DECLARATION OF JUDGE *AD HOC* AL-KHASAWNEH

Discretion left to judges in delimitation of EEZ/continental shelf — Court should assess equity of delimitation holistically — Court should not limit itself to assessing gross disproportionality at third step of delimitation.

Maritime delimitation is, of necessity, a compromise between the need for certainty and predictability of the law on the one hand and, on the other, the need to take cognizance of the realities of geography which are never the same in different cases.

Judges are enjoined not to "completely refashion nature" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 49-50, para. 91), which might be no more than an awkward way of saying they could do so provided this "refashioning" is not complete or blatant. In reality this is what they do all the time. The weight to be ascribed to a given island always carries an element of subjectivity. Similarly, a decision as to when the drawing of an equidistance line constitutes "a cut-off" cannot be made on purely mathematical basis. This subjectivity is both normal and legitimate and I have always believed that the legislator should leave room to the judge.

With regard to delimitation in the exclusive economic zone and the continental shelf, the proposition can be safely advanced that — to the extent that any guidance can be gleaned from the negotiations leading to the adoption of the Law of the Sea Convention — the negotiators consciously left much room for judicial discretion in recognition of the well-nigh impossibility of providing uniform legislative answers.

Still the judicial mind is predisposed to reduce subjectivity, thus the jurisprudence of the Court reveals a success in turning "creative equity" into the more constrained "corrective equity" and this has been done by following methods and techniques, the most notable of which is the three-stage approach to delimitation which has been employed in recent jurisprudence. This is sound and useful, as long as we do not lose sight of the fact that it is no more than a method and that what matters is that the end result must be equitable. A less attractive aspect of this *modus operandi* is that the third stage is tied to the extremely easy test (which no delimitation has failed) of checking gross disproportionality of maritime entitlement against the objective yardstick of the length of the Parties' relevant coasts, which is an important factor in determining lack of gross disproportionality but is not the only factor. The self-imposed reduction

of an equitable solution finds no support in the text of Articles 74 and 83 of the Law of the Sea Convention, which suggest a comprehensive assessment of the equitable nature of the result at the end of the delimitation even if admittedly a subjective element is present in such an assessment.

Applied to delimitation in the Pacific, I believe that a more equitable result would have been obtained had the Nicoya Peninsula been given considerable but not complete effect in so far as delimitation in the exclusive economic zone and the continental shelf are concerned. This would have been justified given its proximity to the starting-point of delimitation and the absence of any qualitative difference between it and St. Elena, thus a refashioning of nature but certainly not a complete one.

(Signed) Awn AL-KHASAWNEH.