

SEPARATE OPINION OF JUDGE RUDA

1. I have voted in favour of the operative clauses of the Judgment and I subscribe to most of its reasoning. However, I am bound to dissent from the conclusions reached in paragraphs 41, 42 and 43, which refer to what the Court calls "a jurisdictional objection raised by Libya".

2. Tunisia submitted two requests for interpretation and one for correction of an error. One of the requests for interpretation, and the request for correction of an error, concern the first sector of the delimitation, the other request for interpretation concerns the second sector.

3. Although the requests for interpretation were submitted in relation to different sectors and have a different nature, because one has a subsidiary character and the other is a principal request, both were objected to in Libya's Observations on the basis of Article 3 of the Special Agreement of June 1977.

4. Libya developed its argument in paragraphs 69-73 of its Observations, recalling that the Special Agreement provided the basis of the Court's jurisdiction, and that it included in Article 3 a procedure to be followed in case of lack of agreement on the delimitation, following the Court's Judgment. This procedure of Article 3 provides that after a certain period, the Parties

"shall together go back to the Court and request any explanations or clarifications which would facilitate the task of the two delegations to arrive at a line separating the two areas of the continental shelf".

Libya understands that the Parties should go back "together" to the Court, after making an effort, in good faith, to implement the Judgment ; if this effort fails, they are obliged to indicate the points of difference. That is what Tunisia, according to Libya, had not done, refusing "to specify the difficulties it had with the way Libya has indicated the Judgment should be implemented". Libya, then, submitted that the point was not whether Article 103 of the United Nations Charter overrides Article 3 of the *compromis*, an argument advanced by Tunisia in the Request, but that Article 3 required the parties to follow a certain procedure ; it added "that is, the evident obligation for them first to exhaust the remedy of seeking explanations and clarifications, under Article 3 of the Special Agreement". Libya concluded that "the Court does not possess the requisite jurisdiction to admit the request for interpretation". However, in the submissions included in the Observations, Libya did not insist on this proposition.

5. The argument of lack of jurisdiction faded away in the course of the oral pleadings. The Libyan Agent said :

“Finally, I should like to make clear that Libya never refused to return jointly to the Court to seek explanations and clarifications under Article 3 of the Special Agreement. However, Libya did insist that Tunisia set forth in writing its precise position as Libya had done. The diplomatic exchanges leave no room for doubt on this. Let me point out that the Court has been provided with the whole file by Libya, not by Tunisia. I urge Members of the Court to read that file since it reveals Tunisia’s attitude. The repeated claims of counsel for Tunisia that Libya rejected Article 3 and refused to return cannot change the truth. As the record shows, it was apparent from the start that what Tunisia sought was modification, not clarification.

Tunisia never set forth precisely in writing the points it considered to require explanations and clarifications. In contrast, Libya set forth its position in writing in the clearest terms.” (Sitting of 17 June 1985.)

6. Counsel for Libya made only a short reference to Article 3, commenting on the Tunisian attitude to the Note of 30 October 1982, where Libya invited Tunisia to state all the points necessary to refer the matter to the Court. He said :

“The Libyan request for more complete and precise information was considered by Libya to be a necessary basis for reference back to the Court. This request could not reasonably be considered a rejection by Libya of the provisions of Article 3 of the Special Agreement, regarding going back to the Court to request explanation and clarification.” (*Ibid.*)

7. Another counsel for Libya, who developed the Libyan thesis on “L’irrecevabilité des demandes en interprétation et correction d’erreur” did not touch the subject of want of jurisdiction on the basis of Article 3. Finally, the last counsel to address the Court merely said, at the beginning of his intervention, the following :

“Tunisia faces an initial difficulty in its request for interpretation in that, as Sir Francis Vallat has shown, Article 3 of the Special Agreement required Tunisia to follow a certain procedure, which she has totally failed to do. I need add nothing more on that point.” (Sitting of 18 June 1985, morning.)

But, as we know this counsel had not developed this argument.

8. Moreover, the Libyan final submissions reaffirmed the submissions

contained in the Observations. No reference, therefore, was made there to lack of jurisdiction.

9. This final position of Libya was clarified thanks to the question put by a judge as to the relation of Article 60 and the role of the Parties under Article 3. Libya replied :

“Tunisia has not made a *bona fide* attempt to agree on points of explanation or clarification for the purpose of a joint request to the Court under Article 3 of the Special Agreement. Such a joint request is a necessary condition for return to the Court under Article 3. The failure of Tunisia to attempt to specify the point or points of explanation or clarification for the purposes of a joint request could well be regarded as debarring Tunisia’s resort to Article 60 of the Statute. Libya, however, has chosen not to rely on what might be regarded by Tunisia as a purely technical bar to the present Application. Libya believes that the application is so lacking in merit that Libya has preferred to oppose it.”

10. To the Court it “is by no means clear” that Libya, by this statement, “intended to waive a jurisdictional objection, based on Article 3” (para. 42, *in fine*). I dissent on this point. This is for me a clear indication that Libya is not insisting on the argument of lack of jurisdiction raised in the Observations. As I said before, Libya did not include this jurisdictional objection in its submissions. Objections of this nature, should normally be raised in a formal way, and they are not lightly to be presumed.

11. Despite this clear statement of intention to waive the objection, the Court, however, goes into the question of the relationship between the procedure contemplated by Article 3 of the Special Agreement and the possibility of either Party to request an interpretation under Article 60 of the Statute. The Court finds that Article 3 does not impair, in the circumstances of this case, the right of Tunisia, under Article 60 of the Statute, to seise the Court unilaterally.

12. I am also of a different opinion on this point, and I regret that I do not share the Court’s findings.

13. My reading of Article 3 of the Special Agreement leads me to the conclusion that the Parties foresee a special procedure of coming to the Court, before Article 60 of the Statute could be invoked ; it does not seem to be the intention of the Parties to waive their rights under the Statute, but to establish a previous procedure for coming to the Court, before they decide to ask unilaterally for an interpretation. The purpose of Article 3 is to oblige the Parties to make an effort to settle between themselves which are the points of difference, before coming to the Court ; if such an effort fails, the Parties then could ask unilaterally for an interpretation under Article 60 of the Statute. Article 3 is not a bar, or a “block” — to use the Court’s terminology —, to the procedure established in Article 60 of the

Statute, if one of the Parties chooses not to co-operate : it is only a procedure that the Parties should try to follow, before coming to the Court. The mechanism set up by the Parties provides for a serious effort to reach an agreement, before coming to the Court. My reading of the documents submitted by Libya, attached to its Observations, leads me to the conclusion that Tunisia never concretely submitted to Libya what were the points that it considered needed some explanation or clarification. To my mind, because of this position of Tunisia, there has never been a serious effort to try to settle between the Parties what were the points that needed explanations or clarifications.

14. As to the Tunisian argument based on the overriding character of Article 103 of the Charter, I would like simply to recall that this article refers only to a conflict of "obligations", not of rights. The subject has been dealt with in detail by the most distinguished commentators on the Charter. It would be an interesting juridical exercise to study whether States may waive their rights under the Statute in a Special Agreement, but this theoretical problem is not before the Court, because the Parties have envisaged in their Special Agreement a procedure which requires, first, that they should try and reach an agreement to seek "explanations and clarifications" before invoking Article 60, a procedure which, to my mind, is not against any provision of the Statute.

15. For these reasons, I share the Libyan argument presented in its Observations, and not the Court's reasoning. I would like to add, returning to the beginning of this opinion, that this proposition, if formally submitted, will amount to the submission of an "*exception d'incompétence*", a preliminary objection challenging the jurisdiction of the Court. As Libya said in the Observations : "The Court does not possess jurisdiction to admit the Tunisian request for interpretation."

16. As I said before, Libya not only did not formally submit this preliminary objection but specifically waived its right. In these circumstances, I do not think it is for the Court to go into the analysis of the arguments related to such objection, when the interested Party has waived its right to invoke it ; this renunciation is tantamount to a very specific consent, and as consent is the basis of the jurisdiction of this tribunal, the Court, in such circumstances, could not but take judicial notice of the waiver.

(Signed) José Maria RUDA.
