1907 Convention, which thus replaced Article 56 of the 1899 Convention, read as follows :

> "La sentence arbitrale n'est obligatoire que pour les parties en litige. Lorsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres Puissances que les parties en litige, celles-ci avertissent en temps utile toutes les Puissances signataires. Chacune de ces Puissances a le droit d'intervenir au procès. Si une ou plusieurs d'entre elles ont profité de cette faculté, l'interprétation contenue dans la sentence est également obligatoire à leur égard." (*Ibid.*, p. 617.)

24. Thus "intervention" in the 1899 Convention as proposed by Mr. Asser and established without much discussion, which was then inherited by the 1907 Convention, simply related to the intervention in the case of the construction of a multilateral treaty.

25. In 1920 this particular institution reappeared in the Statute of the Permanent Court of International Justice. From the outset, the concept of intervention as already defined was taken for granted by the Advisory Committee of Jurists. After only a few discussions the text was adopted by the Committee, and read as follows :

> "[Article 63 as adopted later] – Lorsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres Etats que les parties en litige, le Greffe avertit sans délai tous les signataires.
>
> Chacun d'eux a le droit d'intervenir au procès, et, s'il exerce cette faculté, l'interprétation contenue dans la sentence est également obligatoire à son égard. » (Permanent Court of International Justice, *Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee,* p. 685.)

On that occasion Mr. de Lapradelle, as Chairman of the Drafting Committee, explained this provision as follows :

> "Further there is one case in which the Court cannot refuse a request to be allowed to intervene ; that is in questions concerning the interpretation of a Convention in which States, other than the contesting parties, have taken part ; each of these is to have the right to intervene in the case. If such a State uses this right, the interpretation contained in the sentence becomes binding between it and the other parties to the case.

> Where collective treaties are concerned, general interpretations can thus be obtained very quickly, which harmonise with the character of the Convention." (Permanent Court of International Justice, *Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee,* p. 746.)

Some months later, Léon Bourgeois, presenting to the Council a report on the Permanent Court of International Justice (which was adopted by the Council on 29 October 1920) stated :

> "The observations in the draft project of The Hague by one of our colleagues draw attention to the following case : it might happen that a case appearing unimportant in itself might be submitted to the jurisdiction of the Court, and that the Court might take a decision on this case, laying down certain principles of international law which, if they were applied to other countries, would completely modify the principles of the traditional law of this country, and which might therefore have serious consequences. The question has been raised whether, in view of such an alternative, the States not involved in the dispute should not be given the right of intervening in the case in the interest of the harmonious development of the law, and otherwise after the closure of the case, to exercise, in the same interest, influence on the future development of law. Such action on the part of a non-litigant State would moreover have the advantage of drawing attention to the difficulty of making certain States accept such and such a new development of jurisprudence.
>
> These considerations undoubtedly contain elements of great value." (Permanent Court of International Justice, *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court,* p. 50.)

26. Article 63 of the Statute of the Permanent Court of International Justice was inherited by the International Court of Justice without any discussion or change.

*

*(The Meaning of Article 59)*

27. It seems pertinent in this respect to examine also the meaning of Article 59 of the Statute, which provides for the binding force of the judgments of the Court. As I stated previously (para. 9), this article stemmed from comments of the British delegate at the Council of the League of Nations in October 1920. I quote from my previous opinion :

> "Mr. Balfour submitted a note on the Permanent Court of International Justice, a passage of which read :

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

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

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

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

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

It may accordingly be concluded that the drafters of the Statute apprehended that the interpretation which the Court would place on international law would be shaped by prior judgments of the Court, and that, by adding this provision, they intended to inhibit the extension of a modified interpretation of international law to those States which had not participated in the case." (*I.C.J. Reports 1981,* pp. 29-30, para. 13.)

In fact, the addition of Article 59 to the draft Statute in 1920 was meant to restore the original form of intervention in the case of the interpretation of a multilateral convention under the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes.

28. I continue to quote from my opinion in 1981 :

> "If Article 59 is interpreted against this background, it does not add much to what was contemplated under Article 63, and thus has no direct bearing on it. It may be asked, however, what significance it may have to state, as implied by Article 63, that the construction of a convention will not be binding on States not party to a case before the Court. For regardless of such a postulate there is little doubt that, in a case where the construction of a particular convention is in dispute, the construction placed upon it by the Court in a previous case will tend to prevail. It is submitted that in this sense there will not be much difference between those States which have intervened in a case and those States which have not intervened, so far as the practical effect of the Court's construction of an international convention is concerned. It is questionable whether the intention of the founders – i.e., not to make the interpretation of a convention by the Court binding upon the States which have not participated in the case – was really given effect by the formulation of Article 59." (*I.C.J. Reports 1981,* p. 30, para. 14.)

It was quite correct for the Permanent Court of International Justice to observe the relation of Article 59 to Article 63 in the case concerning *Certain German Interests in Polish Upper Silesia* – "[t]he object of [Article 59] is simply to prevent *legal principles* accepted by the Court in a particular case from being binding also upon other States or in other disputes" (*P.C.I.J., Series A, No. 7,* p. 19). (Emphasis added.)

*

29. After having examined the scope of Article 63 together with Article 59 of the Statute particularly in the light of its drafting process I cannot but reflect upon certain effects of the provision of Article 63 on intervention as an institution as stipulated under Article 62. I would again like to quote from my opinion in 1981 :

> "If an interpretation of a convention given by the Court is necessarily of concern to a State which is a party to that instrument, though not a party to the case, there seems to be no convincing reason why the Court's interpretation of the principles and rules of international law should be of less concern to a State. If, therefore, the interpretation of an international convention can attract the intervention of third

States under Article 63 of the Statute, it may be asked why the interpretation of the principles and rules of international law should exclude a third State from intervening in a case. Lack of jurisdiction is not a sufficient reason for preventing a State from intervening as a non-party in a principal case in which the application of the principles and rules of international law is at issue, for the interpretation given by the Court of those principles and rules will certainly be binding on the intervening State. What is more, as in the case of Article 63, the provisions of Article 59 do not in fact guarantee a State which has *not* intervened in the principal case any immunity from the subsequent application of the Court's interpretation of the principles and rules of international law.

I am not of course suggesting that such an intervention would fall within the meaning of Article 63 of the Statute. I am simply saying that such a type of intervention – i.e., non-party intervention in the case in which a jurisdictional link is absent, but the interpretation given by the Court is binding – was introduced under Article 63. And if such a type of intervention is therefore possible, I submit that Article 62, if looked at in the light of Article 63, can also be viewed as comprehending this form of intervention as well, providing that the interest of a legal nature is present. That is to say, intervention under Article 62 encompasses the hypothesis where a given interpretation of principles and rules of international law is sought to be protected by a non-party intervention. In this hypothesis, the mode of intervention may be the same as under Article 63, so that the third State neither appears as a plaintiff or defendant nor submits any specific claim to rights or titles against the original litigant States." (*I.C.J. Reports 1981,* p. 30, paras. 15-16.)

30. Furthermore, I must point out that the multilateral convention of today is essentially different in character from that of the turn of the century and by its proliferation, universality and generality occupies an altogether more significant position in relation to customary law. Until quite recent times, apart from a handful of conventions mainly relating to the laws of war, multilateral treaties were not so universal, being limited to those concluded amongst only a few countries so as to provide for more concrete rights and duties which would directly affect their interests. Today by contrast, a great number of multilateral treaties are being produced in the United Nations or at conferences held under the auspices of the United Nations or other international organizations, with the goal of forging a new universal law, principally through codification of customary international law. The probability of the application of Article 63 is thus incomparably greater now than it could ever have been at the time the 1899 Convention was drafted.

*4. Probability of the Increase in Requests for Intervention*

31. It may be argued that if, as already mentioned, such a liberal interpretation is given to Article 62 of the Statute, then there is a distinct possibility that litigation before the Court may in future invite a number of interventions by third States. I would like to quote from my previous opinion :

> "It may be objected that the States which may be affected by the interpretation of such principles and rules by the Court will be without number, and that, if an interpretation of the principles and rules of international law can open the door of the Court to all States as interveners, this will invite many future instances of intervention. This problem should be considered from the viewpoint of future judicial policy, and more particularly from the viewpoint of the economy of international justice. Yet this cannot be the reason why a request for intervention which is actually pending should be refused when the requesting State claims that its legal interest may be affected by the Court's rulings on the principles and rules of international law. The possibility of an increasing number of cases invoking Article 63 may likewise not be avoided [particularly in view of the new trends which I explained before]. The fact that in the past Article 63 has been rarely invoked does not guarantee that the situation will remain unchanged in the future. Thus the problem is related not only to Article 62, but also to Article 63.
>
> However, unlike Article 63 dealing with the case of the interpretation of an international convention, Article 62 comprises certain restrictions. Paragraph 2 of Article 62 provides that : 'It shall be for the Court to decide upon this request.' This means that the Court has certain discretionary powers to allow or not to allow any requesting State to intervene in the litigation. Still more important is the restriction of paragraph 1 of Article 62. This paragraph requires the State requesting intervention to show that 'it has an interest of a legal nature which may be affected by the decision in the case'. Thus any danger of expansive application of Article 62 will certainly be restricted by the Court's exercising its discretionary power, more particularly to determine whether the requesting State has such an interest. In the present case, as it happens, the Court has taken this line and come to a negative conclusion on this point, imposing what is in my view an unduly severe test." (*I.C.J. Reports 1981,* p. 31, paras. 17-18.)

32. It should also be pointed out that in the case of a request for an advisory opinion from the Court, any State entitled to appear before the Court, or international organizations considered likely to be able to furnish information on the question, are allowed not only to file written statements but also to be heard at a public sitting. Whilst the probability of

the multiplication of interventions is a matter of concern for judicial policy, it must be said that there is no guarantee that the participation of States and international organizations in advisory proceedings will be restricted.

## II. Object and Legal Interest of Italy's Application

### *1. Object of Italy's Application*

33. I am unable to subscribe to the arguments in the Court's Judgment, as stated in paragraphs 29 and 41 in particular, that, by asking the Court to recognize its right, Italy in fact attempts to seize the Court of a distinct and additional dispute. In my view this presentation stems from the Court's *a priori* assumption that intervention under Article 62 would be intended, as under a municipal legal system, to combine additional litigations to the original one of which the Court has been seized.

34. However, as the Court states :

> "Italy has emphasized in the present proceedings that it is making no claim against either of the two principal Parties, that it is not seeking a decision by the Court delimiting its own areas of continental shelf, nor a decision declaring the principles and rules of international law applicable to such a delimitation." (Judgment, para. 29.)

I cannot see any intention of Italy to introduce through the back door a case which could not otherwise have been brought before the Court because of lack of jurisdiction. The object of Italy's application to intervene is clearly spelt out in its Application :

> "The object of Italy's application to intervene is to ensure the defence before the Court of its interest of a legal nature, so that those principles and rules and, in particular, the practical method of applying them, are not determined by the Court without awareness of that interest, and to its prejudice.
>
> In other words, Italy seeks to participate in the proceedings to the full extent necessary to enable it to defend the rights which it claims over some of the areas claimed by the Parties, and to 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, so that the Court may be as fully informed as possible as to the nature and scope of the rights of Italy in the areas of continental shelf concerned by the delimitation, and may thus be in a position to take due account of those rights in its decision." (Italy's Application, para. 16.)

Italy has neither accepted the compulsory jurisdiction of the Court nor

secured any pertinent agreement from the original Parties ; it has neither presented any claim against either of the original Parties nor proved that there had existed, before its application to intervene, any dispute between it and the original Parties or held any negotiation with the original Parties leading to a solution of such a dispute. These facts certainly do not constitute grounds for rejecting Italy's request in view of the proper scope of Article 62 of the Statute, which I have sufficiently demonstrated in Part I above.

35. Reiterating what I stated in 1981 (*I.C.J. Reports 1981,* p. 29, para. 9), the role to be played by Italy as an intervener must be limited. Italy may assert a concrete claim against Libya and Malta, but that claim must be confined to the scope of the Special Agreement in the principal case. Italy cannot seek a judgment of the Court which directly upholds its own claim. The scope of the Court's judgment will also be limited : it will be bound to give judgment only within the scope of the Special Agreement. Italy cannot, of course, escape the binding force of the judgment, which naturally applies to it to the extent that its intervention has been allowed. Italy will have been able to protect its own rights merely in so far as the judgment declines to recognize as countervailing the rights of either Libya or Malta. On the other hand, to the extent that the Court gives a judgment positively recognizing rights of either Libya or Malta, Italy will certainly lose all present or future claims in conflict with those rights.

36. I do not see any reason why Italy's object in requesting intervention should not fall within the scope of intervention as noted above. If the object of the application falls within the scope of Article 62, an applicant need only indicate what legal interest it possesses which may be affected by the decision in the pending dispute between the parties, irrespective of procedural requirements under Article 81, paragraph 2, of the Rules of Court. I now turn to the legal interest of Italy, which may be affected by the judgment of the Court in the principal case. As the present case has some quite distinct characteristics, Italy's interests are varied.

### 2. *Italy's Legal Interest in the Title* Erga Omnes

37. The subject-matter of this case does not concern claims arising out of the alleged breach of any obligation which one party may have accepted in relation to the other, being thus a matter of concern only to the litigant States. No, what is really disputed between Libya and Malta relates to titles to submarine areas. The claims concerned are thus of a territorial nature and as such are made *erga omnes.* In other words, the titles established may well be asserted not only between Libya and Malta but as regards all other States. It will be recalled that the essentially territorial nature of continental shelf disputes was confirmed by the Court in its Judgment on the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1978,* paras. 86-90) and indeed formed a main factor in that decision. As stated in

Part I above, the interest which a third State may have in claiming a title to an area cannot escape any effect resulting from what is determined by the Court in so far as that title is attributed to any of the litigant States in the principal case. As already mentioned, Article 59 of the Statute may not be accepted as guaranteeing that a decision of the Court in a case regarding the title *erga omnes* will not affect a claim by a third State to the same title.

### *3. Italy's Legal Interest in the Delimitation of as yet Undefined Areas of the Continental Shelf*

38. Although it is territorial, the present case is not of the type in which the title to any specific island or a particular and predetermined area is at issue. As is evident from the Special Agreement between Libya and Malta, neither of the principal Parties lays claim to any particular portion of any precisely defined submarine areas. Hence the extent of the area in dispute between the original Parties, Libya and Malta, where the delimitation is to be effected, cannot normally become clear to any third State until the written pleadings are made public upon the opening of the hearing on the merits. The most that a third State which has been refused access to the pleadings can do in such a situation is not to assert any concrete claim against the original litigant States, but simply to draw the attention of the Court to the right it may claim to its off-shore continental shelf by indicating its general interest in the area as a whole, lest the Court should render a judgment which recognizes the title of either of the litigant parties in the principal case to any specific area of the continental shelf, as if there had been no interest of any third State in that particular area. Here I wish to repeat what I said in the *Tunisia/Libya* case, except that in this case "Malta" becomes "Italy" and "Tunisia and Libya" become "Libya and Malta" :

> "[I]f [Italy] has failed to assert its own claims against either or both of the litigant States, or to seek as plaintiff or defendant any substantive or operative decision against either Party or to try to obtain any form of ruling or decision from the Court concerning its own continental shelf boundary with either or both of the original litigant States, or, then again, to submit its own claims to decision by the Court and not to expose itself to counter-claims, this cannot be any reason to question the admissibility of [Italy's] request. More cannot be demanded of [Italy] than of [Libya] and [Malta]." (*I.C.J. Reports 1981,* p. 32, para. 19.)

39. It has been contended by both Libya and Malta that the Court is simply required to confine itself to the delimitation of the area of Libya's and Malta's continental shelves and that, *ex hypothesi,* no third State can be interested in either of them. The "area-to-be" of the continental shelf appertaining to Libya and the "area-to-be" of the continental shelf appertaining to Malta are of course, distinct. These two "areas" themselves constitute a whole region which has not been defined in the above request by Libya and Malta. If the region concerned is to be simply an aggregate of the two "areas", so that it does not affect any third State but only concerns these two States, how can one identify the region concerned without possessing any precise definition of that aggregate ? Admittedly, the delimitation of the two "areas" concerned is essentially a bilateral matter to be settled between Libya and Malta. Nevertheless, that delimitation ought not to intrude upon the area of the continental shelf of any third State. Yet is it possible to assume with any certainty that, when account is taken of the characteristics of the region concerned, there will not be a third State which may have a legal title to the very portion of the continental shelf at issue ? The question therefore arises as to whether a guarantee can be given that there is no legal interest of such a State which may be affected by the decision of the Court. Furthermore, is it proper to state now, or will it ever be possible to state with certainty, that no conclusions or inferences may legitimately be drawn from the Court's ultimate findings or reasoning with respect to the rights or claims of States not parties to the *Libya/Malta* case ? Without proceeding with a scrutiny which belongs to a later stage, the Court cannot now define the region in which the delimitation between Libya and Malta is to be effected. The Court cannot now take a position in this respect without dealing with the merits of the principal case. Since the region with which the Court has to concern itself, cannot in practice be confined to any precisely defined parameter of a given area within which it is *evident* that no third State may have a claim, the possibility or probability of an adverse effect upon a third State accordingly is not excluded and cannot be so.

### *4. Italy's Legal Interest in the Principles and Rules of International Law*

40. I find it important to re-emphasize that Libya and Malta do not request the Court to determine directly the title to either sovereignty or sovereign rights (which itself has an effect *erga omnes*) over any particular area of the continental shelf, but to decide –

> "what principles and rules of international law are applicable to the delimitation . . . and how, in practice, such principles and rules can be applied by the two Parties in this particular case, in order that they may without difficulty delimit such areas by agreement".

What I stated in the Maltese intervention proceedings is also pertinent in this respect, except that the States concerned are now different, namely "Italy" and "Libya and Malta" in place of "Malta" and "Tunisia and Libya" respectively :

> "Both Parties in this case wish to secure a statement from the Court of what the appropriate law will be for the delimitation of the respective areas of the continental shelf of [Libya and Malta]. On the face of the Special Agreement, what will be argued before the Court by these two countries will remain confined to the principles and rules of international law to be applied in the delimitation of the continental shelf and not relate to the concrete claim to any title. Thus the object of the request for intervention may properly consist, as stated by [Italy], in presenting views on the principles and rules of international law during the proceedings in the principal case (as intended by Cuba in the *Haya de la Torre* case under Article 63). That being so, the position of [Italy] is certainly different from that of Fiji in the *Nuclear Tests* cases, in which the subject-matter was clearly defined in terms of specific claims. Aside from the question of jurisdiction, Fiji could have identified its own interests with those of Australia and New Zealand in specifying the legal interests which might have been threatened by the action taken by France, the legality of which was in dispute. Thus, although Fiji might have been required to specify its own claim as a plaintiff together with Australia and New Zealand against France, this requirement would have arisen out of the very nature of the case. The *[Libya/Malta]* case, however is of a completely different nature." (*I.C.J. Reports 1981*, p. 32, para. 20.)

The issues to be decided by the Court after examining the presentations of the pleadings, written and oral, of the principal Parties, consist in principles and rules of international law to be applicable to the delimitation of the continental shelf and the way in which those principles and rules can be applied. Though Italy has often referred to the concrete interests involved in the dispute between the two original Parties, it can also be seeking through the Court to influence the interpretation of the principles and rules of international law applicable to this particular dispute concerning the delimitation of a maritime boundary.

41. Today no one can ignore the deliberations of the Third Law of the Sea Conference, which were closed towards the end of 1982, and the text of the United Nations Convention on the Law of the Sea signed at Montego Bay, Jamaica. Even if it is not yet a binding instrument in force, it is a multilateral convention coming within the purview of Article 63 of the Statute and is bound to be invoked by the Parties in delimiting their continental shelf in future, and the Court may be asked for an interpretation. In a situation such as this, the third State would have a clear right of intervention under Article 63. Is such a situation so very different from the present case, where this treaty, though signed by a great number of States

all over the world, has not yet come into force, if it be borne in mind that both are related to the interpretation of the principles and rules of customary international law, irrespective of whether or not these principles and rules have already been spelled out in an effective text ? I would like again to use my previous arguments, changing only the word "Malta" to "Italy" as follows :

> "Theoretically, a number of States may have a claim to the continental shelf in the 'area', invoking any justification which they may prefer for this purpose, because the criteria for delimitation of the continental shelf have not yet been firmly settled. Yet, in the light of developments in the law of the sea, it would not have been difficult for the Court to exercise its discretionary powers under Article 62, paragraph 2, and allow the intervention of the third State particularly concerned, depending on the Court's evaluation of the imminent and grave interests prima facie at stake and considering the relevant factors. In this case, I cannot agree that [Italy] which prima facie belongs to the very 'area' in issue, will escape any legal effect of the judgment of the Court. This distinguishes [Italy] from all other countries (except perhaps a few neighbouring States), many of which may of course be interested *in abstracto* in the judgment of the Court concerning the interpretation of the applicable 'principles and rules of international law'." (*I.C.J. Reports 1981*, p. 34, para. 23.)

42. I do not need to follow the development of the ideas relating to the delimitation of maritime boundaries through Article 6 of the Continental Shelf Convention to Article 83 of the United Nations Convention on the Law of the Sea. The concept of the delimitation of the continental shelf has not been crystal clear, and it is known to the international community that the Convention became reality only after a compromised text of Article 83 together with Article 74 relating to the delimitation of the exclusive economic zone was proposed by the President of the Conference at the very last stage. The provision reads :

> "*Article 83 [74]* – 1. The delimitation of the continental shelf [the exclusive economic zone] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

No matter whether the provision has become an established rule of international law today when the Convention has still to secure a great number of ratifications before it comes into force, it would be impossible for the Court to avoid interpreting these very provisions. Inasmuch as Libya and Malta will probably present their respective positions in reliance on different doctrines and justifications with regard to the delimitation of the region yet to be defined, how is it possible to assume that a State such as

Italy, because of its vicinity to the region concerned, the central Mediterranean, may be indifferent to the principles and rules to be decided by the Court to apply in this particular case ?

## CONCLUSION

43. I have thus elaborated my point that Italy's application falls within the purview of the institution of intervention provided for under the Statute, and that Italy is justified in considering that it has an interest of a legal nature which may be affected by the decision in the case. I made almost the same argument in the case of the Maltese intervention three years ago, based on almost the same reasoning. I was not, however, inclined after careful consideration to favour granting the application of Malta. The reason was that, in the case of the delimitation of the continental shelf between territorially *adjacent* States, the interest of a third State which is situated on the opposite side and far from the coasts of these adjacent States may not, prima facie, be greatly affected by such a delimitation, nor by the declaration of the applicable principles and rules. This led me to concur in the conclusion of the Court only in view of the measure of judicial discretion contained in paragraph 2 of Article 62. However, the present case is different, because it concerns delimitation of the continental shelf between "opposite" States, one of which has the would-be intervener as its close neighbour.

*(Signed)* Shigeru ODA.

TABLE OF CONTENTS