DISSENTING OPINION OF JUDGE GROS

[Translation]

I have voted against the Judgment as a whole, for reasons which I shall set forth as succinctly as possible.

1. On account of the importance of the Court's interpretation of its role under the Special Agreement, I shall deal with this point first (the text of the Special Agreement is to be found in the recapitulation at the beginning of the Judgment, para. 2).

The problem that arose for the Court was that of the extent of its competence to answer the Parties' request as formulated in the Special Agreement which is the sole source of that competence. It is apparent from the positions taken up in the pleadings and at the hearing that the Parties disagree as to the precise scope of the request. More is in fact involved than a minor difference in the interpretation of Articles 2 and 3 of the Special Agreement, which are the subject of debate (Judgment, paras. 29 f.) ; the contention argued for by Libya is based on the denial of a principle which is vital for the Court : namely, that the Court is a judicial body the exercise of whose judicial power is governed by the Statute and the Rules. It is of course open to two States, by means of a Special Agreement, to give the Court a wider jurisdiction than is contemplated by the treaties in force between them or, in the formulation of their request, to limit the Court's competence to one or more specific points of law or certain specific facts. But what Libya claims to find in the Special Agreement is something quite different. This was disclosed by the replies given by the two States on 21 October 1981 to the question I put on 15 October 1981. In order to reduce the dimensions of this opinion, I shall not reproduce that exchange but simply draw the appropriate conclusions from it.

2. Concerning as it did the "binding force" of the judgment to be given, the question sought to draw the attention of the Parties to the rules to be found in the Charter, the Statute and the Rules of Court, as well as the practise of the Court. The first text is Article 94, paragraphs 1 and 2, of the Charter, which binds Members of the United Nations to "comply with the decision" of the Court (para. 1), and contemplates action by the Security Council in case of a Party's refusal to do so (para. 2). The other applicable texts on the subject of the binding force are Article 59, Article 60 and Article 61, paragraph 3, of the Statute, and Article 94, paragraph 2, of the Rules of Court, which reiterate the rule of the Charter that every judgment binds the parties to comply with it. Libya's reply to my question makes no reference whatever to the obligations deriving from these texts for every State Member of the United Nations ; the preamble to that reply takes as sole reason for acknowledging the binding force of the future judgment the Special Agreement, as interpreted by Libya :

> "Bearing in mind that Libya and Tunisia have agreed in *Article 3 of the Special Agreement* . . . to 'comply with the judgment of the Court and with its explanations and clarifications', *the position of Libya is as follows* :" (emphasis added).

Thus Libya represented everything as flowing solely from the text of the Special Agreement, without any mention of the rules in the Charter and Statute, and it did so deliberately : Libya did not refer to the obligation to respect and carry out the Court's judgment, as laid down in the Charter and Statute, because that would have undermined its contention that the Special Agreement provides for referral, after the Court has delivered judgment, to an unfettered agreement between the Parties which could thus adjust the terms of the Judgment. The Judgment will indeed be a decision of the Court but, for Libya, its binding force only exists to the extent that ["Bearing in mind that . . ."] it has "agreed" to comply with it by an undertaking given to Tunisia, not to the Court. In giving that reply, Libya was simply confirming what is, for that Party, a basic contention, namely that the final delimitation of the continental shelf *must* be effected by agreement. The Court should have brought this to light in the Judgment and gone on to remove all uncertainty, which has not been done in such a way as to bring home to the Parties the Court's view of the extent of its jurisdiction in the present case : "the seising of the Court is one thing, the administration of justice is another" (*Nottebohm, I.C.J. Reports 1953,* p. 122).

3. Article 2 of the Special Agreement connotes merely an obligation to negotiate the transference to a map of the delimitation decision taken by the Court, no more. Article 3 confirms this limited scope of the "agreement" by making provision for "explanations and clarifications" which would "facilitate the task of the two delegations, to arrive at the line separating the two areas of the continental shelf . . .". The reference to an agreement postulates an obligation to negotiate, which does not run counter to Libya's argument that the Special Agreement entails agreement being reached between the Parties. But what agreement is really involved ?

The obligation to negotiate has been well defined by the Court in a passage of an Advisory Opinion which has become a *locus classicus* :

> "The Court is indeed justified in considering that the engagement incumbent on the two Governments . . . is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements . . . But an obligation to negotiate does not imply an obligation to reach an agreement . . ." (*Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42,* p. 116 ; and cf. also the confirmation of this in the 1969 Judgment, *I.C.J. Reports 1969,* pp. 47 f., at para. 85, *sub (a),* and para. 87.)

The limits of the obligation are simple : to negotiate in a reasonable

manner and in good faith in order to achieve a result acceptable to both Parties, but without being obliged to reach agreement at any price. The obligation to negotiate is an obligation as to conduct, the definition of which in each case involves "standards" or "guidelines" deriving from the nature of the specific object of negotiation and flowing from international custom or practice ; they are thus legal in origin and scope, while not, strictly speaking, being legal rules or principles within the meaning of Article 38 of the Statute of the Court. But they are not political or purely factual elements with no legal colouring ; quite the reverse – since their existence depends upon their recognition by States as factors in resolving their dispute. In the present context, I need hardly recall, the negotiating would revolve upon a judgment of the Court, and thus on binding rules of law.

4. For the record, it is worth mentioning the principle of good faith, which may be construed in this instance as the obligation so to conduct oneself that the negotiations are meaningful, that is to say, that the judgment is carried out. There is no negotiation if each party, or either party, insists on its own position and refuses ever to contemplate any softening or change (cf. *I.C.J. Reports 1969,* p. 48, para. 87 *in fine,* and the *Lake Lanoux* Award of 16 November 1957, *ILR* 1957, esp. pp. 133-138). Various passages in the oral arguments go to show that such might be the outcome of the contention that the final delimitation can only be established by an agreement, so that the findings communicated by the Court are merely "guidance". The Judgment's criticism on this specific point (paras. 29 f.) ought consequently, in my view, to have been rounded off by envisaging all the consequences of a contention which the Court should have ruled out of order.

5. The point is that by taking up such a position, contradicted by Tunisia, Libya was interpreting the Special Agreement as if that instrument were capable of amending the rules of the Charter and Statute, and that is something which goes to the heart of the Court's judicial role. It has been argued that two States can always agree by treaty to modify their legal situation and that the judgment could not make an exception to this rule. This is a somewhat simplistic view of things when what the situation calls for is a decision whether the Court, being thus warned of the intentions of a party, can keep silent in the face of such an opinion. The question was whether, before the judgment which the Parties asked the Court to deliver and which must be binding on them, the Special Agreement could validly have reserved for them the right wholly or partly to modify the Court's jurisdictional act. That is an unacceptable notion for the Court, which does not give States opinions but declares to them, with binding force, what it holds to be the law applicable to the dispute submitted to it. And, having been warned that one of the States felt able to disregard this, while the other State took the opposite position, the Court ought to have asked itself whether it might not thereby be prevented from properly exercising its judicial function. In the Judgment delivered in the *Free Zones* case on 7 June 1932 (*P.C.I.J., Series A/B, No. 46,* p. 161), the Court said :

"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."

The Court ought therefore to have rejected the Libyan contention outright and to have declared that, apart from the drawing upon a map of the line already determined, nothing was negotiable in the Judgment it has delivered on the determination of the areas of continental shelf appertaining to the Parties ; this has not been done (cf. paras. 26 and 29 of the Judgment).

6. The absence of precision in the Judgment with respect to the binding force of the judicial decision it contains is just as serious with respect to Article 3 of the Special Agreement (cf. Judgment, para. 31).

Article 60 of the Statute makes provision for a request for interpretation "as to the meaning and scope" of judgments of the Court, upon the request of any party. If the two States in question had had in mind a request for interpretation, Article 3 of the Special Agreement would have been superfluous ; it is consequently to be supposed that that article was meant to pave the way to some other eventuality than interpretation. The Court has declined to meet this problem which, in my view, also controlled the argument as to how far its Judgment was to be taken as binding. It has been urged that what is entailed is a request for interpretation, or something more than or short of that. For various reasons, it is regrettable to have remained in this uncertainty. If Article 3 is a weakened version of Article 60 of the Statute, the question of its lawfulness arises – in the acutest way, moreover, since Article 60 allows "any party", and thus a single party, to submit a request for interpretation, whereas Article 3 provides that the two Parties "shall together go back to the Court and request . . .", which seems to imply the necessity of an agreement to go back and an agreement as to the points to be explained or clarified. The Court having refused to consider this problem I cannot deal with it in full, since it may actually arise within three or six months, but in so far as Article 3 of the Special Agreement, according to one interpretation of it, clinches the contention that the negotiation of the line to be drawn following delivery of judgment is in the hands of the Parties, without the Judgment being truly "final" (the word employed in Article 60 of the Statute), I find it necessary to dissociate myself both from the Court's refusal to pronounce upon this point of law and from the possible sequels of this abstention. Of these the most serious is that the protection afforded by paragraph 2 of Article 94 of the Charter in the event of a refusal to comply with a judgment would effectively be suspended, if not cancelled, should it not be possible for one Party alone to go back to the Court for an interpretation after a refusal by the other Party based on Article 3, which, according to the interpretation alluded to above, would enable it to say that there was no need for explanations or clarifications and that the Special Agreement laid down an obligation to negotiate, but not to reach agreement (cf. paras. 3-5 above).

7. While the task of ensuring the success of negotiations on the drawing of the line on the map has not expressly been conferred upon the Court, it does have that of ensuring full respect for its decision ; yet no precise bounds have been set to the claim, constantly asserted by one Party in the course of the proceedings, to possess a competence of its own to negotiate how the line is to be drawn. It is the Special Agreement which has determined, in Article 3, the relationship between the Parties with respect to the drawing of the delimitation line following the delivery of judgment, and with respect to the eventuality of an interpretation of the Judgment. The twofold refusal to examine whether that Article 3 is in conformity with Article 94 of the Charter and with Article 60 of the Statute leaves the Parties in confusion, and the supposed negotiations without any certain limits. For my part, I have no doubt that for the Court the two Articles referred to above prevail over any divergent construction of Article 3 of the Special Agreement. The argument that negotiations are to be held as to how the line shall be drawn, going so far as to modify the delimitation laid down in the Judgment, supposes that by the Special Agreement the two States waived their obligation to "comply with the judgment of the Court and with its explanations and clarifications" (Art. 3 *in fine*). Since Tunisia does not accept this argument, the Court ought to have settled the issue, i.e., the problem of the binding force of the Judgment, and thereby to have made clear what it was prepared to accept of the Parties' intentions, from the viewpoint of a proper understanding of its judicial role and the protection afforded by its Statute to States that bring cases before it. The Court had stated in 1963 that its Judgments must "remov[e] uncertainty from [the Parties'] legal relations" (*I.C.J. Reports 1963*, p. 34).

There could clearly be other difficulties with regard to Article 3 of the Special Agreement and its precise interpretation, but the question with which I have dealt here seems to me the major one, and there was nothing to prevent the Court from removing the uncertainty.

8. One word concerning the argument advanced to the effect that the situation created by the Special Agreement is analogous to that in the *North Sea Continental Shelf* cases, where the Court remitted the dispute for negotiation between the Parties : it suffices to recall that nothing in the course of those cases occasioned the slightest doubt as to the solemn intentions of all the Parties to comply with the Judgment, and the Special Agreement provided that "the Governments ... shall delimit the continental shelf ... by agreement in pursuance of the decision requested from the International Court of Justice". There was nothing in this to bring the Special Agreement into conflict with the Statute of the Court, since the application of the legal rules was reserved for the Parties by the request. The ways in which the Court was seised of the 1969 cases and the present case were entirely different.

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9. In the second place, I find myself in disagreement with the Judgment in respect of the way in which the Court set about the search for an

equitable delimitation of the continental shelf areas as between the Parties, which I find contrary to the concept of the role of equity in the delimitation of a continental shelf adopted by the Court in its 1969 Judgment.

10. To take paragraphs 83-101 of the 1969 Judgment, they contain various indications as to the applicable substantive rules and also the factors to be taken into consideration ; more especially, the Court affirms the inherent right of every coastal State to its area of continental shelf, with the corollary that apportionment is not what is called for, the obligation not to refashion geography, that of not encroaching upon any other State's area of continental shelf, the role of natural prolongation, the absence of any one method of delimitation solely applicable, the need to balance the equities, the ascertainment of the effects of particular geographical features, examination of the physical and geological structure and of the natural resources. All this was summed up as follows :

> "in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, namely :
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> *(b)* the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied, – for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved" (*I.C.J. Reports 1969,* p. 47, para. 85).

And the 1969 Judgment provided in its operative provisions that all these rules and factors must be taken into consideration. The competence of the Court, in the matter of delimitation, is definitely limited by this obligation to apply the rules of law and the relevant factors listed in that paragraph 85 ; it is a non-discretionary competence, not freedom to act as the Court pleases. Not only is a goal – equitable delimitation – laid down, which intrinsically is merely to pose the problem without providing the solution, but the rules and means for reaching it are also specified ; such is not the method which has been followed by the Court in the present case.

11. Thus the Court contents itself in paragraphs 113 and 114 of the Judgment with some generalities on the equidistance method without giving the reasons why it has not been employed. Moreover, there is no prior examination to justify such a decision, when the Court, in acting in this way, contradicts the indications it gave on this point in 1969. The reasons referred to in the first lines of paragraph 89 of the 1969 Judgment for discarding equidistance, which "in certain geographical conditions [could lead] unquestionably to inequity", were based on particular geographical configurations and on their unquestionably inequitable effect,

two factors that require examination. Yet in the present case nothing was done to investigate the precise effect on an equidistance line of the relevant geographical features in the area of continental shelf under consideration, the "unreasonable" (the word used in para. 89) results which the equidistance method might produce and any modifications to be therefore envisaged. If the Court stated in 1969 that the concurrent use of various methods could, in certain situations, enable the desired equitable solution to be achieved, there was, precisely, all the more necessity to try several methods, certainly including equidistance in the sector close to the coast and farther out, to compare their effects, to investigate whether disproportionate effects resulted from this, that or the other relevant geographical feature, to weigh the equities and only to decide in full possession of the facts. This was not done, and this lack of a systematic search for the equitable has produced a result the equity of which remains to be proved.

12. The Court's first task was thus to see what an equidistance line would produce in order to identify the "extraordinary, unnatural or unreasonable" result to which, it is said, this method might lead.

These adjectives, selected in the 1969 Judgment (para. 24), indicate the very exigent conditions to be met, and paragraph 96 of that Judgment emphasizes that "pronounced configurations" deserve the same consideration as normal or ordinary configurations. "Extraordinary, unnatural and unreasonable" are conditions that relate to the possible effects of the geographical configuration of the coastline, which must be "examine[d] closely", while keeping in mind the other rule that there can be no "question of completely refashioning nature" (paras. 85-92 of the Judgment). I do not think it necessary to dwell upon the extremely precise and detailed observations in the 1969 Judgment and would merely say that the relevant Tunisian coastline is as simple as could be wished, short of being entirely straight, and that the few particular features along that coastline do not produce "extraordinary, unnatural or unreasonable" results. It should be noted that the entire Gulf of Gabes region, of which the Parties did not leave one element unglossed, has no particular effect on the plotting of an equidistance line, any more than the island of Jerba. To consider that the junction of the north-south segment of the Tunisian coast with its west-northwest segment can be held unreasonable or even unnatural is astonishing (cf. a comparable situation in the delimitation of the continental shelf between Spain and France effected by the Treaty of 29 January 1974). It is thus not from the aspect of the coastline that a difficulty might arise in the first sector ; the sector more to seaward is no more complicated and the effects of an equidistance line are normal, provided no attempt is made to refashion geography.

13. A court of justice only has recourse to equitable principles if faced with a legal situation such that the result obtained by applying the rules of law on the delimitation between two States of an area of continental shelf appears inequitable on account of the presence in the area under consideration of geographical features the effect of which is disproportionate to

their relevance and the necessity of their employment for the delimitation. A court of justice does not modify a delimitation because it finds subjectively that it is less advantageous to one party than to the other, for this would be to embark upon the vain task of equalizing the facts of nature ; it notes, having taken into consideration all the factors contemplated by the applicable law, that some of those factors, which are relevant, have disproportionate or inordinate effects which, perhaps, may generate inequity – which remains to be demonstrated. Only then, after this has been shown to be the case, comes the problem of balancing the equities as between the two Parties (contrary to what is stated in paras. 70 f. of the Judgment) and their application to the construction of the delimitation line.

14. The 1969 Judgment holds "the consequences of a natural geographical feature" to be inequitable where, because of its size and the remoteness of an area from the coast, an irregularity in the coastline would have a magnified effect upon an equidistance line (*I.C.J. Reports 1969*, p. 49, para. 89 *(a)*). I find it impossible to point to a single "natural geographical feature" on the Tunisian coast that meets this double criterion : the construction of the line is governed in the north by the Kerkennah Islands and in regard to the southern coast by specific points on the coasts of the Parties. Islands separated from the coast by an area of shoals less than 12 miles wide, which is the case of the Kerkennahs, are not an abnormal geographical feature and must be employed as base points for lines of delimitation. In its Decision of 30 June 1977, the Court of Arbitration posed the question of inequity in the case of the Scilly Isles, taking account of the distortion in the direction of a line based on the Scillies (more than 31 miles from the coast) instead of a point on the coast of the United Kingdom, as compared with the direction of a line generated from the westernmost point of the French island of Ushant (cf. the principles stated and their application to the geographical facts in paras. 238-245 and 248-252 of the Decision). I shall quote only one sentence which, to my mind, also serves to define the present problem :

> "The question is whether, in the light of all the pertinent geographical circumstances, that fact [the mere presence of the Scilly Isles in the position in which they lie] amounts to an inequitable distortion of the equidistance line producing disproportionate effects on the areas of shelf accruing to the two States." (Para. 243 *in fine*.)

Let us pose the same question with respect to the Kerkennah Islands. The Judgment imposes a half-effect after finding that these islands are highly material. Without dwelling upon the contradiction between this assessment and the refusal to draw the proper conclusion from it, I would simply say that the map does not appear to me to reveal any disproportionate effects on a delimitation line which would be due solely to the presence of these material islands in the position in which they lie, while refraining from comment as to the existence of an inequitable deviation from a line which the Court has derived *ex nihilo*. Where the balance of interests is concerned, in this instance, a difference of some thousands of

square kilometres have tipped the scales to the detriment of one of the Parties, so that the methods behind this "equity" merited some serious checking.

15. Even applying, as the Judgment does, the idea that any method is as good as another for the delimitation of a continental shelf if it enables an equitable delimitation to be reached, it is necessary that the delimitation be equitable for both Parties – a *conditio sine qua non* – and the manner in which the Court has searched for what is equitable never included, by way of checking the method it had decided to adopt, any strict verification of the equity of the results in accordance with the indications given by the 1969 Judgment for the purpose of ascertaining whether an equidistance line is equitable. No method should be exempt from this control, when equity is involved. After contenting itself with a single method, the prolongation of the land frontier – even leaving aside the imprecisions of reasoning on which this method has been grounded in the present case –, the Court failed to crosscheck the equity of the results and confined itself to assertions unchecked by other methods, which it ought at least to have attempted to apply, even if it had eventually – though only after serious consideration – discarded them. It is not enough to say that the equidistance method would not have resulted in the most equitable delimitation, when the conditions for excluding it were neither ascertained to exist nor even given proper thought and the Court has failed to examine the extraordinary, unnatural and unreasonable results of its own manner of proceeding. In the Court's approach, the geographical configuration of the coasts relevant to the delimitation was left on one side, and the examination proceeded by estimates of directions and proportions, with *a priori* postulates being substituted for actual cartographic fact (cf., for example, para. 133 of the Judgment). All the geographical elements of the actual situation were ignored, from the viewpoint of their relevance not only to the delimitation but to verification of the equitable solution claimed to be reached with the aid of other techniques. In sum, the Tunisian coastline was effaced, and the Court reasoned as if some geographical features did not exist – it then found there was no need to calculate their possible effects on the delimitation to see whether they resulted or not in inequitable disproportion through their presence in the places where nature had put them. This is a perfect example of trying to unmake geography.

16. When the Court, in its 1969 Judgment, did not rest content with saying that a continental shelf delimitation should be carried out in accordance with equitable principles, but amassed safeguards by characterizing equity as the application of some lengthily expounded rules and principles of law, taking account of carefully specified factors, it was defining its conception of the role of equity in the delimitation of the continental shelf. While the Court is entitled to change its conception of equity in comparison with the 1969 Judgment, the use of a few quotations from that Judgment does not suffice to prove that no such change has taken place. What is in issue here is the substance of the law applicable to the delimitation of the continental shelf, not the old or novel formulae

employed but the decisions taken and the reasons given in the present Judgment ; and it is on those points that I differ entirely from the present views of the Court.

To simplify, I need only begin with a few general remarks. The question is : exactly what meaning should be ascribed to equity in the delimitation of continental shelf areas, leaving aside all discussion of equity in municipal law, equity in the philosophy of law and the diversity of possible equities ? A court only decides the case before it without being able to deliver judgments of principle with a general scope. Here, equity is the goal, and the way to reach that goal is to apply to the relevant facts such legal methods and reasoning as are suited to the various factors that go to make up that unique phenomenon which is the case referred to the court.

17. The present Judgment has chosen to divide the areas said to be in dispute, i.e., those where the claims of the Parties overlap, while declaring that this division produces the equitable result prescribed by the international law of delimitation. The ideological basis is made shaky by various elements which I shall briefly point out in subsequent paragraphs, but the main thrust of the Judgment's approach seems to be that, equity being the goal, proportionality is the method – the Court even says "principle" – for reaching it ; and the Court makes general use of it throughout the present Judgment. This goes much farther than the remark in the 1969 Judgment, under (D) (3) of the operative paragraph, indicating proportionality as a verifying factor in the case of a delimitation carried out in accordance with equitable principles, but not as a method for achieving that end. Similarly, the Decision of 30 June 1977 by the Court of Arbitration stresses this minor status of proportionality : "It is rather a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation" (para. 99) – and in various places the Court of Arbitration declared that, whatever the method used for achieving an equitable delimitation, that delimitation "is a function or reflection of the geographical and other relevant circumstances of each particular case" (para. 97). The present Judgment drastically alters the restricted role which properly belongs to the proportionality factor, and the justice of the calculations it employs is not borne out by any of the precautions taken in a delimitation which took account of the proportionality of the areas concerned (cf. sketch-maps 1, 2 and 3 in the article by José Luis de Azcárraga on the delimitation effected by the treaty between France and Spain, *Rivista española de derecho internacional,* Vol. XXVIII, pp. 131-138).

As between these two ways of looking at the matter there is a difference which, to my mind, is fundamental : the present Judgment has ruled out the geological argument and effaced the geographical configuration, and has chosen to draw lines of direction which no principle dictates and to adopt angles without justifying their selection in terms of any relevant facts. This is a novel approach which departs from the conception of equity expressed by the 1969 Judgment and applied by the 1977 Decision ; is it still a conception of equity ?

18. There is a profound gulf between an equitable solution to a problem of continental shelf delimitation which is founded upon the rules of law applicable to relevant facts accurately and fully taken into account, and an equitable solution which is founded upon subjective and sometimes divided assessments of the facts, regardless of the law of delimitation, through an eclectic approach to a result unrelated to the extant factors and without any verification other than calculations prompted by chance of coincidence. That is a solution not through equity, but through a compromise sought at one and the same time between the claims of the Parties and the opinions held within the Court.

On the occasion of the Judgments of 25 July 1974 *(Fisheries Jurisdiction, United Kingdom* v. *Iceland* and *Federal Republic of Germany* v. *Iceland, Merits)* and the Advisory Opinion of 3 January 1975 *(Western Sahara),* I stated my views on the sort of amicable conciliation attempted by the Court (see *I.C.J. Reports 1974*, pp. 148 f. and *I.C.J. Reports 1975*, pp. 75-77). The same observation holds good in this case. The present Judgment discloses more than any other consideration the quest for a solution equalizing the interests of the two States. There would be nothing objectionable in this if one were confronted here with an "equality within the same plane" or with that "geographical situation of quasi-equality" which calls for "abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result" (*I.C.J. Reports 1969*, p. 50, para. 91). These again are very precise conditions to be fulfilled before seeking to equalize the balance of interests, and they are not satisfied in the factual circumstances of this case ; the formula of quasi-mathematical equality by which the Judgment proceeds does not correspond to the relevant facts and is not substitute for a delimitation method based on the actual configuration of the coasts of the two Parties instead of coastlines as transformed by estimates of angles or directions in a veritable reconstruction of geography.

19. Much more is here involved than a difference of opinion as to how equity should be conceived : what is at issue is the decision dividing a continental shelf between two States which requested that it be delivered in accordance with the law. If a State claiming a right to an area of continental shelf really possesses that right such as it describes it, it is not equity to deprive it of it but an error of law, and therein lies a far-reaching complaint since the judgments of the Court are irreversible as between the Parties. Equity is not a sort of independent and subjective vision that takes the place of law. The Judgment states that there can be no question in the instant case of applying *ex aequo et bono.* Statements are one thing, the effective pronouncements of the Judgment are another. For the foregoing reasons, and those I give below, it is not equity which has struck me as presiding over the construction of the Judgment.

20. The first "historical justification" of the line adopted by the Court is devoid of either historical or juridical relevance. It involves justifying the maintenance of a limit fixed unilaterally by Italian Instructions of 16 April 1919 issued by the governor of the colony with a view to the introduction of

a régime for the surveillance of fishing and coastal traffic, a text which became ineffective with the advent of the 1940 war ; this was a strictly functional limit lacking all pretension to be anything else, for at a period when the territorial waters were three miles broad, as the text points out, it was for the purposes of this special policing of fishery concessions and local traffic that it was extended into the high seas. How is it possible to believe that a specialized maritime limit extending into the high seas could, at the period in question, have been tacitly accepted as dividing areas of the high seas which were not by any token subject to the sovereignty of States as then defined by international law ? This is a succession of unfounded hypotheses and impossible juridical conceptions. Well may the Court now regard a "historical" buffer zone as a *modus vivendi de facto* : legally speaking, it is still nothing more than it was between 1919 and 1940, that is, the unilateral claim of one State to surveillance of its sedentary fisheries. Retroactively to cast the mantle of historical justification over this zone – which is, besides, an imprecise area, for it is not defined on the map – is a misuse of words which voids them of all import (cf. paras. 93-95 of the Judgment, dealing with these Instructions of 1919, which were based on an alleged agreement, neither identified nor dated, and "approximately" delineate an area of surveillance without giving any co-ordinates : complete text in Ann. 43 to Libyan Counter-Memorial, Vol. II). Tunisia has never ascribed to that demarcation any other meaning than related to the necessary surveillance of the respective sedentary fisheries of the two States ; one cannot pass from this to the notion of the boundary of territorial waters, and from the latter to the notion of the boundary of continental shelf areas, as if the confusion of categories were forensically acceptable.

The fact that the Parties have never reached agreement on the boundary of their territorial waters, right up to the present time when they have formally claimed in court that to do so lies within their competence, should have given the Court pause before it proceeded to construct this unforeseen consensus between two States which are purported to have thus, without realizing it, already settled their continental shelf delimitation problem long before they began negotiating about the boundary or referred the matter to the Court.

21. The second justification indicated by the Judgment in support of that segment of the line delimiting the continental shelf as between the Parties which runs 26° north-east from the starting-point of Ras Ajdir is the "line of adjoining concessions" of the two States which "corresponds furthermore to the line perpendicular to the coast at the frontier point" (Ras Ajdir) : that makes quite a few correspondences. The historical boundary elucidated in the previous paragraph coincides with the limit deriving from the perpendicular to the coast, which in turn coincides with the line between the concessions delineated by each of the two Parties. From these chance encounters the Judgment deduces something more than mere factual concordance : namely proof of the equitable character of the line delimiting the continental shelf as between the Parties. Each line purportedly consolidates the other : the historical, the perpendicular, the

line between concessions. One general comment first : a line cannot consolidate anything if it is fragile, and the sum of controversial theses remains a controversy. The historical line, as we have seen, represents an outdated demarcation for the policing of sedentary fisheries which cannot have any influence on a continental shelf delimitation line, which must be sought within its own appropriate legal framwork. The perpendicular to the coastline is a method of which the Court has not made any scientific use in the present Judgment, since it discloses no serious study of a perpendicular to a coastline which has moreover remained unspecified ; what the Court has been able to adopt is not a genuine perpendicular, which would necessarily have to begin by delimiting the two Parties' territorial waters – competence for which is not conferred by the Special Agreement and is formally refused by the Parties –, but an angle of 26°. So there has been no employment of the coastal-perpendicular method – neither line nor coastline is relied on. There is just an allusion to a coincidence between an undrawn line and an approximate angle – nothing is demonstrated.

22. So there remains the third argument from concordance : the line between the concessions. The line of the concessions is something other than a continental shelf limit and Tunisia, for its part, has formally indicated that "pending an agreement between Tunisia and Libya defining the limit of their respective jurisdictions over the continental shelf" (Judgment, para. 21), one licence-limit was defined by an equidistance line. It cannot tenably be argued that the Libyan concession line enjoys any validity whatsoever vis-à-vis Tunisia, which, by its conduct, its attempts to negotiate the limit of the continental shelf, and finally its recourse to the Court, has constantly shown that there was no accepted or acceptable limit as between the two States. The Court rightly declares that a line of concessions is a non-opposable unilateral act ; all that Tunisia's conduct can be seen as implying is that it has been waiting for delimitation to be effected by negotiations or by the Court, and to deduce from that attitude, from the failure of every attempted negotiation and from the submission of the matter to the Court that Tunisia, without realizing it and while expressing the reverse (Judgment, para. 21 *in fine*), has accepted the Libyan concession line is an error of law which destroys this basis for the initial segment employed by the Court. The Court's first finding was enough, moreover : no unilateral act for the delimitation of the continental shelf on the part of an interested State is opposable to another interested State – that is an axiom of international relations, and to assert the opposite would destroy the very basis of the theory of the continental shelf according to which it is to be delimited by agreement between the parties or by way of adjudication. That point is beyond the shadow of a doubt. But if the Libyan concession line is not opposable to Tunisia, by what coincidence does it become the delimitation line of the continental shelf and, on that account, opposable to Tunisia ? The transformation of the unilateral into the equitable remains unexplained. The Judgment has taken on this point a position which, in my view, is opposed to the applicable rules of law.

23. The same remark applies to the second angle of direction discovered by the Judgment for application to the sector farther out to sea. The angle of 52° supposed to represent a "veering" of the coast shows the persistent effacement of the relevant coasts ; at that position it is the Kerkennahs which influence any delimitation, not directions of the coastline. As for the reasoning given in paragraphs 128 and 129 of the Judgment in order to justify the angle of 52°, it merely serves to demonstrate that any calculation chosen for the purpose can be substituted for the facts of geography.

24. The fact that the Judgment relies on such controversial and fragile arguments for the deduction of a line is disquieting in itself ; history is silent, all that the present reveals is conflicting claims, and the construction of the equitable is no longer based on anything but unfounded calculations and assertions as to the facts of the case, the visible factors, the rules of the applicable law. But the gravest conclusion is that, as thus conceived, the Judgment does not provide a just solution to the problem posed. To term a limit and its motivation equitable is no sufficient proof of equity ; a judgment is only equitable if it establishes the law between the parties. This Judgment falls short of the mark, because the Court has not managed to present a solution which truly balances the interests of the Parties, and as the solution is not equitable for one, it cannot be equitable for the other. In seeking equality when the two States are not on the same plane, proportionality in arbitrary calculations, and in ignoring the relevant geographical peculiarities and their effect on the delimitation, the Judgment has strayed into subjectivism.

For the past ten years or so, States have been less and less inclined to present themselves before the Court ; when they have voluntarily chosen to come, the Court must answer their request and declare the law, not attempt a conciliation by persuasion which does not belong to the Court's judicial role, as long ago defined by the Court itself.

(Signed) André GROS.