

SEPARATE OPINION OF JUDGE NAGENDRA SINGH

While voting for the Judgment of the Court, I have felt that there are certain aspects of the case which need to be emphasized.

(i) It appears from the Court's Judgment that the object of intervention is of great importance to a tribunal when applying the provisions of Article 62 of the Statute to the facts of a case. In this respect, Italy has demonstrated a twofold aspect of its object in presenting its own request to the Court. First, at the very outset, Italy has emphasized in the present proceedings before the Court that it is making no claim against either of the two Parties and, furthermore, that it is not seeking a decision by the Court to delimit its own areas of continental shelf. It has gone further even in stating that it does not seek a decision declaring the principles and rules of international law to be applicable to such a delimitation. The counsel for Italy has stated precisely what Italy expects from the Court in the following words:

“Italy is asking the Court . . . to take into consideration the interests of a legal nature which Italy possesses in relation to various areas claimed by the main Parties, or certain parts of those areas, and accordingly . . . to ensure that they do not, when they conclude their delimitation agreement pursuant of the Court's judgment, include any areas which, on account of the existence of rights possessed by Italy, *ought to 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.*” (Hearing of 25 January 1984. Emphasis added.)

If the intention was thus to apprise the Court of the areas of Italian concern of which the Court should be cautioned and warned, so that the Judgment does not trench on the sovereign rights and claims of Italy, it would appear that such a purpose has been effectively served by the exercise which the Court has undertaken under Article 62 of the Statute by giving a hearing not only to Italy but also to the Parties to the dispute. There can be no doubt that the Court has now been made fully aware of Italian interests and where they lie so that there should be no possibility of it even inadvertently encroaching upon or undermining Italian claims and interests in this case. In answer to the question asked by Judge de Lacharrière at the hearings, the Italian written reply has given a precise answer defining the four corners of the parameters of Italian interest which concern the Court here. No tribunal could ever disregard this aspect, which has been effectively presented by Italy. The Court in its Judgment has taken proper precautions to safeguard the interests of Italy in paragraphs 42 and 43,

with which I entirely agree. When the would-be intervener is not permitted to be present before the Court, it becomes the bounden duty of the tribunal to safeguard its rights and on no account to allow them to be downtrodden in the adjudication of the dispute between the parties before the Court. While pointing out this aspect, it is felt that the object of Italy in cautioning the Court in this case has already been achieved inasmuch as the Court has been warned how far to proceed in its delimitation. This is not to suggest that the institution of intervention as embodied in Article 62 could ever be reduced to the mere practice of giving a hearing to the applicant on the point of admissibility of its request, because much more than a mere preliminary hearing is contemplated by that article of the Statute. In addition to the above there is also another consideration of vital importance which is mentioned in paragraph (ii) below.

The second aspect of the Italian pleading noted by the Court relates to the role of the Court which Italy seemed to be asking the Court to undertake in "defining", "safeguarding", "protecting" and "recognizing" the rights of Italy which gives the appearance that the Court is required to undertake an exercise in adjudication. This would certainly need a jurisdictional link between the intervener and the Parties to the dispute, and I agree with the Court's finding that this aspect of the object of Italian intervention could not be met without a proper jurisdictional link between Italy and Malta and Italy and Libya.

In short, therefore, both aspects of the Italian object of intervention are met to the full extent that the Court could help to meet them. The purpose of warning the Court as to the area of Italian concern has indeed been totally fulfilled. Again, as far as the other aspect of the object of intervention is concerned, which was to have Italian interests "recognized", "safeguarded" and "protected", the Court has expressed its inability to proceed without a jurisdictional link between the intervener and the Parties to the dispute. In short, therefore, the Court has done its utmost in the circumstances to meet the Italian viewpoint in so far as it was within the limits prescribed by Article 62 of the Statute and could be accomplished without a jurisdictional link and in the teeth of opposition from both Parties to the dispute. The Court apparently has felt helpless when confronted with the request relating to "recognition" of Italian rights which would involve the Court in an exercise in jurisdiction, and that could not be undertaken without the consent of the Parties to the dispute.

Thus, whatever the Court could offer to Italy within the limits of Article 62, and devoid of a jurisdictional link, would appear to have been offered to Italy in this case. It is true, of course, that intervention has been refused, but that does not in any way amount to an injustice. This indeed is the basic reason for my voting for the Court's Judgment, because even without granting intervention to Italy the Court has duly emphasized that Italian interests in the area will remain the paramount concern of the Court. In the circumstances, the granting of intervention would not have added anything to the process of cautioning the Court. On the other hand, agreeing to the Italian request would have clearly resulted in making Italy subject to

the obligations imposed by Article 59 on the parties before the Court. In short, therefore, it would appear that the Court has given to Italy by this Judgment all that it could be entitled to in the circumstances of this case, and that, too, without holding it bound by the forthcoming judgment in the *Libya/Malta* case by virtue of Article 59. The net result should therefore satisfy Italy.

(ii) Furthermore, what I wish to emphasize relates to the need to allow the would-be intervener to have access to the pleadings of the parties to a dispute, because it does not answer the call of judicial propriety if the would-be intervener is asked to plead, blindfold so to speak, without the pleadings of the parties. This essential facility was denied to Malta in 1981 and now to Italy in this case, although it was pleaded by the Parties to the present dispute that the applicant, having had its say when invoking Article 62 of the Statute, need not be given a further hearing by way of intervention as stipulated in Articles 82 to 85 of the Rules of Court. In other words, it has been argued by the Parties that if the would-be intervener was heard once it should suffice for the purpose of cautioning the Court. If it was ever so, it would appear that the would-be intervener must be supplied with the pleadings of the parties in order to have its full say with a view to effectively warning the Court of its interests. It is true, of course, that Parties objected in both these cases to their pleadings being made available to the would-be intervener, but then they could not argue that the applicant had had its full say in the matter. It would therefore appear to be in the interests of the parties to a dispute to agree to make their pleadings available to the would-be intervener in order that they may be fully apprised of third party interests, of which the Court would also like to be equally and fully informed. In the present case, the fact that the pleadings of the Parties to the dispute were not made available to the applicant weighs to the extent that, as a consequence, the applicant could have failed to present to the Court as complete, clear and precise a statement of its interests as might have been possible had it had access to those pleadings. Such a statement is manifestly desirable also for the Court so as to enable it to decide correctly on the admissibility of the intervention itself. Thus, it is in the interests of justice that the would-be intervener should have access to the pleadings of the parties to a dispute. However, I am satisfied that in the present case, despite this lacuna, the Court has been able to get a sufficient overall picture of the Italian interests to enable it to come to a decision on the Application. Nevertheless, the aspect relating to pleadings of parties being made accessible to the would-be intervener should be borne in mind by all concerned in future cases of intervention.

(iii) Lastly, I wish to emphasize that despite the two negative decisions of the Court in 1981 and in this case, the institution of intervention which exists as enshrined in Article 62 of the Statute is still very much available to the community, provided it is sought within the limits prescribed by that Article. The Court has now made it abundantly clear that if the intervener expects determination of any of its claims, which involves an exercise in

adjudication, this would necessitate a jurisdictional link between the parties to the dispute and the intervener. However, as far as cautioning the Court of the interests of the third party is concerned, this can always be achieved by an application under Article 62 without establishing any jurisdictional link. The said provision of the Statute has therefore a utility of its own, however limited it may be.

(Signed) NAGENDRA SINGH.
