SEPARATE OPINION OF JUDGE JIMÉNEZ DE ARÉCHAGA*

PART I. INTERPRETATION OF THE SPECIAL AGREEMENT

1. The Parties' Submissions

1. The Parties presented different views as to the role to be performed by the Court in this case. Tunisia contended that the task of the Court was, first, to determine the principles and rules of international law applicable to this delimitation and then, as a second question, to identify and indicate the practical method or methods to be followed for that delimitation, and to do so with such clarity and in such detail "as to enable the experts of the two countries to delimit these areas without any difficulties". For Tunisia, the role of the experts consists "in the substantial but technical task of constructing the line of delimitation and establishing the boundary line". This is to be done within a period of three months and, during this period, the Parties are to conclude an agreement providing legal sanction to the line arrived at by the experts on the basis of the Judgment of the Court.

2. Libya, on its part, advanced a more restrictive view of the role of the Court, and, consequently, a much larger view of the task of the experts. It contended that the application by the Parties and their experts of the principles and rules set forth in the Judgment could not be restricted to a mere mechanical plotting of co-ordinates or drawing of lines from point to point. According to Libya, the Court was "invited to indicate the considerations and factors which should be taken into account" but not "to indicate a very precise method of delimitation", since this would be, for all intents and purposes "the same as taking over the task of drawing the line".

In support of this view Libya recalled that Article 3 of the Special Agreement mentions the need of a further "agreement" between the Parties, and pointed out that this instrument is to be interpreted against the background of the fundamental principle that delimitation is to be settled by agreement.

3. The divergence of views of the Parties as to the degree of precision which the judgment of the Court should possess was reflected in their respective final Submissions, that is to say, in what they asked the Court to adjudge and declare. In consonance with its interpretation of the Special Agreement, Libya framed its Submissions in such broad and general terms that their acceptance would still have left wide room for substantive

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negotiations and for substantial disagreements between the Parties. The adoption by the Court of Submissions framed in such terms would not have advanced the settlement of the dispute to any great extent, nor would it have complied with the requirement of the second section of paragraph 1 of the Special Agreement, namely :

> "to clarify the practical method for the application of these principles and rules in this specific situation, so as to enable the experts of the two countries to delimit these areas without any difficulties".

The Tunisian Submissions were, on the contrary, very precise but they asked the Court to endorse and adopt certain methods of delimitation which, for reasons of substance, the Court could not accept.

4. What then had to be done in view of this lack of correspondence between the Parties' Submissions and the task assigned to the Court in the Special Agreement ? The Court has followed its established jurisprudence to the effect that, in order to determine the precise points which require decision in the operative part of a judgment, when the case has been brought by Special Agreement,

> "it is rather to the terms of this agreement than to the submissions of the Parties that the Court must have recourse in establishing the precise points which it has to decide" (*"Lotus"* case, *P.C.I.J., Series A, No. 10,* p. 12). (Cf. also *Serbian Loans* case, *P.C.I.J., Series A, Nos. 20/21,* p. 47 ; *River Oder* case, *P.C.I.J., Series A, No. 23,* p. 18 and *Minquiers and Ecrehos* case, *I.C.J. Reports 1953,* p. 52.)

2. The Role of the Court and the Subsequent Role of the Experts

5. I concur with the Judgment in preferring the Tunisian interpretation of the Special Agreement as to the role of the Court and the subsequent role of the experts. But this conclusion is not, in my view, one to be based on minor exegetical points such as whether one or two questions have been put to the Court or whether the words *"avec précision"* are to be read into the French translation of the text of the Special Agreement or, finally, whether there is a real distinction between "practical method of delimitation" and "practical method for the application of principles and rules that may be applied for the delimitation".

6. There is a more fundamental reason for preferring the Tunisian interpretation of the Special Agreement in respect to the role of the Court. The Libyan interpretation envisages the role of the experts as that of diplomatic representatives who will negotiate the final delimitation within a vague and very general framework of pronouncements from the Court described as mere indications or "guidance". Thus, the Libyan interpretation of the Special Agreement, combined with the broad submissions

Libya presented, would in fact have made the implementation of the Court's Judgment depend upon the subsequent agreement of the Parties.

7. Confronted with a situation in a case where there were two possible interpretations of a Special Agreement, one of them making the Judgment dependent on a subsequent agreement of the Parties, the Permanent Court decided :

> "it is hardly possible to suppose that the Parties intended to adopt a clause which would be incompatible with the Court's function ; as, accordingly, if it is possible to construe paragraph 2 of Article 2 of the Special Agreement in such a way as to enable the Court to fulfil its task, whilst respecting the fundamental conception on which that paragraph is based, such a construction is the one which must be preferred ;
>
> Whereas it is certainly incompatible with the character of the judgments rendered by the Court and with the binding force attached to them by Articles 59 and 63, paragraph 2, of its Statute, for the Court to render a judgment which either of the Parties may render inoperative." (*Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24,* p. 14.)

And in the final Judgment in that case, the Permanent Court reiterated the same position :

> "After mature consideration, the Court maintains its opinion that it would be incompatible with the Statute, and with its position as a Court of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties." (*Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46,* p. 161.)

8. In the light of these pronouncements it must be concluded that, in making the choice between the two conflicting interpretations of the Special Agreement, the one to be preferred is that which is compatible with the character of judgments rendered by the Court and with the binding force attached to them by Articles 59 and 63, paragraph 2, of the Statute.

It would certainly be incompatible with the Statute and with the Court's position as a Court of Justice to accept an interpretation of the Special Agreement leading to a judgment which would not advance the settlement of the dispute and which would be dependent for its application on the subsequent agreement of the Parties.

9. However, in my view, the operative part of the Judgment should have been framed on the basis, not of degrees of latitude or longitude but of concepts such as the line perpendicular to the coast at Ras Ajdir, going as far as the parallel of the westernmost point in the Gulf of Gabes, and from that point successive veerings parallel to the successive inclinations of the coast of the Tunisian mainland, all of these geographical facts to be determined by the experts. On the other hand, it should have indicated that

the perpendicular line applicable for the first sector is that of 22°, because this is the one resulting from the historical records, in particular the recognition made by the French Resident-General in Tunisia (cf. para. 90 below).

10. There is no contradiction in indicating in this sector a perpendicular line defined by degrees as the 22° line because the principles and rules of international law applicable in this segment of the boundary are, in themselves, so precise as to result in a concrete line of delimitation established by history. By proclaiming that 22° line the Court would not have invaded the function of the experts but would have performed its own task of determining the existence and applicability of a rule of law which is, in itself, of absolute precision.

3. The Geographical Scope of Equitable Principles

11. The fundamental rule authorizing the Court to apply equitable principles in the decision of this case is to be found in the Special Agreement which provides in its first paragraph that "the Court shall take its decision according to equitable principles". This authorization refers to the decision concerning "the delimitation of the area of the continental shelf appertaining to the Republic of Tunisia and to the area of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya". Consequently, it does not place any geographical limitation on the applicability of equitable principles ; on the contrary, the Special Agreement refers to the whole area at issue between the Parties and not just to the marginal or overlapping segments of that area.

12. However, as a consequence of their rigid view of natural prolongation, both Parties assigned in their written and oral pleadings a limited and subordinate role to equitable principles in the decision of the case. It is striking that one of the few manifestations of express agreement by the Parties during the oral hearings was their coincidence in subordinating "equitable principles" to their own conceptions of "natural prolongation".

13. The reason for this coincidence was, of course, that both Parties contended that their respective geomorphological and geological conceptions of "natural prolongation" should control the delimitation and that equitable principles should come into play successively and only where the physical facts of "natural prolongation" were no longer of assistance in determining the respective limits of the two shelf areas : in other words, equity would operate merely as a corrective criterion, and only in overlapping, doubtful or marginal segments of the continental shelf, such as, according to Libya, in the zone north to the latitude of Ras Yonga, or in what Tunisia described as the borderland area. But neither Party in its

pleadings regarded "equitable principles" as a basic principle of law governing the delimitation of the area as a whole and as its starting point.

14. This approach of the Parties is not in accordance with the principles and rules of international law declared by the Court in 1969, confirmed by the 1977 Arbitral Award between the United Kingdom and France and codified in Article 83 of the draft convention on the Law of the Sea. And, what is more important, such a position is not in accordance with the terms of the Special Agreement, as quoted in paragraph 11 above.

15. The Court, in 1969, after it had discarded the principle of equidistance as a mandatory rule of customary international law, did not accept that there was a "lacuna" in the law of nations on the subject ; it stated, on the contrary, that "there are still rules and principles of law to be applied" (*I.C.J. Reports 1969,* p. 46). It found that the first of these rules is that delimitation should be agreed or decided in accordance with equitable principles. The Court referred to "equitable principles" in the operative part of its 1969 Judgment, under letter (C), when defining "the principles and rules of international law applicable to the delimitation". There it assigned the first place and not a secondary or successive one to "equitable principles", adding afterwards relevant circumstances, natural prolongation and non-encroachment. So, in the Court's Judgment, "equitable principles" have pride of place and apply from the start to the whole area subject to delimitation and not just to marginal or overlapping segments of that area.

16. A similar position was adopted by the Anglo-French Court of Arbitration which, far from subordinating "equitable principles" to "natural prolongation", did the opposite when it stated that it is clear

> "from the emphasis on 'equitable principles' in customary law that the force of the cardinal principle of 'natural prolongation of territory' is not absolute, but may be subject to qualification in particular situations" (para. 191).

Consequently, the award proclaimed that the principle of natural prolongation, having a relative character, is subordinated to the necessity of reaching an equitable delimitation.

17. Finally, Article 83, paragraph 1, of the draft convention on the Law of the Sea makes clear that the only goal of delimitation on the basis of international law is "to achieve an equitable solution". This text does not place geographical limits nor does it qualify in any other way the equitable solution which is to be achieved of a dispute concerning "the delimitation of the continental shelf between States with opposite or adjacent coasts".

4. The Meaning of Equity : Equity, Equidistance and Relevant Circumstances

18. The opinion has been expressed that in deciding a case of this nature the point of departure should always be the line of equidistance, and that this line should be altered only to the extent that it is found to produce inequitable results. Naturally, in all cases the decision-maker looks at the line of equidistance, even if none of the parties has invoked it. But the question is whether he is obliged to depart from it and confine his task to the correction or moderation of the line of equidistance to the extent that it is found to lead to inequitable results.

19. In support of the above opinion it is contended that equity is to be viewed as a discretionary or moderating influence superadded to the rigour of formulated law ; that it consists in the correction of a general rule when that rule, by reason of its generality, works hardship in a concrete case and produces results which are felt to be unfair.

20. There is no denying that this is a current conception of equity, which may be a correct one in the municipal legal field. However, it is not the conception of equity applicable to continental shelf delimitation, as proclaimed by the Court in 1969 and developed by the arbitral tribunal in 1977.

21. Moreover, in order to apply that view of equity to this branch of international law it would be necessary to assume that equidistance constitutes the general rule of law which is to be corrected or moderated in a concrete case in proportion to the unfairness of its results. However, the 1969 Judgment of the Court proclaimed that equidistance was not a binding rule of law but merely one method among others which could lead to an equitable solution in some cases but produce inequitable results in others. From this Judgment it follows that the above-described conception of equity is not valid in the field of continental shelf delimitation, by reason simply of the absence of a general rule of law which is to be moderated or corrected in its concrete application.

22. What, then, is the meaning of equity in this field ? The 1977 Arbitral Award gave a positive content to the notion of equitable principles as applicable in this context, by linking them to the circumstances of each case. It thus recognized implicitly that each case is necessarily different from all others, by reason of the varying reciprocal relationship between the geographical configuration of the coasts concerned and the historical and political factors which established the land frontiers separating the States parties to each dispute.

23. And what is more important, that award expressly linked the notion of equity to those particular circumstances, when it stated :

> "this Court considers that the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable

delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of the method or methods of delimitation in any given case, whether under the 1958 Convention or customary law, has therefore to be determined in the light of those circumstances and of the fundamental norm that the delimitation must be in accordance with equitable principles." (Para. 97.)

24. Consequently, in the context of the law of continental shelf delimitation, the making of the decision "according to equitable principles", as the Court is ordered to do under the Special Agreement, compels the judges to determine what are the relevant circumstances in each specific case and to make an evaluation of their relative importance and weight. To resort to equity means, in effect, to appreciate and balance the relevant circumstances of the case, so as to render justice, not through the rigid application of general rules and principles and of formal legal concepts, but through an adaptation and adjustment of such principles, rules and concepts to the facts, realities and circumstances of each case. As was well stated by the 1977 Court of Arbitration, equity is "to be looked for in the particular circumstances of the present case" (para. 195). In other words, the judicial application of equitable principles means that a court should render justice in the concrete case, by means of a decision shaped by and adjusted to the relevant "factual matrix" of that case. Equity is here nothing other than the taking into account of a complex of historical and geographical circumstances the consideration of which does not diminish justice but, on the contrary, enriches it.

25. For the notion of justice is not divorced from or opposed to that of equity. Its having authority to apply equitable principles does not entitle a court to reach a capricious decision in each particular case, but to reach that decision which, in the light of the individual circumstances, is just and right for that case. Equity is thus achieved, not merely by a singular decision of justice, but by the justice of that singular decision.

26. This conception of equity, not as a correction or moderation of a non-existent rule of law, but as a "lead rule" well adapted to the shape of the situation to be measured, is the one which solves the fundamental dilemma arising in all cases of continental shelf delimitation : the need to maintain consistency and uniformity in the legal principles and rules applicable to a series of situations which are characterized by their multiple diversity.

5. Non-Existence of a Presumption in Favour of Equidistance

27. A second and related view has also been expressed. This gives to equidistance the rank of a privileged method, enjoying, as it were, a presumption in its favour, so that it must be applied unless those arguing

for the rejection of its application succeed in demonstrating that its results are extraordinary, unnatural or unreasonable. If this demonstration fails, then, according to this view, equidistance should be followed strictly.

28. Such a view does not correspond to the law on the subject, as it was declared in the 1969 Judgment of the Court, developed in the 1977 Arbitral Award, codified at the Third Conference on the Law of the Sea and established by the Parties to this case in their Special Agreement. According to all those precedents no method is privileged or enjoys the advantage of a presumption in its favour. All are to be judged by their results and applied only to the extent that they lead to an equitable solution.

29. The Court in 1969 not only found that equidistance was not obligatory ; it also said that this method was likely to produce inequitable results, particularly in delimitations between adjacent States. The Court said that "in certain geographical configurations, *which are quite frequently met with,* the equidistance method, despite its known advantages, leads unquestionably to inequity" (para. 89, emphasis added). And in the opinion of the Court this occurs when, for instance, there is a concave coast or a straight coastline with the coasts of adjacent countries protruding immediately at a right angle.

30. Furthermore, the 1977 Award asserted that between the notions of equidistance and special circumstances there was not the relationship which exists between a rule and its exceptions, and concluded that Article 6 of the 1958 Convention "gives particular expression to a general norm" of customary law requiring the application of equitable principles, as declared by the Court in 1969. Thus "the question whether another boundary is justified by special circumstances is an integral part of the rule providing for application of the equidistance principle" (para. 68). For this reason the Court of Arbitration rejected the United Kingdom's claim that France had the onus of proving the existence of special circumstances. This rejection signifies that there is no presumption in favour of equidistance.

31. The law established in 1969 and 1977 was codified in the successive texts of the Third Conference on the Law of the Sea. If one compares all these texts with Article 6 of the 1958 Convention one cannot avoid the conclusion that the emphasis has been displaced from equidistance to equity, equidistance being simply one method available among others for reaching an equitable solution. One of the main protagonists of the Conference, commenting on the new accepted trends on the subject has stated that at the Conference, in the various versions of the texts, there was a "toning down of the significance attached to the median line principle [1]". This "toning down" has gone so far that the terms "equidistance" or

[1] Cited in E. D. Brown, "The Continental Shelf and the Exclusive Economic Zone : The Problem of Delimitation at UNCLOS III" in *Maritime Policy and Management,* 1977, 4, p. 400.

"median line" have disappeared altogether from the text of Article 83 of the draft convention. According to the new text, in order to be applicable, any method must ensure an equitable solution. Consequently, the *onus probandi,* the need to demonstrate the attainment of an equitable result rests equally on those who advocate equidistance as on those who advocate a different method.

6. New Accepted Trends at the Third UNCLOS

32. Article 83 was recently incorporated in the draft convention, after a long and protracted negotiation of what became one of the most difficult "hard core" issues at the Conference. It is true that the significance to be attached to Article 83 of the draft convention and to previous texts of the Conference has been questioned on the ground that they cannot be considered as having already become rules of customary international law.

While the Special Agreement empowers and even obliges the Court to take into consideration "the new accepted trends at the Third Conference on the Law of the Sea", both Parties have agreed that the Court is not empowered to regard as principles and rules of international law new trends merely because they have emerged during the Conference and have gained a place in the negotiating texts. They have pointed out that according to the Special Agreement they must be "accepted trends", in other words, they must be, or have become, rules of customary international law.

33. There is, however, a certain difference between the Parties. While Libya has maintained that position strictly, Tunisia has advanced a somewhat broader interpretation of the clause in the Special Agreement. It observed that if such an interpretation is rigidly maintained, then "the mention of this category in the Compromis would have added nothing to the principles and rules of international law" and consequently, this reference to "new accepted trends" would have no legal effect at all. The submission was then made by Tunisia that even if a new accepted trend does not yet qualify as a rule of customary law, it still may have a bearing on the decision of the Court, not as part of applicable law, but as an element in the interpretation of existing rules or as an indication of the direction in which such rules should be interpreted.

34. This is, in my opinion, the correct view of the Special Agreement and the only one which assigns practical effect and an independent meaning and significance to the reference to new accepted trends. As the Court has said, "no method of interpretation would warrant the conclusion" that this reference is meaningless (*I.C.J. Reports 1971,* p. 35).

35. Therefore, it is legitimate to take into consideration that the whole process of the Conference is indicative of a new accepted trend, which is to minimize and "tone down" the role assigned to equidistance in Article 6 of the 1958 Convention. These Conference texts signify that equidistance is a method and not a principle ; that it is no longer a privileged method or one having pride of place ; that, like all others, it must be judged by its success in achieving an equitable solution, and, finally, that the application of equidistance and of equitable principles are not to be viewed as two distinct and successive phases, nor as requiring that equitable principles are only to be resorted to after applying equidistance, in order to correct its result. There is no such succession in time and the process must be a simultaneous one. All the relevant circumstances are to be considered and balanced ; they are to be thrown together into the crucible and their interaction will yield the correct equitable solution of each individual case.

36. Finally, the "toning down" of equidistance has been reflected in the terms of the Special Agreement, which orders the Court to apply equitable principles and does not mention equidistance at all. This is confirmed by the fact that neither of the Parties invoked equidistance in its pleadings or submissions.

PART II. THE CONCEPT OF NATURAL PROLONGATION

1. The Parties' Contentions

37. The two Parties agreed in considering that the fundamental and most relevant circumstance in this case consists in the fact that the shelf area to be delimited constitutes the "natural prolongation" of their respective territories. The Parties also agreed in that they regard the concept of "natural prolongation" as one primarily or exclusively determined by certain physical facts, and their disagreement only appeared at the stage of identifying the precise facts which constituted, for each of them, the external evidence of that "natural prolongation". For Tunisia, its "natural prolongation" was evidenced by the geomorphology of the sea-bed, which, so it was contended, reproduces the contours of the Tunisian coast, and by its bathymetry, which provides identifiable limits to the shelf and shows that its "natural prolongation", with the sequence of shelf, slope and rise, has an eastwards direction. Libya, on its part, invoked the geological evidence and the theory of plate tectonics to demonstrate its contentions as to the affinity between the shelf and the landmass to the south, and thus to show that the "natural prolongation" occurred in a northerly direction. This it confirmed by the existence of a fault line and a parallel "hingeline" from west to east. Both Parties also coincided in considering "natural prolongation", thus understood, as the unqualified and controlling prin-

ciple or circumstance which should govern, above everything else, the delimitation of the area.

38. As a result of the position adopted by the two Parties the Court was placed in the situation of being asked to decide this case exclusively on the basis of the conflicting scientific evidence presented to it by expert oceanographers and geologists. Such evidence, even if very ably explained by the Parties' respective counsel, was not only of a very specialized and somewhat speculative character, but it was strongly contested by the other side, not only as to its relevance and interpretation, but also in respect of the facts alleged in support. The impression gained from the lengthy and instructive discussion was that the criticism by each Party of the scientific arguments presented by the other was far stronger and more convincing than their affirmative contentions. The consequence was that the Court could not decide the case either on the basis of the data of bathymetry and geomorphology, disputed as to the facts and running contrary to judicial precedents and State practice, nor on the basis of a sea-floor spreading, tectonic plate and continental drift idea which is still a theory described by one of its proponents as an "essay in geopoetry [1]".

39. Moreover, the case could not be decided by choosing one of the rival scientific theories of "natural prolongation" for a more fundamental reason, namely that the basic premise upon which both Parties based their cases is not, in my view, a correct one. This is so, in the first place, because the legal concept of continental shelf, as defined by the applicable rules of international law, is not determined by the facts of "natural prolongation" as they have been understood and alleged by both Parties. It is incorrect, furthermore, because continental shelf delimitation is not governed in an unqualified and exclusive manner by such a notion of "natural prolongation". For these reasons it must be concluded, as the Court has concluded, that the decision of this case is to be based on legal principles, putting aside the expert evidence submitted by the Parties.

2. The Legal Definition of Continental Shelf not Based on Geology or Geomorphology

40. A definition of the continental shelf was made in Article 1 of the 1958 Convention, a provision which the Court considered in 1969 "as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf" (para. 63). As is confirmed by its *travaux préparatoires,* this Article divorced the legal definition of continental shelf from the geological and geomorphological

[1] Hess, as cited by John Noble Wilford, *The Mapmakers,* New York, 1981, p. 292.

facts which were at the origin of the doctrine. It is true, as the Court recognized in 1969, that "the institution of the continental shelf has arisen out of the recognition of a physical fact", a physical fact present in "most coastal States" (para. 95) (or "generally" as the United States press release of 1945 says) namely, the existence of a species of platform which extends around the continent until a substantial break in gradient occurs, leading to abyssal ocean depths.

41. However, in the process of codification and progressive development of this doctrine, an important element of contemporary codification practice made itself felt ; the interaction between legal experts and governmental observations. The International Law Commission and the 1958 Conference were confronted with the observations raised by certain States on whose coasts the physical facts which were at the origin of the doctrine presented themselves in a different manner or did not exist at all. Chile, for instance, observed to the International Law Commission that that country, as well as other Latin American States on the Pacific coast, had no continental shelf in the geomorphological or geological sense, or had only a very narrow one owing to the fact that the sea reached oceanic depths at a very short distance from the shore. It pointed out that a purely geological definition of the continental shelf would discriminate against them.

42. In order to deal with this situation, and thus preserve the principle of equality of coastal States, the International Law Commission, following the recommendation of an Inter-American Specialized Conference, added the test of "exploitability" in its final draft, which was discussed and finally accepted at the 1958 Conference. It is clear from the text of Article 1 that the right of the coastal State to explore and exploit the submarine areas adjacent to its coast does not depend on the existence of a continental shelf in the geological or geomorphological sense. This is confirmed by the *travaux préparatoires,* for the International Law Commission commentary to this Article states :

> "the Commission decided not to adhere strictly to the geological concept of the continental shelf. The mere fact that the existence of a continental shelf in the geological sense might be questioned in regard to submarine areas where the depth of the sea would nevertheless permit of exploitation of the subsoil in the same way as if there were a continental shelf, could not justify the application of a discriminatory legal régime, to these regions." (*International Law Commission Yearbook,* 1956, Vol. II, p. 297, subpara. 6.)

43. A similar point, which was also considered by the International Law Commission and the Conference, was raised by Norway, which pointed out that :

"There may be a stretch of deep water near the coast and areas of shallow waters further out. That is for instance the case outside the coast of Norway . . . It would obviously be most unfair if Denmark, Germany, the Netherlands and the United Kingdom should share between them the whole North Sea, while Norway should be excluded because of the above-mentioned belt of deep water." (*International Law Commission Yearbook,* 1953, Vol. II, p. 261.)

44. This situation was covered when the purely bathymetrical definition of the shelf, which had been adopted by the Commission in 1953, was modified and enlarged in 1956 by the addition of the "exploitability" test. In consequence, treaties were entered into by Norway with other countries bordering the North Sea, according to whose terms the existence of the Norwegian trough did not prevent Norway having sovereign rights in the sea-bed beyond it. All this demonstrates that the facts of geomorphology, as well as those of geology, did not constitute a controlling factor in the legal definition of the continental shelf or in the recognition of sovereign rights for its exploration and exploitation.

3. The 1969 Judgment and the 1958 Definition

45. Both Parties relied extensively on the use of the term "natural prolongation" employed by the Court in several passages of its 1969 Judgment. They invoked this expression as constituting a sort of definition of the concept and nature of the continental shelf. However, in the light of the text and history of Article 1 of the 1958 Convention, the use by the Court of that formula cannot be interpreted in the sense and with the meaning attributed to it by the two Parties.

46. Such an interpretation would imply that the Court meant in 1969 to reject the existence of a continental shelf and to deny the exercise of continental shelf rights in those cases in which it could not be said (as in the cases of Chile and Norway) that there was a "natural prolongation", in the geological or geomorphological sense, of the continental shelf beyond the shore. That would be attributing to the Court the intention, by using these terms, of revising or amending the definition contained in Article 1 of the 1958 Convention. This would be unthinkable, when it is also recalled that the same Judgment proclaimed that Article 1 represented a rule of customary international law. Consequently, it is not possible to interpret the term "natural prolongation" in the 1969 Judgment as reintroducing into the definition of the continental shelf the geological and geomorphological elements which had been left out by the International Law Commission in 1956 and by the Conference in 1958.

47. If "natural prolongation" were to be interpreted as requiring the existence of certain facts of geology or geomorphology in order to define the nature of the continental shelf, this would entail that the existence of

those physical facts would be decisive for the recognition or denial of continental shelf rights. The phrase, thus understood, would then put in question and challenge rights possessed *ab initio* by virtue of Articles 1 and 2 of the Convention by those States which could not show the existence of a "natural prolongation" from the geological or geomorphological point of view. Far from making such a challenge, the Court in 1969 referred, in general terms, to the right of "the coastal States" in respect of the "submarine areas concerned" and described it as an inherent right. And it clearly recognized that a physical shelf was not present in every case, since it stated that "the continental shelf is, by definition, an area *physically* extending the territory of *most* coastal States into a species of platform" (para. 95, emphasis added).

48. This interpretation is confirmed by the fact that several Members of the Court in 1969 had taken an active part in the work of the International Law Commission and the Geneva Conference, where these questions were discussed. Others, like Judge Ammoun, cited in his separate opinion the following quotation from Professor Henkin :

> "since geology was not crucial to the legal doctrine, it was difficult to resist claims of coastal States that had no geological shelf, whether in the Persian Gulf or in Latin America" (*I.C.J. Reports 1969,* p. 111, footnote 5).

49. Since geomorphology and geology were not admitted as the tests for the existence and recognition of the right to explore and exploit adjacent submarine areas, they cannot constitute by themselves valid grounds or applicable criteria for continental shelf delimitation. It would be contradictory to recognize that Chile, Peru or Norway possess continental shelf rights, as was done in 1958, despite the existence of deep depressions and regardless of the geological identity of the rock strata, and at the same time to deny these same rights to State A or to State B, setting a limit to their continental shelf rights, on the sole ground of the existence of a trough or depression, or by reason of the sea-bed contour, or of a certain change in the geological composition of the subsoil.

4. The New Definition in the Draft Convention at the Third UNCLOS Conference

50. It has been said that the Court's formula of "natural prolongation" received new vigour and a definite physical meaning by its inclusion in Article 76 (1) of the draft convention at the Third UNCLOS. However, the phrase "natural prolongation" was incorporated in Article 76 (1) because its connotation – of a projection seaward from land – was of use in justifying the extension of the continental shelf doctrine to comprise both

the continental slope and the continental rise "to the outer edge of the continental margin". Thus, the Court's formula, with a meaning different from that attributed to it in the 1969 Judgment, became a trump card for the States which were successful in advocating at the Conference what has been described as the "broad shelf school".

51. But the new definition in Article 76 (1) provides, as a second alternative, that a coastal State is entitled to a continental shelf "to a distance of 200 nautical miles from the baselines" when the outer edge does not extend to that distance. This second alternative has, even more categorically than did Article 1 of the 1958 Convention, done away with the requirement of a geological or geomorphological continental shelf, thus destroying the conception of "natural prolongation" advocated by both Parties in this case. What makes this conclusive is that, despite certain ambiguities in its drafting, the alternative 200-mile definition is obviously made independent of the criterion of natural prolongation : in the second part of the formula, after the word *or,* the requirement of "natural prolongation" ceases to apply. This new method of defining the continental shelf by laying down an agreed distance from the baselines definitively severs any relationship it might have with geological or geomorphological facts. The continental shelf extends, regardless of the existence of troughs, depressions or other accidental features, and whatever its geological structure, to a distance of 200 miles from the baselines, unless the outer edge of the continental margin is to be found beyond that distance.

52. Libya had advanced the argument that while the first part of Article 76, paragraph 1, represents "existing customary law", the second part of the formula, the distance test, "is not customary law". In my view, if a distinction is to be made in respect of the legal status of the two criteria in Article 76 (1), it would have rather to be in the opposite sense. The extension of the shelf to the outer edge of the continental margin still encounters some opposition, and on the question of a corresponding payment of compensation by the States with a broad shelf a final consensus has not yet been reached (*Official Records,* UNCLOS III, Vol. VIII, p. 69). On the other hand, the criterion of "exploitability", which was designed to deal with the position of coastal States without a geological shelf, but was dangerously open-ended, has now been replaced by a criterion stated in terms of distance, which has the same objective. It is safe to assert that today the distance test of 200 miles has abrogated the exploitability test and consequently must be considered as having already crystallized as a rule of customary international law.

53. This is so because the exploitability test was formulated in Article 1

of the 1958 Convention, which the Court considered in 1969 to represent a rule of customary international law. A rule of customary international law, judicially recognized as such, has been abrogated or superseded by a new definition. In order to have this abrogating effect the new rule must necessarily partake of the nature of a rule of customary law. Only a legal rule may abrogate a pre-existing one. This is confirmed by the observation that it would be unthinkable that a State would try to exploit the submarine areas off the coasts of another State at less than 200 nautical miles from the shore, claiming in doing so that such an area "lies beyond the edge of the continental margin". This leads to another accepted new trend at the Third UNCLOS Conference.

5. The Exclusive Economic Zone and Shelf Delimitation

54. A confirmation of this conclusion and a further divorce from geological and geomorphological requirements results from another accepted trend at the Third UNCLOS, which is the widespread recognition of an Exclusive Economic Zone comprising the sea-bed and subsoil and the superjacent waters up to 200 miles from the baselines. In that area the coastal State has sovereign rights, for the purpose of exploring and exploiting all natural resources. The provisions of the negotiating texts and of the draft convention, and the consensus which emerged at the Conference, have had in this respect a constitutive or generating legal effect, serving as the focal point for and as the authoritative guide to a consistent and uniform practice of States. The proclamation by 86 coastal States of economic zones, fishery zones or fishery conservation zones, made in conformity with the texts of the Conference, constitutes a widespread practice of States which has hardened into a customary rule, an irreversible part of today's law of the sea.

55. It is significant that in the 1977 Arbitration, France contended that the 1958 Convention on the continental shelf was no longer in force by reason of the consensus on the Exclusive Economic Zone arrived at at the Third UNCLOS. The Tribunal could not accept this extreme view, but it is difficult to deny that, at least in the case of continental shelves not extending beyond 200 miles, the notion of the continental shelf is in the process of being assimilated to, or incorporated in that of the Exclusive Economic Zone (cf. Arts. 56 (3) and 60 of the draft convention).

56. As this process reaches its conclusion, the facts alleged by the Parties to govern delimitation of their continental shelves will completely lose any possible relevance or *raison d'être.* At least in the large majority of normal cases, the delimitation of the Exclusive Economic Zone and that of the continental shelf would have to coincide. The reason is that both of these delimitations are governed by the same rules, as is shown by the fact that at

the Third UNCLOS the corresponding Articles 74 and 83 are identical, and have been discussed jointly. This being so, and since delimitation would then comprise not just the sea-bed and subsoil, but also the superjacent waters for fishery rights and other uses, it would be even less justifiable to take into account geological and geomorphological factors of the sea-bed in order to effect such delimitation.

6. The Real Meaning of "Natural Prolongation" in the 1969 Judgment

57. The question which remains to be answered is what was the positive meaning attributed by the Court to the phrase "natural prolongation" used in numerous passages of the 1969 Judgment. The insistent use of this expression by the Court arose from the fact that all the Parties in the *North Sea Continental Shelf* cases constantly relied upon the principle of natural prolongation (para. 43 of the Judgment). But the Court, while accepting the concept, did not agree with the interpretation given to it by the Parties. In rejecting the Danish and Dutch interpretation, the Court gave a clear idea of its own understanding of the formula, when it stated, in the crucial paragraph 44 of the Judgment :

> "As regards equidistance, it clearly cannot be identified with the notion of natural prolongation or extension, since, as has already been stated (paragraph 8), the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's coastal front, cutting it off from areas situated directly before that front."

58. This statement makes it quite clear that for the Court "natural prolongation" is a concept divorced from any geomorphological or geological requirement and that it merely expresses the continuation or extension seawards of each State's coastal front. It means that the continuation of the territory into and under the sea has to be based on the actual coastline, as defined by the land frontiers of the States in question, since it is from the actual coastline of each State that the land territory continues into and under the sea. Consequently, the basic corollary of "natural prolongation" is the need to avoid the "cutting-off" of areas "situated directly before that front". For this reason the Court referred in paragraph 95 to the fact of "the appurtenance of the shelf to the countries in front of whose coastline it lies" and in paragraph 58 it reiterated that "a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other".

59. Thus, the meaning attributed to the expression "natural prolonga-

tion" in the 1969 Judgment, when properly analysed, is that it signifies the continuation or extension of the coastal front of the territory of every coastal State into and under the sea, "via the bed of its territorial sea" (para. 43), a territorial sea to which all maritime States are entitled. This "natural prolongation" exists in every case, whatever may be the characteristics of depth or geological composition of the sea-bed. To enjoy continental shelf rights all that a State needs is a coastal front to the sea, which is then naturally prolonged "via the bed of the territorial sea". And the "most natural prolongation" is that which continues or extends more directly into the sea and is not "cut off" by the extension or prolongation of the coastal front of another State. From this meaning of "natural prolongation" results the corresponding principle which both Parties in this case have recognized to be the other side of the coin of the principle of "natural prolongation" : the principle of "non-encroachment", a fundamental principle of equity to be examined later.

7. Geological Structure in the 1969 and 1977 Judgments

60. It is true that, as pointed out in the hearings, the Court referred, in the operative part of the 1969 Judgment, to "the physical and geological structure, and natural resources, of the continental shelf areas involved". But these factors were not mentioned under letter (C) of the operative part, which prescribes the principles and rules of international law governing the delimitation of shelf areas, but were mentioned separately of "natural prolongation", under letter (D), which indicates the factors which may "be taken into account" by the Parties "in the course of the negotiations". In other words, these physical and geological facts were not placed by the Court among the legal rules which govern or determine delimitation, as has been claimed in this case, but as factors which the Parties may take into account in negotiating their delimitation.

61. And there is a world of difference between the two situations. Physical features such as depressions, channels, sea-bed contours, geological structure, etc., cannot by themselves govern the determination of continental shelf boundaries. Likewise, natural land features, such as valleys, mountain crests, river thalwegs, etc., cannot by themselves determine boundaries between States. We would otherwise retrogress to the dangerous doctrine of "natural frontiers", which Rousseau demolished when he observed *"qu'elles aboutissaient à faire de l'ordre politique l'ouvrage de la nature"*. Those natural features can only become dry land boundaries when they have been subject to human occupation or have been agreed in treaties entered into by the neighbouring States as constituting their political frontiers.

62. But the area of the sea-bed and subsoil is barren of human population and cannot be acquired by occupation ; consequently, the political

and historical factors which have led to the establishment of natural frontiers on land are not present in the sea-bed. This means that continental shelf boundaries based solely on geological or geomorphological facts may only result from the agreement of the interested States, since there is no rule of international law prescribing the use of these features as dividing boundaries. And this is the reason for the distinction in paragraphs (C) and (D) in the operative part of the 1969 Judgment.

63. Likewise, the 1977 award refused to accept the Hurd Deep Fault Zone as a "feature capable of exercising a material influence on the determination of the boundary" (para. 107), stating that this feature "is placed where it is simply as a fact of nature, and there is no intrinsic reason why a boundary along that axis should be the boundary" (para. 108). Moreover, the Court of Arbitration added that :

> "to attach critical significance to a physical feature like the Hurd Deep-Hurd Deep Fault Zone in delimiting the continental shelf boundary in the present case would run counter to the whole tendency of State practice on the continental shelf in recent years" (para. 107).

64. When referring to State practice the Court of Arbitration probably had in mind not just the agreements made by Norway which disregarded the Norwegian trough, but also unilateral acts such as decrees and concessions which have been granted by numerous States which disregard deep depressions, including trenches and submarine canyons, and incorporate them as part of their shelf. This is the case, for instance, of the Soviet Union, Norway off its northern coast, Brazil, Venezuela, Canada and the United States off the coasts of California. (Prescott, *The Political Geography of the Oceans,* pp. 159-160 and E. D. Brown, *The Legal Régime of Hydrospace,* pp. 18 ff.)

PART III. THE EQUITABLE PRINCIPLE OF NON-ENCROACHMENT

65. In the operative part, letter (C), of its 1969 Judgment, the Court proclaimed the principles of "natural prolongation" and "non-encroachment" as two correlative principles, when it concluded that delimitation had to be effected :

> "in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other" (para. 101 (C) (1)).

66. It is common ground between the Parties that there are here two

fundamental and complementary conditions, since the principle of non-encroachment is inherent in the principle of natural prolongation ; the two are inextricably interwoven, and one is a reflection of the other. However, the Parties have expressed a fundamental disagreement as to how the principle of non-encroachment ought to be interpreted.

1. The Parties' Divergent Interpretations

67. Libya understands it is a prohibition upon either State crossing over to the other side of the appropriate line running seaward from the territorial sea-boundary, stating as the rationale of the principle, thus understood, that coastal States will not tolerate a sea-bed area immediately in front of their coasts being used by a foreign power.

68. Tunisia has taken issue with this interpretation, observing that by means of a series of semantic shifts, Libya

> "goes on to deduce a prohibition against encroachment on areas of continental shelf in front of the coasts of Libya, which, I think it will be agreed, is something quite different from the encroachment on the natural prolongation . . . Yet the Libyan Reply systematically uses the expression, encroachment of the shelf in front of the Libyan coasts, as synonymous with encroachment on the natural prolongation of Libya's land territory".

2. The Correct Interpretation of the Principle

69. The solution of this disagreement is to be found in the meaning which is to be attributed to the correlative notion of "natural prolongation". If, as stated above, the Court used this expression to describe the continuation of the coastal front of every coastal State, and not with a geological or geomorphological meaning, then the "non-encroachment" in front of and close to the coasts of a State is the correct interpretation of the principle. It is true that there may be geographical configurations in which a boundary line cannot avoid "cutting across" the coastal front of one State or of both. But the principle of non-encroachment, being an equitable principle, is not a rigid one. It admits a corrective element, which is the factor of distance from the coast. If the above-described geographical situation occurs, then the "cutting-off" effect should be allowed to take place at a point as far as it may be possible to go, seawards, from the coastal front of the affected State.

70. This interpretation is confirmed by the very *raison d'être* of the institution of the continental shelf as it appeared and developed in the middle of the present century. The reason which explains the wide and immediate acceptance of the doctrine was not so much the possibility it offered of exploiting the natural resources of the shelf, but rather the fact that it authorized every coastal State to object to the exploitation of the

sea-bed and subsoil in front of its coasts being undertaken by another State. At that time, only a handful of industrialized States possessed the technology required for such exploitation. Yet, all coastal States accepted the doctrine without hesitation mainly because of its negative consequences, namely, that it prevented a rush and grab for sea-bed resources being undertaken by a few States on the basis of the Grotian dogma of "freedom of the seas". It is for this reason that the 1958 Convention does not subordinate the acquisition *ab initio* of sovereign rights to actual exploitation or occupation, or even to a proclamation of these rights.

3. The German Proposal and the Reaction at the 1958 Conference

71. It is instructive in this connection to recall what happened at the 1958 Conference when the Federal Republic of Germany proposed to declare that "anyone is free to explore and exploit the subsoil of the sea outside the territorial sea" (*Official Records,* Vol. VI, p. 126). This proposal was forcefully and unanimously rejected. The strongest objection was made by the delegate from Peru, who pointed out that such a view :

> "would produce the absurd consequence that a State could exploit the natural resources of the continental shelf at a short distance from the coast of another State" (*ibid.,* p. 11).

Other delegations criticized the proposal on similar grounds, observing that :

> "it was necessary for a coastal State to protect itself against the possibility that other States might undertake exploitation of its continental shelf at short distance from its shores" (Lebanon, p. 14)

> "There would be a great ado if one State started exploiting the submarine resources within a very short distance of the coast of another State without first obtaining its agreement" (Brazil, p. 36)

since

> "One of those realities [of international life] was that no State could countenance the presence of foreign installations in a zone immediately opposite its coastal defences." (Argentine, p. 43.)

In a similar vein, it was pointed out that :

> "the exploitation of the natural resources of the continental shelf was generally connected with the erection of permanent installations which necessarily entailed the exercise of a State's authority" (USSR, p. 20)

and such exploitation

> "might – particularly where the extraction of petroleum was concerned – interfere with deposits within that territory. Both legally and politically, the presence of installations belonging to a foreign State would constitute a constant threat to the security of the coastal State" (Vietnam, p. 24).

72. Already the Truman Proclamation had invoked in its preamble the need for "self-protection" which "compels the coastal nation to keep close watch over the activities off its shores which are of the nature necessary for the utilization of these resources". There was, therefore, an immediate and almost instinctive rejection by all coastal States of the possibility that foreign States, or foreign companies or individuals, might appear in front of their coasts, outside their territorial sea but at a short distance from their ports and coastal defences, in order to exploit the sea-bed and erect fixed installations for that purpose.

73. Thus, the fact that a trough or ridge may appear close to the shoreline of a State, or that the strata of rock may be similar to that of certain sediments in another land territory, cannot be valid grounds for attributing a certain area of shelf to a certain State to the detriment of another "in front of whose coastline it lies" (para. 95 of the 1969 Judgment). This is the proper meaning of "natural prolongation" and of the correlative principle of "non-encroachment" of that natural prolongation.

4. The Principle of Non-Encroachment and Its Effects in the Present Case

74. In the light of the foregoing, none of the extreme positions claimed or suggested by the Parties – neither the prolongation northward of the terminal point of the land boundary, nor the eastward line determined by the crest of the ridges – could be accepted as compatible with the basic principles of international law on continental shelf delimitation, as expressed in the concepts of "natural prolongation" and "non-encroachment".

75. Encroachment is particularly to be avoided when a proposed boundary line brings a foreign State too close to the main ports of the other. The reason is that, as Judge Jessup recalled in his separate opinion in the *North Sea Continental Shelf* cases, quoting from the German pleadings :

> "From the point of view of exploitation and control of such submarine areas, the decisive factor is not the nearest point on the coast, but the nearest coastal area or port from which exploitation of the seabed and subsoil can be effected. The distance of an oil, gas or mineral deposit from the nearest point on the coast is irrelevant for practical purposes, even for the laying of a pipe-line, if this point on the coast does not offer any possibilities for setting up a supply base

for establishing a drilling station or for the landing of the extracted product." (*I.C.J. Reports 1969,* pp. 67-68.)

The two boundaries suggested in the Memorials of the two Parties come too close to the main ports which are the basis for their respective offshore exploitation : Sfax on the Tunisian coast and Tripoli on the Libyan one.

76. It is therefore necessary to examine what other principles and rules of international law on the subject and what other relevant circumstances of fact in the case may lead to an intermediate solution that, while respecting the principles of "natural prolongation" and "non-encroachment", as properly understood, will effect a more appropriate and equitable balance between the respective claims and interests of the Parties.

PART IV. HISTORIC FISHERY RIGHTS

1. Existence of Historic Fishery Rights

77. A circumstance which is relevant to the shelf delimitation which is the object of the present case is the existence of historic rights with respect to sponge fisheries. Historic fishery rights have been invoked by Tunisia with respect to two kinds of fishery : the sedentary sponge fisheries and the fisheries which are conducted by means of fixed installations in the shallow waters close to the Kerkennah Islands and the El-Biban shoals. Only the first type of fishery is relevant for the delimitation, since the second takes place too close to the shore to have any influence upon it. The existence of Tunisian rights over sponge fisheries has not been questioned by Libya.

78. While Tunisia has been the party emphasizing the relevance of historic rights with respect to sponge fisheries, Libya has also demonstrated that it has possessed and exercised rights identical with those of Tunisia with respect to the sponge fishery off the coasts of Tripolitania. The Tripolitanian fishermen have exploited sponge banks off their coasts at least since 1893 and rights of surveillance over sponge fisheries were invoked and exercised off the Tripolitanian coast after the Italian annexation in 1911. When becoming the authority in Tripolitania, the Italian Government regulated sponge fisheries off that coast in a manner analogous to that adopted by the French Protectorate in Tunisia. And these rights over sponge fisheries were recognized by the French Protectorate, whose authorities stated that the two "nations concerned had the strict right of exercising surveillance over the sponge-banks situate well outside the boundaries of their territorial waters".

2. Relevance of Historic Fishery Rights to Continental Shelf Delimitation

79. Generally speaking, the existence of historic fishery rights is a circumstance which is relevant to continental shelf delimitation. The *travaux*

préparatoires of Article 6 of the 1958 Convention, where the notion of "special circumstances" originated, leave no doubt that fishery rights in general were then considered as one of the "special circumstances" which might influence delimitation. (*Official Records* of the 1958 Conference, Vol. VI, p. 93.)

80. The argument has been propounded that the 1958 Convention on the Territorial Sea and the Continental Shelf, as well as the Third UNCLOS draft convention refer to historic rights only in the context of territorial sea delimitation, but not of that of the continental shelf. The explanation, however, is simple. It is not that historic rights are irrelevant or unimportant for shelf delimitation, but that there are, in this case, besides the historic factor, other special circumstances equally relevant. Consequently, the historic factor is included in the wider formula of "special circumstances", as the *travaux préparatoires* of 1958 indicate, and is undoubtedly contained within the broad terms of the Special Agreement : "the relevant circumstances which characterize the area ".

81. And the relevance of historic rights with respect to sponge fisheries is decisive in this particular case, when account is taken of the fact that the taking of sponges adhering to the sea-bed constitutes a form of exploitation of one of the natural resources of the shelf, according to Article 2, paragraph 4, of the Continental Shelf Convention – a provision which the Court found in 1969 to be part of customary international law. The taking of sponges, as of other living resources permanently attached to the sea-bed at the harvestable stage was considered by the International Law Commission and defined in the 1958 Convention, not as a sedentary fishery, but as a form of shelf exploitation, as much as is the extraction of oil or of gas. Consequently, the taking of sponges in the area was really an exploitation of shelf resources, which began in Tunisia and Tripolitania in the last century, and continued into the present century, thus long antedating the Truman proclamation.

82. It has been contended, however, that since continental shelf rights are defined as rights owned *"ab initio"*, then those historic rights which were acquired before the Truman proclamation should be set aside, and denied the nature of continental shelf rights, since they were not acquired *"ab initio"* but from occupation. This objection is fallacious. Naturally, rights with respect to sponge fisheries could only result from occupation because the *"ab initio"* doctrine did not appear until 1958. It was adopted at the Geneva Conference as a means of protecting coastal States which had not made a proclamation of their continental shelf rights and had no means of exploring or exploiting their resources. However, when the continental shelf doctrine was first enunciated, its proponents, including President Truman's advisers, found support in the existence of historic fisheries involving exploitation of natural resources attached to the sea-bed. A new

legal concept, consisting in the notion introduced in 1958 that continental shelf rights are inherent or *"ab initio"*, cannot by itself have the effect of abolishing or denying acquired and existing rights. That would be contrary to elementary legal notions and to basic principles of intertemporal law. It would be absurd to contend that the Truman proclamation or the 1958 Convention abolished or disregarded pre-existing rights over the continental shelf, when, on the contrary, they embodied or assimilated those rights into the new doctrine.

83. Other minor objections have been made with respect to the relevance and decisive character which must be attributed in this case to the taking of sponges from the sea-bed. It has been pointed out that these activities were carried out not by nationals of the Tunisian Protectorate or of Tripolitania but mostly by foreigners. This does not mean, however, that sovereign rights of the respective countries are not involved. Gas and oil exploration and exploitation are likewise generally carried out by foreign companies ; yet no one denies the sovereign rights of the coastal State which has granted the required concessions, licences or permits for those activities.

84. A similar objection is that sponge taking was only carried out in certain sparsely located banks. However, mineral resources are also extracted from certain sparsely located wells, but the sovereign rights of the coastal State extend to the whole area over which exploration permits are granted. In both cases what determines the political and economic interests of the coastal State is the control over offshore resources, rather than the control over an area.

3. The Tunisian Claim for a ZV 45° Line

85. The conclusion to be drawn from the foregoing is that there was in the area to be delimited an exploitation of shelf resources which was carried out in parallel by two sovereignties : Tunisia under French protectorate and Tripolitania under Italian administration. It was a contiguous shelf exploitation, and, as a consequence of the frequent problems that inevitably arose, a *modus vivendi* was reached, which constituted in fact a tacit shelf delimitation.

86. Tunisia has claimed that the area of its historic fishery rights over sponges "is defined laterally on the side towards Libya by the line ZV 45°" (Submission I.2). It is true that in 1902 the Tunisian authorities claimed that line as the easternmost lateral limit of their *"zone de surveillance"* over sponge fisheries. The record presented to the Court explains, however, the reason why the French authorities claimed the ZV 45° line before 1910 but dropped that claim in 1911 and afterwards. When the French authorities thought, before 1910, that the land frontier would follow the Wadi Fassi, the prolongation of that boundary into the sea had a 45° angulation (as

shown by Map No. 8 in the Libyan Memorial). But when the French authorities succeeded in 1910 in extending the land frontier to the Wadi El Mokta, the prolongation of that new land frontier into the sea had a different and considerably smaller angulation and the thesis of the prolongation of the land frontier was no longer convenient to Tunisia. This was the reason given by the Resident-General in Tunisia in a letter to Prime Minister and Foreign Minister Doumergue, to justify his recommendation not to insist on the 45° line based on the prolongation of the land frontier.

4. The Orfeo *Incident : French Protest and Italian Answer*

87. The record also shows that after the annexation of Tripolitania by Italy, the Tunisian claim for a ZV 45° line was consistently and firmly opposed by the Italian authorities, and that such opposition resulted in the establishment of a régime different from that of the ZV 45° line. An important part of that record is the correspondence filed by Libya relating to the incident between Tunisian and Italian authorities arising out of the arrest of three Greek fishing boats possessing Tunisian fishing licences, made by the Italian torpedo boat *Orfeo* on 26 August 1913. The arrest was made at a point 11° 42′ 14″ east of the Greenwich meridian, that is to say, within the ZV 45° line claimed by Tunisia.

88. The French authorities, through their embassy in Rome, presented to the Italian Foreign Ministry a formal protest stating that "the sponge-bank where the Greek vessels were carrying on their trade belongs to the body of banks over which the Tunisian Fisheries Department exercise surveillance". In consequence, the Note Verbale added that :

> "the Government of the Protectorate can in these circumstances only maintain its assertion of its rights, which are directly infringed by the seizure of vessels fishing with a Tunisian licence on a bank recognized to be Tunisian".

89. The answer to the preceding communication was given by the Italian Government in a Note Verbale of 2 October 1913 which reads in part :

> "Since a delimitation must exist between the water, and the sponge-banks thereof, appertaining to the Regency of Tunis and those of Tripolitania, the Ministry of Colonies has instructed the Governor of Tripolitania, for the time being and awaiting for the question to be settled by agreement between the two Governments, to limit his jurisdiction on sponge-fishing westwards within a straight line that, starting from the coastal boundary point with Tunisia, extends on the

sea normally to the direction of the coast at that point. That line, bearing approximately north-northeast, would appear provisionally to settle the question in the most natural and equitable way without compromising, even in a seaward direction, the rights of the two Governments over the sponge-banks appertaining to each of them respectively."

90. The record does not contain any reply from the Tunisian authorities to this communication. However, Libya has furnished two documents from French archives which explain why no answer was given. The first is an official letter of 2 February 1914 from the Resident-General in Tunis to the French Prime Minister and Minister for Foreign Affairs, M. Doumergue, referring to the arrests made by the *Orfeo,* where he examines "the position of the point of capture in relation to the imaginary line marking the maritime boundary of Tunisian and Tripolitanian waters". The Resident-General compares the ZV 45° line with the Italian line "starting from the Tunisian frontier and extending seawards NNE at right angles to the direction of the coast at this point", asserting that "the discrepancy of 23° between the Italian and Tunisian delimitations is of some importance". This constitutes a significant recognition by the French authorities of the fact that the perpendicular line proposed by the Italian administration was that of 22°. The official Note concludes by saying :

"There would thus be an evident advantage if the French Government could cause the Royal Government to accept as the limit of the Tuniso-Tripolitan waters a line starting from the frontier pyramid taking the direction N 45° E, but the question is not sufficiently important for us to insist on the maintenance of a possession which is not supported by tangible signs, and we can do no more than refer to Your Excellency's judgment as to whether one should not accept as the offshore boundary *('frontière de mer')* the line perpendicular to the general direction of the coast which has been indicated by Italy, as being a rational solution to a dispute which it is important to settle and for which the evidence is not sufficiently precise."

91. Libya has also presented a personal letter dated 29 January 1914, from the Resident-General to the French Prime Minister and Minister for Foreign Affairs, M. Doumergue, where, referring to the preceding official communication, he states that he had examined with Navy experts

"the question of our maritime frontier, and we agreed that it was necessary to modify the conclusion in the report which is to be addressed to you, and which, when in the form of a minute, called on you to insist that our line should be made to prevail over the Italian line".

The following reason is stated in explanation of this change of position :

> "Our line was roughly the prolongation of our land frontier. However, when that frontier was modified by the Treaty of Tripoli, we did not prolong the new line seaward. If the Italians were to draw it, the line would be more advantageous to them than a perpendicular to the general direction of the coast. It would give them part of the channel leading to the pocket of 3-metre depths, whereas at present they regard as theirs part of the pocket, but none of the channel."

5. The French-Italian "Modus Vivendi"

92. In the light of these documents, counsel for Libya contended in the hearings that "the situation which had arisen following the Italian Note of 1913 and the silence observed by the Franco-Tunisians" signified that the provisional solution suggested by Italy "had been tacitly accepted by the Franco-Tunisians". Undoubtedly the French Prime Minister and Minster for Foreign Affairs, advised by the French Resident-General in Tunisia, was fully competent to decide not to insist on the diplomatic claim which had been submitted to the Italian Government and thus tacitly accept the Italian proposal. A further indication of the tacit acceptance of the Italian line is that the Italian instructions of 16 April 1919, on the surveillance of maritime fishing in the waters of Tripolitania and Cyrenaica provided in Article 3 that :

> "As far as the sea border between Tripolitania and Tunisia is concerned, it *was agreed* to adopt as a line of delimitation the line perpendicular to the coast at the border point, which is, in this case, the approximate bearing north-northeast from Ras Ajdir." (Emphasis added.)

It is significant that on the frontier of Cyrenaica with Egypt the same Article establishes a line east-north-east but no mention is made of the existence of an agreement.

93. Counsel for Tunisia, in replying to these contentions, pointed out that the Italian Instructions of 1919 created on each of the Tunisian and Egyptian borders of Libya a buffer zone in the following terms :

> "I establish that the lines of delimitation mentioned above be moved in a direction parallel to their own selves, until the first shall have as its point of origin Ras Makabez [1] . . . In such a way there will be two areas of about eight miles each, the one toward Tunisia, included within the two lines with a NNE direction, passing one through Ras Ajdir and the other through Ras Makabez ; and that toward Egypt . . ."

[1] Ras Makabez is located seven nautical miles east of Ras Ajdir.

Counsel also stated that :

> "If one carefully examines the extent of this buffer zone and compares it with the ZV 45°, it will be found that the zone in question covered almost the whole sea area adjacent to the ZV 45° line."

He then argued that :

> "in its concern to avoid conflicts with Tunisia, Italy attributed to the area claimed by its neighbour a special nature, a nature different from that of the waters over which the Italian authorities intended to exercise their full sovereignty. In that area Italian ships could not seize foreign fishing boats."

In conclusion, he asserted that :

> "these instructions were the result of the firm attitude of the French authorities, and the subsequent desire of Italy to find what it called a provisional solution, a compromise. This compromise, which was lacking in certitude but was nevertheless fruitful, since no further incident occurred, was to continue until the end of the second world war."

94. In analysing more deeply the nature of what counsel for Tunisia had described as a provisional solution or a compromise which lasted until the end of the Second World War, counsel for Libya observed that the Italian Instructions provided with respect to the buffer zones that :

> "in these two areas, although the conditions for prohibition of fishing and the right to perform an on board inspection are still standing, the boats flying a foreign flag and not in possession of the Italian maritime authorities' permit shall not be seized, but rather ordered away, unless the position of the site within the borders where such boats were fishing illegally can be demonstrated in an irrefutable manner even afterwards".

Consequently, the buffer zone was not excluded from Italian naval jurisdiction, since foreign boats could be detained and inspected and ordered off, "which certainly presupposed that the waters of the buffer zone were Italian waters, because you may only order a vessel out of a zone which belongs to you". Furthermore, if the incident had occurred beyond all doubt within the limits, the Italian naval units "were under orders to proceed to seizure ; the tolerance was not to continue if the location of the infringement had been irrefutably established".

95. Both Parties thus recognized before the Court that a *de facto* compromise, a provisional solution or *"modus vivendi"* had been achieved by means of the buffer zone. But clearly the buffer zone proclaimed in the Italian Instructions presupposed the existence of Tripolitanian and not Tunisian jurisdiction up to the end of that buffer zone, that is to say,

laterally as far as the line perpendicular to the coast at Ras Ajdir, and seawards as far as the more removed sponge banks. A map furnished by Tunisia shows that the dense sponge banks off the Tripolitanian coast extended to the north well beyond the 34th parallel. Consequently, that perpendicular line extending beyond the 34th parallel constituted the compromise or the *"modus vivendi"* for the delimitation of the surveillance of sponge fishing in the area. Other documents emanating from the French authorities in Tunisia recognized that such surveillance of sponge fishing was effectively exercised by the Italian authorities in Tripolitania, since in these documents reference is made to "the frequent presence of Italian torpedo boats, which pursue (foreign fishermen) as soon as they cross the boundary".

6. Equitable Reasons which Compel Respect for the Historic Lateral Delimitation

96. There are fundamental reasons of equity and of law which compel respect for the historic lateral delimitation established along the perpendicular line NNE from Ras Ajdir. The most important of these equitable reasons was forcefully stated by counsel for Tunisia, in the following terms :

> "where any part of that zone has from time immemorial been exclusive to one of the coastal States, as in the case of Tunisia, the equities surely demand that it remain so ; not just for the positive reason of respecting those rights as they are today, but even more so because it is unthinkable that an area which has from time immemorial been exclusive to one State should as a result of the determination of the boundary of sea-bed and subsoil rights, now and henceforward become the exclusive fishery of the other State. That result cannot be right in law or equity."

97. It is obvious that this elementary principle of equity cannot operate only to the benefit of Tunisia, but must be equally valid for both Parties. As has been well said, "the principle in equity is that if a party invokes an argument against the opposing party, the argument must carry equal weight against itself". It is therefore unthinkable, to borrow the term used by Tunisian counsel, that the delimitation which existed during the colonial period should be revised or abolished and that a part of the shelf which was for almost 50 years exploited and controlled by Tripolitanian authorities should be transferred to Tunisia. Italian torpedo boats excluded from that area Tunisian sponge-fishing boats or foreign sponge fishermen possessing a Tunisian licence. This exclusion constituted an act of sovereignty and, as was contended in the Tunisian pleadings, such exploitation and

control resulted in the acquisition and exercise of sovereign rights over the continental shelf.

98. Both Parties were asked the question whether, if one Party has demonstrated possession of historic fishery rights over sedentary species in certain specified waters, it is possible to attribute to the other Party the exclusive right to exploit the mineral resources of the shelf below the sea-bed to which the sedentary species are attached. Tunisia, after invoking paragraphs 1, 2 and 4 of Article 2 of the 1958 Convention, and Article 77 of the draft convention on the Law of the Sea, answered in the negative :

> "It follows that, in the modern Law of the Sea, the exclusive rights of fishing of sedentary species, and the exclusive rights over the non-living resources, cannot be dissociated and belong to two different States. Such a division would furthermore involve insurmountable difficulties in practice."

Libya, for its part, answered the same question in the affirmative, because :

> "to allow an existing fishery for sedentary species to set the geographical limits of the continental shelf boundary would be . . . tantamount to allowing prior rights, acquired by a form of occupation, to override the inherent *de jure* rights of a coastal State based upon natural prolongation".

After indicating several instances in State practice of "vertical superimposition of rights", it pointed out that the incompatibility between fishing for sedentary species and oil-drilling might be avoided by directional drilling, by abstention from oil drilling or by compensation for the loss of catch.

99. The uniqueness which characterizes the sovereign rights of the coastal State with respect to all the natural resources of the shelf indicates that a dual régime, as suggested by Libya, cannot result from the rules of general international law. There may be examples in State practice of a "vertical superimposition of rights" but they can only result from special agreements accepted by the Parties and are not imposed by the general rules of international law which the Court is called upon to identify as applicable in the present case. Consequently, it is impossible to accept that, if one of the Parties to this case has demonstrated the existence of historic fishery rights over sedentary species in certain specified waters, the other Party can be recognized as having the exclusive right to exploit the mineral resources of the shelf below the sea-bed to which the sedentary species are attached. These equitable considerations determine the impossibility of accepting as the line of continental shelf delimitation in that area any line other than a straight line starting from Ras Ajdir and extending seawards beyond the 34th parallel perpendicularly to the direction of the coast at Ras Ajdir.

7. Reasons of Law which Compel Respect for the Historic Lateral Delimitation

100. Most African States, including the Parties to the case, have accepted the *status quo* of colonial boundaries at the time of independence. According to the resolution adopted by the African States in Cairo in 1964, the Assembly of African Heads of State and Government, "solemnly declare that all Member States pledge themselves to respect the borders existing on their achievement of colonial independence". The terms of this pledge determine its applicability not just to those borders established by treaty or existing on dry land. It also includes boundary arrangements and even tacit compromises concerning maritime frontiers which divide zones of sedentary fisheries.

101. Tunisia has accepted that the principle of stability of African colonial frontiers as well as the principle of State succession apply to this delimitation, despite the fact that this is a maritime boundary, and one not established by treaty but resulting from the conduct and the history of the relations of the former colonial powers. In the memorandum the Government of Tunisia circulated to the Secretary-General of the United Nations, the OAU and the Arab League, and to diplomatic missions accredited in Tunis, on 3 May 1976, referring to the ZV 45° line, it stated :

> "5. On this basis, and according to the preamble and Article III of the Charter of the Organization of African Unity which stipulate that African States should recognize the borders resulting from their independence, and the stability of such borders, the sea boundaries delimitation referred to in paragraph 2 is unalterable.
>
> 6. On the other hand, international practices and jurisprudence are unanimous in that the new State which replaces the colonial power (as is the case with both Tunisia and Libya) is bound, and shall continue to be bound, by any agreements fixing boundaries which may have been concluded by the colonial power."

It results from the foregoing that both principles of international law invoked by Tunisia in the above memorandum, namely, the colonial *uti possidetis* agreed by the African States and the principles of State succession compel respect for the delimitation resulting from the French-Italian *"modus vivendi"*.

102. The objection is made that the record does not contain positive evidence of the express acceptance by the authorities of the Tunisian Protectorate of the perpendicular line. This is true, but this is not the crucial point. The decisive and material points are, first, that there is conclusive evidence that the Italian authorities exercised effective surveillance of sponge fisheries off the Tripolitanian coasts, laterally, to the 22° line and seawards, beyond the 34th parallel ; second, that during a period of more than 30 years the Franco-Tunisian authorities did not oppose but acquiesced in such an exercise of effective surveillance ; third, that sponge

fisheries constitute a form of shelf exploitation *avant la lettre* ; fourth, that such surveillance confers sovereign rights over the sea-bed of the area in question, as convincingly contended in the Tunisian pleadings ; fifth, that it would be unthinkable for the Court to assign to one Party an area which was controlled by the other for more than 30 years, and, finally, that the international law principles of *uti possidetis* of African boundaries and of succession of States in respect to frontier delimitation also apply to the colonial delimitation of sponge fisheries, as was contended by Tunisia, with respect to the ZV 45° line, in its memorandum of 3 May 1976. Even if one denies the existence of an agreement, there was a *de facto* delimitation for the exploitation of sea-bed areas which was acquiesced to and thus it is one which the Court cannot now revise or ignore. Libyan proven historic rights are as worthy of respect as those invoked by Tunisia.

PART V. GEOGRAPHICAL CONFIGURATION

1. General Relevance of the Circumstance

103. Geographical configuration, that is to say the relationship between the coasts of the States in dispute, is undoubtedly a most relevant circumstance in any continental shelf delimitation. The Court said in its 1969 Judgment :

> "the principle is applied that the land dominates the sea ; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited" (*I.C.J. Reports 1969,* p. 51, para. 96).

And the 1977 Court of Arbitration stated that the validity of any method "as a means of achieving an equitable delimitation of the continental shelf is always relative to the particular geographical situation" (para. 84).

2. Substantive Inequity of Equidistance in this Case

104. By reason of the geographical configuration of the coasts of the respective countries the line of equidistance would in this case produce inequitable and disproportionate results to the detriment of Libya. This line would impinge on the basic principle of non-encroachment, producing a cutting-off effect by pulling the line too close to Tripoli, from which port all offshore oil exploration and exploitation is made by that country. This cutting-off effect was taken into account and rejected by the Court in 1969. It is true that the specific effect which the Court rejected in the *North Sea Continental Shelf* cases was the cutting off of the German coast resulting

from the combined effect of the two equidistance lines with the Netherlands and Denmark, which pulled the boundary inwards in the direction of the concavity of the German coast. In this case, the concavity of the Gulf of Gabes would not influence the line of equidistance, because the islands of Jerba and Kerkennah control that line.

105. However, with respect to the 1969 Judgment, the Arbitral Award of 1977 made the following pertinent remark :

> "Although its observations on this aspect of 'adjacent States' situations were directed to the particular content of a concave coastline formed by the adjoining territories of three States, they reflect an evident geometrical truth and clearly have a more general validity."

This is confirmed by the fact that in 1969, when deciding against the binding character of the method of equidistance, the Court had before it various maps and diagrams, not limited to the case of concave coasts, which illustrated the inequitable results produced by certain geographical configurations, if the equidistance method was applied rigorously in all cases of adjacent States. One of these illustrations is the geographical situation of Haiti and the Dominican Republic, which is shown in the map appearing in the second volume of Pleadings in that case, at page 28. The geographical relationship between the coasts of these two States is very similar to that existing in the present case, with one coast protruding at a right angle to the other and the presence of an island which, like Kerkennah and Jerba, swings considerably the equidistance line to the detriment of Haiti.

106. When introducing this map Professor Jaenicke, Agent and Counsel of the Federal Republic of Germany, stated that it illustrated :

> "the effect which the configuration of the coast has on the direction of the equidistance line if it is drawn for a boundary between countries lying adjacent to one another, a so-called lateral boundary. I mentioned that a very striking example of how much the equidistance line diverts the boundary before the coast of another State is the actual geographical situation before the coast of the Dominican Republic and Haiti ... The fact that the coast of the Dominican Republic projects here for some miles causes a diversion of the equidistance line to quite a considerable extent." (*I.C.J. Pleadings, North Sea Continental Shelf,* Vol. II, p. 27.)

107. The Court expressly took into account these maps and diagrams, saying :

> "It would however be ignoring realities if it were not noted at the same time that the use of this method, partly for the reasons given in paragraph 8 above and *partly for reasons that are best appreciated by*

> *reference to the many maps and diagrams furnished by both sides in the course of the written and oral proceedings,* can under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable." (Para. 24, emphasis added.)

And in paragraph 8 of the Judgment, the Court did not refer exclusively to the case of concave coasts, for it said that :

> "The effect of concavity could of course equally be produced for a country with a straight coastline, if the coasts of adjacent countries protruded immediately on either side of it."

Again in paragraph 59 the Court made express reference to the maps and diagrams when it stated :

> "As was convincingly *demonstrated in the maps and diagrams furnished by the Parties,* and as has been noted in paragraph 8, the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out."

108. This observation of the Court refers to the well-known fact that the effect of any distorting geographical feature upon adjacent countries by the use of the equidistance method is automatically magnified the greater the distance from the shore. Counsel for the Federal Republic of Germany had referred in this context to "the extreme, and even sometimes bizarre, results reached by strictly applying the equidistance method" (*I.C.J. Pleadings,* Vol. II, p. 57), which "can only be properly applied at short distances from the coast" (*ibid.,* p. 62). In this particular case the distorting effect would be such that Tunisian islands of no more than 180 square kilometres would attract about 2,000 square kilometres of shelf area. And if account is taken, as it should be, of the shelf area acquired by Tunisia by its 1973 law, five years after the critical date when the dispute arose, the equidistance line would give to Tunisia 70 per cent of the disputed area, leaving to Libya less than one-third of it. This would not be an "equitable solution" as required by the applicable law codified in the new accepted trends at the Third UNCLOS.

3. Procedural Inequity of Equidistance in this Case

109. The Court is not confronted in this case with the procedural situation existing in the *North Sea Continental Shelf* or Anglo-French cases, where one side advocated equidistance, the other pointed out its inequity in the case and the Court or the Tribunal rejected that method or varied it by diminishing its effects. Here the two Parties are in agreement that the

equidistance method not only is not of general application, but must be discarded in this particular case, on the ground that it does not lead to equitable results. Moreover, the Parties have admitted, in the Special Agreement, the existence of relevant circumstances and have imposed upon the Court the obligation to take them into account in its decision ; the existence of these circumstances logically excludes the application of the equidistance method.

110. While Tunisia had invoked this method in the diplomatic correspondence prior to the submission of the case to the Court, it abandoned that position completely in its Memorial and subsequent Pleadings. This had irreversible consequences. The Court has not received arguments for or against the general applicability of this method or concerning its geographical details in the particular circumstances of this case, other than a brief rejection in the Libyan Memorial, on the grounds of its inequitable results. For the Court to resort *proprio motu* to a method not advocated but strongly rejected by both sides would not only take the Parties by surprise, but it would imply deciding the case without the benefit of the Parties' assistance, and without having afforded them the opportunity of submitting arguments for or against its applicability to this particular geographical configuration. These would have included complicated issues of fact, such as a deeper analysis of the legality of the baselines, the effect of the islands and low-tide elevations on the line and the geographical determination of the controlling points. In this respect it is of significance that there have appeared marked divergences as to the effect to be given to islands and low-tide elevations in the opinions which advocate equidistance in the present case. This illustrates the danger of applying equidistance *motu proprio.* These are not mere procedural objections, but involve important considerations with respect to the right of defence in judicial proceedings and the reception of the Court's Judgment by the Parties.

4. The Configuration of the Tunisian Coastline

111. The most important geographical feature to take into account as a relevant circumstance in this case is that the Tunisian coast, which extends from Ras Ajdir to the west in a general direction facing north-east, turns at a certain point in the Gulf of Gabes, in a north-northeast direction. The line perpendicular to the coast established historically by the colonial Powers extends to the sponge fishing banks located further from the shore line. However, if that perpendicular line were to continue in the same north-northeast direction, after the point at which the Tunisian coast turns, then an effect of encroachment would be produced, particularly in respect of the port of Sfax, the banks and shoals of the Kerkennah Islands

and the promontory of the Sahel. Account must be taken, therefore, of the change of direction of that coast as it turns inside the Gulf of Gabes and then runs to the north-east.

112. In order to take into account this relevant geographical circumstance, and reflect the configuration of the Tunisian coast, a veering to the east should be introduced in the line of delimitation, parallel to the line of that coast. The first point at which such a change of direction begins to occur is in the neighbourhood of a locality in the Gulf of Gabes named "la Skira", some 15′ north of the 34th parallel. This coastal configuration should in my view have been taken into account by a first veering of the line of delimitation at this latitude, reflecting exactly the same angle of divergence which exists in the direction of the coastline. The exact location of the parallel where the change of direction occurs and the angle of inclination should have been left, in my view, to be determined by the experts of the Parties.

113. Further to the north, at the latitude of Ras Yonga, the eastwards projection of the Tunisian coast is accentuated and, consequently, a second veering of the line of delimitation should have taken place, reflecting again exactly the change of direction of the Tunisian coast at this latitude. Such a veering, the exact angle of which should have been left to be determined by the experts, would maintain within Tunisian jurisdiction the banks and shoals of the Kerkennah Islands and all the sponge banks traditionally exploited under the surveillance of Tunisian authorities.

114. This means that the historic rights over sponge fishing traditionally exercised by Tunisia, as well as those of Libya, would be respected and preserved in the continental shelf delimitation. But these historic rights, based as they are on prolonged exercise, and having an exceptional character, by their very nature, cannot be invoked or used as having a potential effect which would make them capable of a projection seaward, and thus as the basis for more extended and different maritime claims. Historic rights must be respected and preserved, but as they were and where they were, that is to say, within the limits established by usage and history. In particular, to transform these historic waters into internal or territorial waters in order to project a further claim to a continental shelf beyond them is unjustified.

115. An objection has been made to the above veering. It has been pointed out that this solution would only take into account the inclination of the Tunisian coast, while ignoring the south-easterly inclination of the Libyan coast. An immediate answer is that the alteration in the perpendicular line established by history is only caused by the inclination of the Tunisian coast, which, if ignored, would produce an effect of encroachment. A further reply is that the suggestion that exact consideration should be given to both coasts is, really, only another way of advocating the application of the equidistance method, which is unacceptable in this case for the reasons already given. Finally, the point is made that after the 34th parallel the two coasts cease to be adjacent and become opposite. This,

from a geographical point of view, is not so. After the 34th parallel, as well as before, the areas of shelf to be delimited lie off and not between the coasts of the two countries. This means that this is not a delimitation between opposite States but one which continues to be a lateral delimitation between adjacent States. This conclusion is confirmed by the findings of the 1977 arbitral award. In that case, the two States were opposite in the Channel area but the Court of Arbitration considered that in the Atlantic region, where the areas of shelf lie off, rather than between their two coasts, an analogy could be drawn with a lateral delimitation. The Court of Arbitration said :

> "in the Atlantic region the situation *geographically* is one of two laterally related coasts, abutting on the same continental shelf . . . Indeed, the Court notes that so evident is this lateral relation of the two coasts, *geographically,* that both Parties in their pleadings saw some analogy between the situation in the Atlantic region and the situation of 'adjacent' States." (Para. 241.)

5. The Test of Proportionality

116. In the *North Sea Continental Shelf* cases, the Court indicated as a possible pertinent factor in negotiations what it described as :

> "a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines" (*I.C.J. Reports 1969,* p. 52, para. 98).

117. The 1977 Court of Arbitration in the Anglo-French dispute rejected what it described as "nice calculations of proportionality" and refined this concept into a test of the equity of the results reached in a delimitation, saying :

> "In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. The equitable delimitation of the continental shelf is not, as this Court has already emphasized in paragraph 78, a question of apportioning – sharing out – the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines ; for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares . . . Proportionality, therefore, is to be used as a criterion or factor relevant in evaluating the equities of certain geographical

> situations, not as a general principle providing an independent source of rights to areas of continental shelf." (Para. 101.)

In the light of this pronouncement, proportionality is linked with the application of equitable principles, and its function is to test the equitable character of the method of delimitation used, in the light of the results to which it leads. It constitutes a test to be applied *ex post facto* to the results obtained through the appreciation of the relevant circumstances, and not a relevant circumstance or independent factor in itself.

118. Moreover, it is necessary to establish clearly and with fairness the basic premises which need to be adopted in order to make a comparison of proportionality possible. The first of these premises concerns the area to be taken into consideration. In this respect the Judgment defines it as delimited by Ras Kaboudia and Ras Tajoura and this appears as generally acceptable. Another premise is the measurement of the length of the relevant coasts. In this respect the 1969 Judgment is clear when it states that the coastlines are to be measured

> "according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions" (*I.C.J. Reports 1969,* p. 52, para. 98).

119. The most serious disagreement concerns the determination of the areas of shelf covered by waters appertaining to each Party which are to be taken into account in order to make this comparison. Libya has contended that in evaluating the effect of a proposed shelf delimitation one should consider all areas of shelf, whether under the waters of the high seas, the waters of exclusive fishing zones, the waters of the territorial sea and even any internal waters lying beyond the actual coast. Tunisia, basing its argument on the legal definition of the continental shelf as lying beyond the territorial sea, has contended, on the contrary, that territorial and internal waters are not to be taken into account in any comparison of equitable results.

120. This is not an issue that could be decided in the abstract and in a general way, but must be decided – as other questions involved in an equitable delimitation – in the light of the circumstances of the particular case. One such circumstance has to do with the baselines adopted by Tunisia in 1973. These baselines are, to say the least, of doubtful legality since they do not conform to the only restriction established by the Court's Judgment of 1951 in the Norwegian *Fisheries* case, namely, that the baselines should follow the general direction of the coast. These baselines, with a seaward point going as far as El-Mzebla, form a triangle which lies against the concavity of the Gulf of Gabes and which is not just different but opposite to the general direction of the coast. Furthermore, these

baselines are drawn on the basis of low-tide elevations, some of which are always below water while the applicable rules of international law forbid their use unless lighthouses or similar installations have been built upon them. It is obvious that lightbuoys on the water cannot fulfil this requirement nor is there any record of stationary fishing gear that far out to sea.

121. However, the legality of these baselines is not the question to be decided here. What is important is whether these baselines are opposable to Libya for the purposes of the application of the proportionality test. This question is determined conclusively by the fact that these baselines were proclaimed by Tunisia in 1973, five years after the critical date when the dispute arose, and that the 1973 law and decree modified radically the pre-existing Tunisian laws which did not constitute these waters either as internal or as territorial. Tunisia thus unilaterally appropriated a large expanse of the disputed continental shelf and this makes it difficult to claim with fairness that such an area should not be counted and should be left out of any comparison with the portion of shelf which each party will obtain from the Court's Judgment. In the *Minquiers and Ecrehos* case the Court said that acts subsequent to the critical date should be taken into consideration "unless the measure in question was taken with a view to improving the legal position of the Party concerned" (*I.C.J. Reports 1953,* p. 59). And this is the case here.

122. Furthermore, it would seem that in a case such as the present, which is different in this respect from the *North Sea Continental Shelf* cases in that there is an enormous difference between the areas of water claimed as internal and territorial by each Party, it would be inequitable not to take into account, for the overall evaluation of fairness and proportionality, the whole expanse of water, on the sole ground that legally the continental shelf begins at the outer limit of the territorial sea. To do so would be to commit the sin of formalism ; to allow that form of inequity which the Romans called *subtilitas,* that is to say, an exaggerated adherence to the strict letter of the law when equity demands a broader approach for the purposes of comparison.

123. Taking the above into account, a line as the one suggested of 22° with a veering parallel to that of the Tunisian coast, would have resulted in assigning to each Party almost 50 per cent of the area in dispute. Such a line of delimitation would thus have complied with the test of a reasonable degree of proportionality, and have achieved an equitable result.

PART VI. THE JUDGMENT'S FINAL CONCLUSIONS

124. It results from the foregoing that I have certain doubts and divergences concerning some of the final conclusions in the operative part of the Judgment. In particular, it seems to me that not sufficient significance has

been attributed to the 22° historic line and that a veering of 52° is too pronounced.

However, since I concur fully with most of the Court's legal reasoning, and the above indicated differences do not result in too great a disagreement with respect to the line of delimitation, I consider that I ought not to press these differences and doubts to the point of dissenting from the Court's decision.

(Signed) Eduardo JIMÉNEZ DE ARÉCHAGA.

SYNOPTICAL TABLE