CORRESPONDENCE

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TO THE EDITORS-IN-CHIEF:

January 10, 1982

Judge Jessup's Editorial Comment on *Intervention in the International Court* (75 AJIL 903 (1981)) highlights the broader implications of the Court's Judgment of April 14, 1981 in the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application of Malta for Permission to Intervene.* May I be allowed to add the following observations:

1. The opening sentence of the Comment states that this was the first time that the Court "ruled upon the right of a third state to intervene in a case to which two other states are parties." To be more precise, this was the first time that the Court ruled on a request to intervene under Article 62 of the Statute. This article does not grant an inherent *right* of intervention—at least not in the sense of Article 63—but gives the Court discretion to allow a state to intervene; a state may prove that it has a legal interest but the Court may still refuse its request on other grounds. The two types of intervention are in fact distinguished later on in the Comment (p. 904).

2. For Jessup, paragraph (*c*) of the 1978 Rules is very important (p. 903). It is indeed unfortunate that we must await a future pronouncement on the jurisdictional link issue, especially since it was one of the principal bones of contention among the litigants. However, paragraph (*c*) must be put in its proper perspective and its importance in intervention proceedings must not be overestimated. Although the rule in its present form is a direct consequence of the problems identified in the *Nuclear Tests* cases (1974), that does not mean that this rule has become a sine qua non condition for the application of Article 62 of the Statute. The Rules of Court are subordinate to the Statute. The insistence on the necessity of a jurisdictional link arises from a failure to distinguish the nature of jurisdiction on the merits from the incidental jurisdiction of the Court. Unlike the action on the merits, incidental jurisdiction, of which intervention forms a part, is independent of the consent of the original parties to the proceedings and arises from express provisions of the Statute.

3. Jessup makes an interesting reference to advisory opinions, in which cases states are free to submit their views without having to prove an interest of a legal nature (p. 905). The *Tunisia/Libya* proceedings, while contentious in nature, were rather special since the Court was not asked to decide a concrete delimitation dispute, but to render its judgment on "what principles and rules of international law may be applied for the delimitation of the area of the continental shelf appertaining to Libya and Tunisia respectively." This wording brings the case closer to a request for an advisory opinion and Jessup may be inferring by analogy that the rules applicable to advisory opinions, rather than the more stringent requirements for intervention, could have been applied to Malta's request to intervene. Given the circumstances of this particular case, this line of reasoning could well have been adopted by the Court. However, one would hesitate to apply the analogy on a more general basis as Judge Jessup seems to be doing when he quotes with approval the statement that "a more active participation by third states . . . could make the Court more relevant in international litigation." While it is desirable that states should

interest themselves in the Court, the consensual nature of its jurisdiction would not seem to permit it to develop into a forum for submitting views.

4. As Jessup rightly states, the central point of the Court's decision is "the identification of the type of legal interest which must be demonstrated under Article 62." For the Court, a legal interest is one that is directly in issue in the proceedings as between the parties or as between the applicant and either of the parties (paras. 19 and 22 of the judgment); it excludes an interest simply in the Court's pronouncement in a case regarding the applicable general principles and rules of international law (para. 30). Prima facie, these two principles are mutually exclusive; however, when applied to the *Tunisia/Libya* proceedings they would not seem to disqualify Malta's request. The Court readily agreed that Malta's was more than a general interest in abstracto in international legal principles and that Malta had a specific legal interest in the subject matter of the proceedings. This subject matter consisted exactly of an examination of the international legal principles to be applied in an eventual delimitation; so there seems to be no reason why Malta's intervention could not have had as its object the presentation of its views on the principles and rules of international law at issue in the principal proceedings. In the words of Oda J. (para. 19), "more cannot be demanded of Malta than of Tunisia and Libya."

It is unlikely that the possibility of interventions will discourage states from seeking access to the Court since this possibility has always existed. It is more likely that its restrictive interpretation of legal interest will dissuade potential intervenors from applying to participate in future proceedings. We might therefore have to wait a considerable time before a future decision throws some light on the issue of jurisdictional link.

TANIA LICARI

TO THE EDITORS-IN-CHIEF

Joe C. Barrett (1897–1980)

In American transnational relations, Joe Barrett, "small-town lawyer from Arkansas," as he liked to identify himself, was the right man at the right time for a giant step forward in the protection of our interests abroad. Concern about unnecessary conflicts in interstate legal relationships made him a very active member of the National Conference of Commissioners on Uniform State Laws and led to the presidency of the conference. The work on interstate uniformity convinced him that the United States policy of abstaining from participation in international unification of law activities because the subject matter had traditionally been dealt with by state legislatures merely resulted in leaving both federal and state interests unprotected.

When the International Institute for the Unification of Private Law invited Commissioners on Uniform State Laws to attend a conference to be held in Barcelona in the early fall of 1956, Joe Barrett decided to go on his own and see what was happening in the rest of the world regarding uniformity of law. From Barcelona he proceeded to The Hague where the second postwar session of the Hague Conference on Private International Law was taking place. An understanding had been reached that the national organization in the United States, which had expressed interest in the work of the Hague Conference, would send observers to this meeting and Joe Barrett was one of this small group.