SEPARATE OPINION OF JUDGE BASTID

[Translation]

I

1. Approval must be given to the finding of inadmissibility reached in respect of the request submitted by the Republic of Tunisia, under Article 61 of the Statute of the Court, for the revision of the Judgment given by the Court on 24 February 1982.

This decision is based upon lengthy considerations (paras. 28 ff.). Furthermore, as regards the subsidiary request for interpretation, the Court has at certain points referred back to the reasoning concerning revision (paras. 29 ff., 41, 45, 50 and 56). Certain observations are called for as regards not only the Court's findings on the inadmissibility of the request for revision but also the rejection of the subsidiary request for interpretation and that of the request for the correction of an error.

2. There is a clear distinction to be made as between revision and interpretation in respect of the circumstances in which the Court may in accordance with the Statute be induced to reconsider *res judicata*. Since the inception of the Court, requests for interpretation have given rise to a practice enabling one to discern the requisite conditions and the repercussions on the text to be construed. On the other hand, no request for revision had ever been submitted until the Application of 27 July 1984. Whether in certain circumstances this form of challenge to *res judicata* had ever been contemplated, and why, if it was, the idea was eventually dropped, remain unknown.

The Statute of the Court, while laying down the conditions of admissibility of an application for revision, is silent as to the effects of that application if deemed admissible. What would it imply to reopen the merits of a case, and to what extent should the case as a whole be reviewed ? Such a situation would call for an examination of the very concept of revision in the light of any existing practice of international tribunals and the, at times, conflicting practice of the various municipal judiciaries. But this question would not arise until after the delivery of a judgment declaring an application admissible.

Considering the difficulty of the problems to which I have just alluded, it will be realized that the conditions of admissibility are very important and deserve particular scrutiny. The Rules of Court of 14 April 1978 set forth the procedural requirements corresponding to the conditions the terms of which, embodied in Article 61 of the Statute, are the same as have existed ever since the Statute of the Permanent Court was drawn up.

3. Given the gravity of an application for revision, from the viewpoint

of the importance of its consequences, and having regard to the caution exercised by international courts in the light of the parties' situation as sovereign States, it appears essential at the outset to make sure whether it satisfies each of the conditions in question. Should any one of them not be fulfilled, the application will be inadmissible, whatever conclusion may be reached in regard to the others.

Strictness in weighing the question of admissibility is vital, otherwise, under colour of an application for revision, the Court might in fact find itself induced to rule upon considerations that would have belonged to the merits and on modifications of *res judicata* that might have been envisaged at that stage.

4. In the present case, the importance of the foregoing is evident not so much from the final rejection of admissibility as from the care taken to accumulate the various grounds of rejection on the basis of the requirements laid down in Article 61, and from the link with the subsidiary request for interpretation. It is to be feared that in future there may be an increasing number of applications for revision, whether alone or in conjunction with requests for interpretation, and that they may provide an opportunity for detailed commentaries, which may or may not be complicated by intervening changes in the composition of the Court called upon to pronounce on the revision.

5. That said, attention may be drawn to what was decisive, having regard to the terms of the Statute and of the Rules of Court. The submissions of Tunisia on 14 June 1985 refer to "a new fact of such a character as to lay the Judgment open to revision within the meaning of Article 61 of the Statute of the Court". The new fact (the text of the resolution of 28 March 1968 of the Libyan Council of Ministers) is set forth in the Application, in paragraph 50. In paragraph 51 the Application asserts that the new fact was of such a nature as to be a decisive factor in the decision of the Court. Each of these paragraphs contains a complex commentary on these points. But the text of the resolution of the Libyan Council of Ministers, mentioned in paragraph 50, is not itself made the subject of any clarification.

The provisions of Article 99, paragraph 1, of the Rules of Court should be carefully examined so as to ascertain whether the application satisfies the requisite conditions. The report of the independent expert appointed by Tunisia is not presented as a new fact, whatever arguments may have been drawn from it. If one reaches the conclusion that the application for revision does not directly invoke any new fact which is clearly relevant as such, there is no need to go any farther and the application must be dismissed. Any further considerations would lead to an examination of the merits of the application for revision.

6. Irrespective of the actual wording of the resolution of the Council of Ministers, the real "new fact" relied upon by Tunisia is to be found in Annex II to the Application under the title "Description of Concession No. 137 as defined in the Resolution of the Council of Ministers of 28 March 1968". Libya has not disputed this description.

The Parties argued at length as to whether Libya ought spontaneously to have supplied Tunisia with this description, or whether Tunisia could have obtained it without difficulty. There is no point in going into the details of this controversy, which rather concerns another condition laid down by Article 61, for there can be no doubt that Tunisia could have had some general idea of the Libyan concession, even if most of the co-ordinates were drawn to its attention only at the moment when the report of the expert it had appointed came into its possession. On the other hand, so far as the perimeter of the western part of the concession is concerned, it has to be noted that the document presented as a "new fact" does not reveal any fact of such a nature as to constitute a decisive factor. According to this document, the concession is defined as "starting at the intersection of 12° 00′ longitude and 33° 55′ latitude" and finishing at "33° 10′ latitude [and] 11° 35′ longitude", "thence northeastward in a straight line till the point of origin". But the Judgment of 1982, quoting paragraph 36 of the Libyan Memorial, does in fact state (in para. 117) that in 1968 :

> "Libya granted a concession (No. 137) 'lying to the eastward of a line running south/southwest from the point 33° 55′ N, 12° E to a point about one nautical mile offshore' the angle thereof viewed from Ras Ajdir being 26° ; the western boundaries of subsequent Libyan concessions followed the same line, which, Libya has explained, 'followed the direction of the Tunisian concessions'."

True, no co-ordinates are given for the offshore point, but all that the new document contributes is in fact that element, and so it is very much open to question whether knowledge of it could have constituted a decisive factor within the meaning of Article 61 of the Statute.

If the relationship with the Tunisian concession was erroneously presented in the passage of the Libyan Memorial quoted by the Court, that was due to the absence of any precise outline of that concession. Admittedly, the co-ordinates of the stepped line had been indicated (Tunisian Memorial, Ann. 1 ; Tunisian Reply, Ann. 4 ; decree of 1 January 1953, document deposited with Tunisian Reply on 15 July 1981, table referred to in Art. 37 ; cf. document No. 9 produced at the sitting of 13 June 1985). But it was only in the plates prepared in 1984 by the Tunisian expert that the respective positions of the concessions could be more clearly observed. For the rest, the description of Concession No. 137 did not constitute a fact of such a nature as to warrant the admission of the application for revision.

It is therefore apparent that the finding of non-admissibility of that application could legitimately have been based upon the absence of a new fact, without any consideration of the other elements stipulated by Article 61 of the Statute of the Court in relation to the admissibility of an application for revision.

II

7. As for the subsidiary request for interpretation, the Judgment has pronounced upon the Libyan contention that an objection to jurisdiction can be derived from Article 3 of the Special Agreement. That Article provides for the possibility of both Parties returning to the Court together in order to "request any explanations or clarifications which would facilitate the task of the two delegations to arrive at the line separating the two areas", while the Parties undertake to comply with the Judgment of the Court and with "its explanations and clarifications". The role conferred on the Court is very specific ; account is taken of the fact that its task is to define the "principles and rules of international law" and then to clarify the practical method for the application of these principles and rules (Special Agreement, Art. 1). The terms used by Article 3 of the Special Agreement have no definite legal scope, but, considering that very specific role, what they obviously contemplate, for practical purposes, is assistance from the Court in solving difficulties of application.

In contrast, it is in "the event of dispute as to the meaning and scope of the judgment" that the Court may be called upon to construe it, according to Article 60 of the Statute and Articles 98 ff. of the Rules of Court. This procedure must end in the delivery of a judgment.

The request for interpretation submitted by the Republic of Tunisia under Article 60 of the Statute must be regarded as admissible so far as the first sector is concerned. The Court's dismissive findings regarding the substantive meaning to be given to the interpretation are likewise to be accepted. However its grounds therefor cannot be based on a link with the application for revision (para. 29), and the "subsidiary" interpretation cannot be understood according to paragraphs 32-39 of the present Judgment.

8. The problem of interpretation must be examined in direct relation to the precise request bearing upon the terms of part of the operative provisions of the 1982 Judgment, namely paragraph 133 C (2) :

> "a bearing of approximately 26° east of north, corresponding to the angle followed by the north-western boundary of Libyan petroleum concessions numbers NC 76, 137, NC 41 and NC 53 which was aligned on the south-eastern boundary of Tunisian petroleum concession 'Permis complémentaire offshore du Golfe de Gabès' (21 October 1966)".

This follows the indications given as regards the delimitation line, this being a straight line passing through two defined points.

In its Application, Tunisia seeks

> "to obtain some clarifications, notably as regards the hierarchy to be established between the criteria adopted by the Court, having regard to the impossibility of simultaneously applying these criteria to deter-

mine the starting-point of the delimitation line as well as the bearing of that line from due north" (para. 55).

The Tunisian request seeks to reconcile the drawing of a given line and its reference to the alignment between the Libyan and Tunisian concessions. It winds up with an interpretation which in fact constitutes a new text, conveyed in its submissions of 14 June 1985, the only logical place for which would be in submissions on the merits of a claim for revision.

Limited to interpretation, the problem is to ascertain the meaning of the reference to the north-western boundary of the Libyan concessions "which was aligned on the south-eastern boundary of [the] Tunisian petroleum concession", and the logic of this wording in the operative provisions of the 1982 Judgment.

9. By "aligned" the drafters of that Judgment presumably understood the situation of which they in fact had knowledge, i.e., "approximately aligned" on the south-eastern boundary of the Tunisian permit and the north-western boundary of the Libyan concessions.

The boundaries of the concessions, as outlined in the reasoning of the 1982 Judgment, do not indicate an "alignment" in the proper sense of the term, i.e., an "identity of line". However, the Court doubtless considered that it would be useful to refer in subparagraph 133 C (2) to the concrete practice of the Parties in the matter of concessions, for in subparagraphs 133 A and B it had not referred to it except – see 133 B (4) – in conjunction with other factors (the perpendicular to the coast and the *de facto* maritime boundary). It is understandable that in regard to the practical method for applying the principles and rules of international law the Court, given the specific circumstances of the case, should where the first sector was concerned have found it necessary to mention, without going into detail, the relationship between the Libyan concessions and the Tunisian permit.

The attention of the Parties was bound to be drawn by the last-mentioned lines of the operative provisions, for they expressly mention the petroleum concessions the "great relevance" of which had been stressed by the Court (para. 118). The operative provisions expressly refer again to those the Judgment had already mentioned (para. 117).

But it is the bearing of "approximately" 26° that is associated with the angle of the north-western boundary of the Libyan concessions, which is aligned on the south-eastern boundary of the Tunisian permit. The operative part here makes use of the terms of paragraph 121, where the following reservation also appears : "On the information available to the Court, that angle appears to be 26° ; it will, however, be for the experts of the Parties to determine it with exactness."

Clearly the Court was justified in recalling in the operative part the consideration which had been uppermost in its reasoning, without seeking to introduce a hierarchy of criteria. It was out of the question to alter the operative provisions in respect of the starting-point of the delimitation line under colour of an interpretation.

III

10. It must unreservedly be accepted that, as regards "the most westerly point of the Gulf of Gabes", the request for interpretation submitted by the Republic of Tunisia under Article 60 of the Statute of the Court is admissible.

By way of construing the Judgment of 24 February 1982, it is right to stress the importance of the words in paragraph 124, "approximately 34° 10′ 30″ N", as well as of the role devolving upon the experts of the Parties. It must also be accepted that the submission whereby the Republic of Tunisia would have the most westerly point of the Gulf of Gabes fixed on the latitude of 34° 05′ 20″ N (Carthage) cannot be upheld. The submission, presented at the hearing by the Republic of Tunisia, to the effect that there is cause for the Court to order an expert survey with a view to determining the precise co-ordinates of this point, must be rejected. However, it would in my opinion have been useful to specify the legal significance of the formula "shoreline (low-water mark)" which appears in paragraph 124 and operative paragraph 133 C (2) of the 1982 Judgment. The description of the task of the Parties' experts should have included a definition of that expression. Paragraph 63 of the present Judgment could therefore have been drafted as follows :

> "To sum up, the task of the experts of the Parties is, so far as regards the determination of the latitude at which the bearing of the delimitation line is to change, as follows. That latitude is, as made clear in the 1982 Judgment, to be that of the most westerly point of the shoreline (low-water mark) of the Gulf of Gabes. It has however also to be borne in mind, first, that the working definition of the latitude in question, though stated 'approximately', was the basis for the effect given to the Kerkennah Islands in paragraph 133 C (3) of the Judgment ; and, second, that the low-water mark is normally to be understood as the line of low tide 'along the coast as marked on large-scale charts officially recognized by the coastal State' (Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958, Art. 3 ; Montego Bay Convention, Art. 5). Employing for the purpose whatever charts and maps they may consider appropriate, the experts should therefore seek to define, on the low-water mark the most westerly point of the Gulf of Gabes."

11. Subject to the above observations concerning the method followed by the Court in considering the Application of the Republic of Tunisia, and, while regretting that the operative provisions, after finding admissible the request for interpretation in regard to the first sector, should in subparagraph B (2) have made reference, "by way of interpretation", to paragraphs 32-39 of the present Judgment, I concur in the findings of the Court.

(Signed) Suzanne BASTID.
