SEPARATE OPINION OF JUDGE WEERAMANTRY

TABLE OF CONTENTS

INTRODUCTION

1. The observations that ensue indicate the reasons for my agreement with the Judgment of the Court. In view of the Judgment's intensive use of equity, they explore in somewhat extended form the jurisprudential content and practical application of that concept in a manner which can most appropriately be attempted in a separate opinion.

2. Against this background, it is not necessary in this opinion to recapitulate the several details of fact, which are set out in the Judgment. This opinion will attempt, rather, to examine the application of equity to those facts, explaining my support of the methods used and conclusions reached.

3. The ensuing analysis is undertaken against the background of the substantial body of creative work done by this Court in laying the foundations of an equitable jurisprudence for the evolving law of the sea. What "appears at first sight to be a jumble of different and disparate elements" [1] may well yield, upon closer examination, some useful guidelines for the determination of a case such as this.

4. Although this opinion focuses on the field of maritime delimitation, it will also take in occasional glimpses, when necessary, of the broader equitable landscape lying beyond. This is rendered all the more necessary because application of equity in the field of maritime delimitation raises far-reaching juristic questions [2] and is currently passing through a critical phase [3].

Special Role Played by Equity in this Case

5. The Court's Judgment reveals the use of equity in several ways, and at various stages in the judgmental process.

---

[1] R. Y. Jennings, "Equity and Equitable Principles", in *Annuaire suisse de droit international*, Vol. XLII (1986), p. 38. See, also, the same author in "The Principles Governing Marine Boundaries", in *Staat und Völkerrechtsordnung, Festschrift für Karl Doehring*, 1989, p. 408.

[2] See Mark W. Janis, "Equity in International Law", *Encyclopedia of Public International Law*, Vol. 7, pp. 76-77:

> "The application of equitable principles in these maritime delimitation cases has evoked a debate regarding the role of equity which is rather similar to that which accompanied earlier manifestations of equity practice. Some observers — largely in the positivist tradition — have criticized the courts for going beyond their powers."

[3] Judge Jennings refers, in connection with maritime delimitation, to "some deep problems — one might almost add a malaise — affecting that part of international law today" ("The Principles Governing Marine Boundaries", *op. cit.*, p. 398). See, also, the criticisms of the use of equity assembled by Judge Bedjaoui in "L''énigme' des 'principes équitables' dans le droit des délimitations maritimes", in *Revista Española de Derecho Internacional*, Vol. XLII (1990), p. 376.

6. It describes the equidistance-special circumstances rule of the 1958 Convention as expressing a general norm based on equitable principles (para. 46) and examines the "equitable principles-relevant circumstances" rule relating to delimitation of a continental shelf, fishery zone or all-purpose single boundary (para. 56). It also examines the effect of the customary rule which requires a delimitation based on equitable principles (paras. 46 and 71).

7. The Court gives its attention to the application of equitable procedures (para. 92), the effecting of an equitable division (para. 64), the need to arrive at an equitable result (paras. 54 and 90), the ensuring of an equitable solution (para. 65) and the process of evolving such a solution (para. 63). It notes the prima facie equitable character of the reasons underlying the equidistance method and the need for an equitable delimitation to take into account the disparity in coastal lengths (para. 65). It stresses that a result which is equitable in itself is the objective of every maritime delimitation based on law (para. 70), and refers to the equity of the delimitation line (para. 62).

8. The Judgment considers whether a given line is "equitable in its result" (para. 62), and it describes the line drawn by Denmark 200 nautical miles from the baselines of Eastern Greenland as "inequitable in its effects" (para. 87). It takes note of Norway's argument that proportionality is the test of the equitableness of a result arrived at by other means (para. 63) and Denmark's reference to "a method appropriate for an equitable delimitation line" (para. 62). It considers the manifestly inequitable results following from the application of the median line (para. 68).

9. Specific reference is made to the measure of discretion conferred on the Court by the need to arrive at an equitable result (para. 90). Recognizing the need to make proper provision for equitable access to fishery resources (paras. 75, 91 and 92), the Court makes a division according to which it considers that "the requirements of equity would be met" (para. 92).

10. Equity has thus played a role of overwhelming importance in the Court's decision, involving the application of equitable principles, equitable procedures and equitable methods. The decision reveals an intensive effort directed towards achieving an equitable solution and at testing the equitable nature of that solution. It draws in equity to address the problem in hand through a multitude of routes — treaty, customary international law and judicial decisions to name a few. The methods used involve both the *a priori* use of equity to work forwards towards a possible result and the *a posteriori* use of equity to test a result thus reached.

11. Since this case has drawn both upon the Court's general equitable jurisprudence and on its particular invocations in relation to the law of the sea, this opinion will deal with both these aspects. The special invocations of equity which give it redoubled emphasis in the law of the sea tend some-

times to overshadow the applicability of general principles of equity, which still play a vital part in this field. To minimize the importance of general equitable considerations, especially at this incipient stage of the developing law of the sea, may cramp the evolution of the latter in what is perhaps its most formative phase. This opinion consequently devotes some attention to an examination of the ways in which equity, both in its general sense and in its special application to the law of the sea, can contribute to the solution of the varied problems encountered in this case.

PART A. GENERAL EQUITABLE JURISDICTION OF THE COURT

Conceptual Problems Associated with the Use of Equity

12. The issue whether equity should play a role in maritime delimitation is one which has been questioned by eminent authority, both judicial and academic, and must be seriously addressed if reliance is to be placed upon it. This is part of a larger question as to whether, indeed, although equity is clearly a part of public international law, its use is really necessary or useful, having regard to its uncertainties, its difficulties of definition and its lack of methodologies for the precise quantification of its findings.

13. Telders, for example, has expressed the view that, apart from the application of the principle of good faith, equity has no special legal significance[1]. Ripert, in his lectures before the Hague Academy in 1933, went even further to state that equity is a principle, but a principle of morality and not of law[2].

14. Indeed, judicial dicta of some judges of this Court have given strong expression to such a view. Vice-President Koretsky, for example, in the *North Sea Continental Shelf* cases, affirmed that equity, being of "a non-juridical, ethical character", ought not to be resorted to by this Court:

> "I feel that to introduce so vague a notion into the jurisprudence of the International Court may open the door to making subjective and therefore at times arbitrary evaluations, instead of following the guidance of established general principles and rules of international law in the settlement of disputes submitted to the Court." (*I.C.J. Reports 1969*, p. 166, dissenting opinion.)

---

[1] "Opzet van een boek over het internationale recht" ("Outline of a Book on International Law") in *Verzamelde Geschriften* (Collected Papers), The Hague, 1948, p. 292, at p. 338.

[2] Georges Ripert, "Les règles du droit civil applicables aux rapports internationaux", 44 *Recueil des cours de l'Académie de droit international* (1933-II), p. 575 — "L'équité est principe, mais principe de morale et non principe du droit."

Judge Tanaka put it even more strongly in his observation in the same case that, "Reference to the equitable principle is nothing else but begging the question." (*I.C.J. Reports 1969*, p. 196, dissenting opinion.) Other criticisms[1] describe equity as a doctrine "déroutée et déroutante", "a riddle wrapped in a mystery inside an enigma", as paradoxical, circular, fuzzy and lacking precise definition.

15. These conceptual criticisms of equity may be addressed at three levels — at the level of law in general, at the level of international law and at the level of the law of the sea.

16. At its most general level, equity has been seen as the source of that dynamism which is necessary for legal development. Thus, in the words of the eminent comparativist Puig Brutau, "equity is one of the names under which is concealed the creative force which animates the life of the law"[2].

17. At the level of international law, that creativity is well illustrated when one considers that equity has been the source that has given international law the concept of international mandates and trusts, of good faith, of *pacta sunt servanda*, of *jus cogens*, of unjust enrichment, of *rebus sic stantibus* and of abuse of rights. No doubt, the future holds for it a similarly vital creative role.

18. Viewed more specifically, in the context of the law of the sea, its potential for developing that incipient branch of international law is so far-reaching as to have attracted the comment that it is

> "a juridical arsenal from which the judge draws the tools which enable him to identify, evaluate, understand and give effect to circumstances recognized as juridically relevant in a particular case"[3] (translation).

19. What follows is an analysis of these tools by which equity helps to identify, evaluate, understand and give effect to the circumstances in a particular case. Thereafter, this opinion will address the question whether the uncertainties of equity render it a practically unsuitable tool for the determination of cases such as this.

Issues Arising from the Court's Reliance on Equity

20. This analysis centres around the following aspects of the reliance on equity in the Judgment:

---

[1] As assembled by Judge Bedjaoui in "L'énigme' des 'principes équitables' dans le droit des délimitations maritimes", *op. cit.*, p. 376.

[2] "Juridical Evolution and Equity", in *Essays in Jurisprudence in Honor of Roscoe Pound*, 1962, pp. 82, 84.

[3] "les principes équitables se présentent en définitive comme un arsenal juridique dans lequel le juge puise les outils permettant d'identifier, d'évaluer, de comprendre et de satisfaire des circonstances reconnues juridiquement pertinentes dans une espèce déterminée." (Bedjaoui, *op. cit.*, p. 384.)

— The Judgment of the Court, in common with most others in the field of maritime delimitation, resorts to equity not merely for principles but also for procedures and methods, and for the testing of tentative solutions reached. The one word "equity" covers all these applications, some of them quite distinct from others.

— The term "equity" as used by the Court, and in international law and in maritime delimitation generally, has a distinct meaning from equity as used in the sense of a corrective system standing apart from the law. Whenever the term equity is used in the Judgment, the term is not used in the latter sense, and this distinction must be kept in mind for an appreciation of the role of equity in this case.

— There has been no resort to equity *ex aequo et bono.* Nearly every decision applying equity to maritime delimitation has stressed that the species of equity employed is not equity *ex aequo et bono.* This necessitates an examination of the distinctions between that concept and the concept of equity actually employed. The various categories of equity and their relevance to this case call for examination in this context.

— The Judgment draws in equity through treaties, customary international law and judicial decisions, as well as broader concepts of equity which flow in from many sources. An examination of these varied sources will clarify the several ways in which the problem before the Court has necessarily attracted its operation.

— The Judgment uses equity *a priori* to work towards a result, and *a posteriori* to check a result thus reached. This raises important juristic issues.
— There are several purposes or ends for which equity has been used. These are varied and some of them are pertinent to this Judgment in particular and to maritime delimitation in general. Not all the possible purposes and ends of equity are appropriate to maritime delimitation.

— Equity has many methods of operation, more than one of which has been used in the Judgment. These may not all be spelt out specifically, but one or more of them are in constant use in every exercise of that discretion, as indeed they are in this case. The ambit of judicial discretion — a matter specifically referred to in the Judgment — has been the subject of some controversy. In subscribing to the decision of the Court, I have accepted the legitimacy of such a use of judicial discretion and feel impelled to explain why I consider such use of discretion legitimate.
— The process of equitable decision-making, as in a boundary delimitation, is not a single process but can be broken up into its constituent stages. The decision in this case has proceeded through those stages as

will be pointed out. An appreciation of those separate stages is an aid to understanding the actual operation of equity in this case.

These aspects will be discussed in the ensuing paragraphs in the order in which they have been set out.

ANALYSIS OF EQUITY WITH REFERENCE TO MARITIME DELIMITATION

I. The Application of Equity

21. The application of equity to a given case can comprise the application of an equitable principle or principles, the adoption of an equitable procedure or procedures, the use of an equitable method or the securing of an equitable result. All of these aspects are relevant to the determination of the present case.

(a) *Equitable principles*

22. Equitable principles are in this discussion taken to include concepts, black-letter rules and standards or principles in the broader sense, as there is no need in this discussion to refine this category further. The important distinction drawn by jurists[1] between black-letter rules and standards or principles is hence not used for the purpose of this classification, and the term "equitable principles" is to be read as covering all of these.

23. The Chamber of this Court, in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, had in mind a classification of this broad nature when it observed that there is a distinction:

> "between what are principles and rules of international law governing the matter and what could be better described as the various equitable criteria and practical methods that may be used to ensure *in concreto* that a particular situation is dealt with in accordance with the principles and rules in question" (*I.C.J. Reports 1984*, p. 290, para. 80).

The ensuing analysis proceeds upon the broad division between concepts and principles without making another specific category of "criteria".

24. General equitable principles relevant to this case would include equitable principles applicable to the assessment of representations of State policy regarding maritime delimitation which other States have relied upon to their prejudice; equitable principles of interpretation in relation to relevant treaties; and principles of fairness in considering

[1] See, for example, R. Dworkin, *Taking Rights Seriously*, 1977, p. 46.

whether large sections of the waters to be demarcated are unusable in consequence of their being frozen over for considerable periods.

(b) *Equitable procedures*

25. As with most areas of law, equity has both a substantive and an adjectival aspect. The application of equitable procedures of enquiry is necessarily an important part of equity. Procedural equity in its broadest form is the equity which ensures that in the process of enquiry and investigation leading to a decision, the parties enjoy the opportunity of a full and fair presentation of their respective cases to the court or tribunal. The procedural aspect of equity has an ancient origin and is rooted in popular concepts of fairness[1].

26. The equitable concern with procedural fairness gives rise to the principle involved in this case, that all relevant circumstances will be considered in determining how the maritime space in contention is to be delimited between the Parties, unless this consideration is prevented by a rule of law. The Court in its Judgment has therefore given its consideration to a wide range of factors — State practice, the conduct of the Parties, proportionality of coastlines, population, economic factors, the equidistance principle and the unusability of part of the maritime space in contention owing to drift ice. Whatever may be the eventual conclusion regarding the weight to be given to each factor, Parties are entitled to a consideration of such factors by the Court and in the absence of a legal principle rendering a particular factor irrelevant, the impact of that factor upon the case in hand needs to be assessed.

27. This is especially so having regard to the uniqueness of each particular case and the fact that its special circumstances may throw up for consideration some fact or circumstance never considered in the relevant jurisprudence up to that time. The fact that a considerable portion of the relevant area in this case is ice-bound for the greater part of the year is such a factor. As this Court pointed out in the *Gulf of Maine* case:

> "Although the practice is still rather sparse, . . . it too is there to demonstrate that each specific case is, in the final analysis, different

[1] For example, the *audi alteram partem* rule has from ancient times been described even in popular literature:

> "Qui statuit aliquid parte inaudita altera,
> Aequum licet statuerit, haud aequus fuit."

(Seneca, *Medea* 199-200, cited in a series of later common law cases such as *Re Hammersmith Rent-Charge*, 4 Ex 87, at 97; *Smith* v. *Rex*, 3 App. Cas. 614 at 624. See also Broom, *Legal Maxims*, 10th ed., 1939, p. 66.)

> from all the others, that it is monotypic and that, more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates, can only be determined in relation to each particular case and its specific characteristics." (*I.C.J. Reports 1984*, p. 290, para. 81.)

Thus, there is "no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures" (*I.C.J. Reports 1969*, p. 50).

(c) *Equitable methods*

28. Among the practical *methods* listed by the Chamber in the *Gulf of Maine* case, as distinct from criteria and rules or principles which should be used for achieving an equitable result, are the drawing of an equidistance or median line, the division of the area in various segments using different methods in respect of each sector and the method of drawing a line perpendicular to the coast or to the general direction of the coast[1].

29. Many other suggestions appear in the literature, which could be described as methods stemming from equitable considerations[2]. As the jurisprudence on maritime delimitation develops, a refinement of methods appropriate to particular types of dispute may well emerge[3].

30. In the present case, the Court has used as its method the provisional adoption of the median line as its starting point and, having regard to its evaluation of the various considerations before it, moved that line eastwards, carefully dividing the relevant space into segments which again

---

[1] *I.C.J. Reports 1984*, p. 313, para. 159.

[2] See, for example, the five separate tasks devolving on the Court, as analysed by J. I. Charney, of which the last three may be classified as methods:

> "(3) To the extent possible, each piece of information identified in the prior paragraph should be used to construct a line or range of lines that best suits the function to which it relates.
>
> (4) These alternative lines and previously identified factors should be studied and weighed according to their importance. In a process that might even approach vector analysis, a line that best reflects all the relevant factors in light of their importance to the zone should be sought.
>
> (5) A cartographical method should be selected to describe the line accurately and reliably." (J. I. Charney, "Ocean Boundaries between Nations: A Theory for Progress", 78 *American Journal of International Law* (1984), p. 597.)

[3] One could, if so disposed, draw a distinction between a merely geometrical norm and a juridical norm as Judge Tanaka did in his dissenting opinion in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 183). However, if the geometrical norm stems from equitable considerations, it is for the purposes of this discussion classed as an equitable method. Judge Tanaka was referring to the distinction between the rule of equidistance as a mere technique and as a norm of law.

have been differently divided having regard to the considerations involved, such as the seasonal movement of fish and equitable access to fishery resources (para. 91). These methods are all grounded in equitable considerations and are, for the purposes of the present discussion, treated as equitable methods.

(d) *Equitable results*

31. The first three aspects mentioned are only the means towards the last, which, as the object and test of every determination according to equitable principles, calls for considered attention. As this Court observed in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case:

> "It is however the goal — the equitable result — and not the means used to achieve it, that must be the primary element . . ." (*I.C.J. Reports 1985*, pp. 38-39, para. 45.)

32. The Court has at numerous points in its Judgment referred to the importance of achieving an equitable result. Some of these references are detailed in paragraphs 7 and 8 of this opinion. In paragraph 54, the Judgment states that "The aim in each and every situation must be to achieve 'an equitable result'" and in paragraph 56 it concludes that:

> "there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result".

33. Articles 74 (1) and 83 (1) of the 1982 Convention also highlight the importance of achieving an equitable solution. The Judgment, after referring to the "correction" of a median line delimitation in the *Gulf of Maine* case[1], similarly rejects the application of the median line in this case as leading to "manifestly inequitable results" (para. 68) in view of the great disparity of the lengths of coasts.

34. This concern with equitable results, despite the application of equitable principles, procedures and methods, is well founded in the Court's jurisprudence. The object of equitable principles is to obtain an equitable result. However equitable each principle may appear to be when considered in isolation, it may not necessarily produce an equitable result, as is demonstrated by the application of the equidistance principle to two opposite coastlines which are vastly different in length. As this Court has observed, "the term 'equitable principles' cannot be interpreted in the

[1] *I.C.J. Reports 1984*, p. 336, paras. 221-222.

abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable *result*" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 59, para. 70; emphasis added).

35. Even though, in the *North Sea Continental Shelf* cases, the Court appeared to stress the methods used, it also emphasized the importance of an equitable result, for, while it said that resort could be had "to various principles or methods, as may be appropriate, or a combination of them", this was subject to the proviso that "by the application of equitable principles, a reasonable result is arrived at" (*I.C.J. Reports 1969*, p. 49, para. 90). So, also, the Court said: "it is necessary to seek not one method of delimitation but one goal" (*ibid.*, p. 50, para. 92).

36. This aspect was stressed also by this Court in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*:

> "The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal." (*I.C.J. Reports 1982*, p. 59, para. 70.)

37. The difference between the use of an equitable method and the achievement of an equitable result was well brought out in the joint separate opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case:

> "To assert, as Malta has done, that the equidistance method should be applied, even if it produces a delimitation which is grossly disproportionate to the length of the relevant coasts, is an attempt to subordinate the equitable result to be achieved, to the method adopted. This is precisely the opposite of the fundamental rule of delimitation, namely, that the method to be adopted should be justified by the equity of the result." (*I.C.J. Reports 1985*, pp. 82-83, para. 20.)

38. The *Gulf of Maine* case drew a clear distinction between the application of equitable criteria and the reaching of an equitable result. The process by which the Chamber determined the boundary line has been analysed as consisting of:

(1) the delimitation of the boundary line through the use of equitable criteria — primarily the use of geographical configurations to set out the affected area and the subsequent equal division of that area;

(2) the adjustment of that line, by the consideration of relevant circumstances including geographic "anomalies" and the proportionality of maritime area to coastal frontage;

(3) the checking of the equitableness of the result so reached, by examining other factors such as economic impact and resource use patterns [1].

39. The Judgment was specially useful in separating some of the different elements included in the equitable process and showing how more than one element could be used in combination [2].

40. It is interesting also to note from the opinion of Judge Oda in *Tunisia/Libya* that even as early as the 1958 Convention

> "the idea of an *equitable solution*, although not specifically mentioned in Article 6 of the 1958 Convention, lay at the basis of that provision . . ." (*I.C.J. Reports 1982*, p. 246, para. 144; emphasis added).

It is to be noted also that the Law of the Sea Convention uses the term "equitable solution" thus turning the spotlight on the equity of the result (see Arts. 74 and 83).

41. Having regard to the overall importance of the equitable result, it is not without interest that there is support in legal philosophy for the method of testing a solution by taking a view at its results. This additional juristic basis for checking a result for its equity or inequity comes from the "sense of injustice" which has an ancient history in the philosophy of jurisprudence. This is briefly considered in Section V, paragraphs 104-109, below.

42. The foregoing discussion shows that all four aspects of equity dealt with in this section come into play in this case, and an approach to the application of equity in this fashion helps to focus attention upon the particular aspect under examination.

II. Inapplicability of Equity as a System Separate from Law

43. It scarcely needs to be mentioned that the term equity, as used in the Court's Judgment or in the context of international law, is quite distinct from its use to designate separate systems of judicial administration such as existed in some legal systems for the purpose of correcting insufficiencies and rigidities of the law.

44. The equity of the common law system and the *aequitas* of the Roman law, exercised by the Chancellor and the *praetor* respectively, were the systems *par excellence* which give the word equity such overtones of interference with the law. The term equity as used in the law of the sea naturally does not absorb such associated meanings.

---

[1] See T. L. McDorman, P. M. Saunders and D. L. VanderZwaag, "The Gulf of Maine Boundary: Dropping Anchor or Setting a Course?", 9 *Marine Policy* (1985), p. 100.

[2] *Ibid.*

45. In view of the substantial influence exercised by these systems on the development of international law, the heavy overtones of equity's corrective influence over law tend to spill over into international law, necessitating a constant vigilance against this tendency. This is especially important, in relation to maritime delimitation, where there is a constant questioning as to whether the Court, in using equity, is overstepping its authority. As this Court observed in *Tunisia/Libya*:

> "In the course of the history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law." (*I.C.J. Reports 1982*, p. 60, para. 71.)

46. In view of the importance of equity in these two systems, a brief note upon them ensues.

(a) *Equity in common law*

47. In the *Norwegian Shipowners' Claims* case, the Permanent Court of Arbitration said:

> "The words 'law and equity' used in the special agreement of 1921 can not be understood here in the traditional sense in which these words are used in Anglo-Saxon jurisprudence.
>
> The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence of the municipal law of any State."[1]

48. Some of the principles of equity, as evolved by the English Court of Chancery, may, however, be relevant to a matter concerning the law of the sea, not because they are part of the English law of equity, but because those principles accord with the concepts of general equity as more widely understood. Such concepts might conceivably include such notions as that equity looks to the intent rather than to the form, or that a person must not act contrary to his own representations on the faith of which others have acted. Items of State conduct, for example, may attract general principles of equity such as these.

(b) *Equity in civil law*

49. The *jus honorarium* built up by the Roman *praetor*, through his praetorian edict, served the purpose, according to Papinian, of aiding,

[1] *Reports of International Arbitral Awards (RIAA)*, Vol. I, 1922, p. 331.

supplementing or correcting the *jus civile*[1] — a useful summary of three different functions served by Roman equity. Roman equity thus stood as a system separate from the *jus civile*, at any rate until Hadrian in A.D. 125 froze the form of the edict, after which it ceased directly to be a source of new law. The corrective function of *aequitas* up to that time included action *contra legem.*

50. Though equity continued to fertilize the Roman law thereafter, this was achieved largely through the work of the jurists acting through the interpretation and adaptation of the law rather than by standing in opposition to it[2].

51. In view of the immense influence of the civil law upon international law, it bears repetition that the *aequitas* of the era of praetorian equity — a corrective equity standing separate from the law — is not an analogy for the equity of international law. The later tradition of the civil law, of law and equity integrating with each other to produce a harmonious whole, would be a truer analogy.

III. The Categories of Equity

52. As observed earlier, the Court in its Judgment has not used equity *ex aequo et bono.* Nor has it used absolute equity or equity *contra legem.*

(a) *Equity* ex aequo et bono

53. The issue has frequently been raised, in the context of maritime delimitation, as to whether the Court is resorting to a concept of equity more liberal than that which it is entitled to administer. This issue has come indeed to acquire the appearance of a question mark hanging over the use of equity in such cases and has resulted in frequent disavowals, in the jurisprudence of maritime delimitation, of resort to equity *ex aequo et bono*[3].

54. The extent of the concern registered in this regard is indicated in juristic literature which specifically raises the question whether there is indeed a difference between the equity administered by the Court and equity *ex aequo et bono.* Judge Jennings alerts us to the attendant dangers of litigants obtaining a decision *ex aequo et bono* whether they wanted it or not, and observes:

---

[1] "Adjuvandi, vel supplendi, vel corrigendi juris civilis" (D.1.1.7.1).

[2] The equitable work of the jurists was fruitful, and important doctrines such as subrogation, estoppel and constructive notice resulted from their efforts. See W. W. Cook, in *Encyclopedia of the Social Sciences*, ed. Seligman, 1931, Vol. 5, p. 584. Equity can do no less in international law.

[3] See *I.C.J. Reports 1974*, p. 33, para. 78, and p. 202, para. 69; *I.C.J. Reports 1982*, p. 60, para. 71, and p. 92, para. 133 A (1); *I.C.J. Reports 1984*, p. 278, para. 59, and p. 299, para. 112; *I.C.J. Reports 1985*, pp. 38-39, para. 45, and pp. 56-57.

> "At any rate, the very serious question arises of what exactly is the difference between a decision according to equitable principles and a decision *ex aequo et bono*?"[1]

The question raised is truly a very serious one, for if this is indeed the case, the Court is extending itself into an area which it can only reach by the consent of parties[2]. Such uncertainties necessitate a close examination of the *ex aequo et bono* provision in Article 38, paragraph 2, of the Statute of the Court.

55. This phrase, which has its origins in the Roman law[3] is defined in the standard works of reference in terms that involve justice, fairness and conscience. Thus *Black's Law Dictionary* (5th ed., 1979, p. 500) defines it as a "phrase derived from the civil law, meaning, in justice and fairness; according to what is just and good; according to equity and conscience". It will be seen that equity *ex aequo et bono* is thus not confined within limitations of existing rules of law but extends more widely, leaving aside considerations of what the law may be, regarding the matter under reference. It enters into the area of equity *contra legem*, as discussed below.

56. Equity *ex aequo et bono*, in the context of the Court's jurisprudence, is perhaps best approached through a perusal of the drafting history of the *ex aequo et bono* provision in the Statute of the Court.

57. One could perhaps identify three stages in the *travaux préparatoires* leading to the adoption of Article 38 (2) of the Statute:

(1) Earlier drafts of Article 38 of the Statute of the Permanent Court[4] did not contain a subsection dealing with decisions *ex aequo et bono*. The draft section read as follows:

> "Dans les limites de sa compétence, telle qu'elle est déterminée par l'article 34, la Cour applique en ordre successif:
>
> 1. Les conventions internationales soit générales, soit spéciales, établissant des règles expressément reconnues par les Etats en litige;
>
> 2. La coutume internationale, attestation d'une pratique commune acceptée comme loi;

---

[1] R. Y. Jennings, "The Principles Governing Marine Boundaries", *op. cit.*, p. 401.

[2] See *Encyclopedia of Public International Law*, *op. cit.*, p. 77.

[3] The related expression *bonum et aequum* means "right and equitable, fair(ness) and just(ice)" (Adolf Berger, *Encyclopaedic Dictionary of Roman Law*, 1952, p. 377) and appears, in Celsus' celebrated definition of *jus* as *"ars aequi et boni"*, cited at the very commencement of Justinian's *Digest* (D.1.1.pr.). It appears, also, in the formula of *actiones in aequum et bonum conceptae* (Berger, *ibid.*).

[4] Draft Scheme for the Institution of the Permanent Court of International Justice Presented to the Council of the League of Nations by the Advisory Committee of Jurists, Art. 35 (corresponding to the later Article 38).

3. Les principes généraux de droit reconnus par les nations civilisées;

4. Les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations, comme moyens auxiliaires de détermination des règles de droit."[1]

(2) The discussions among the distinguished international jurists participating in the drafting Committee's meeting of 1 December 1920[2] are of great interest. Mr. Fromageot (France) wished to widen the wording of the then Article 35 in order to enable a judgment of the Court to confirm an arrangement reached by the parties — a result which was not possible under the existing wording of the Article. In the course of the ensuing discussion, serious concerns were voiced about the effect of such an amendment. The Chairman (Mr. Hagerup) expressed the view that Mr. Fromageot's idea belonged rather to the sphere of arbitral jurisprudence and that its application would jeopardize the authority of a Court of Justice. Mr. Fernandes (Brazil) expressed a fear that the amendment would open the way to arbitrary decisions. Mr. Loder (the Netherlands) pointed out, however, that the Court would evidently not confirm proposals which were not well founded. During further discussion, Mr. Fromageot amended his proposal to add to Article 35 (3) the further words "the general principles of law and justice". He explained that the effect of his amendment would be to enable the Court to state as the sole reason for its judgment that the award had seemed to it to be just. He explained further that this did not mean that the Court might disregard existing rules. Mr. Fromageot's amendment was adopted[3].

(3) However, the amended Article 35 continued to cause concern. At the meeting of the Sub-Committee held on 10 December 1920, to adopt the final draft for submission to the Main Committee, it was the sole subject of further discussion. That discussion is recorded as follows:

"During the discussion on the President's report, M. POLITIS (Greece) raised the question whether the text of Article 35, No. 3, adopted by the Sub-Committee, did actually express the Sub-Committee's opinion on the subject. This opinion was, according to M. Politis, that the Court should have the right to apply the general principles of justice only by virtue of an agreement between the parties. The actual text was wider, in so far as it left it to the discretion

[1] *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*, Geneva, 1921, p. 41, Annex.

[2] Seventh Meeting of the Sub-Committee of the Third Committee of the First Assembly Meeting held on 1 December 1920.

[3] *Documents concerning Action Taken . . ., op. cit.*, p. 145.

of the Court to decide when those principles could be applied. M. Politis consequently proposed to alter the paragraph as follows:

The general principles of law and with the consent of the parties, the general principles of justice recognised by civilised nations.

After some discussion, M. FROMAGEOT (France) proposed to meet M. Politis' point by adding at the end of Article 35, No. 3, the following:

This provision shall not prejudice the power of the Court to decide a case ex aequo et bono *if the parties agree thereto.*

The Article thus amended was adopted."[1]

58. In reporting this Article (renumbered Article 38) to the Main Committee, the Sub-Committee stated as follows:

"The Sub-Committee has . . . made the following changes in the Article:

. . . . . .

(2) At the end of No. 3 it has added a new clause in order to give a more flexible character to this provision and to permit the Court, if necessary and with the consent of the Parties, to make an award *ex aequo et bono.*"[2]

Such was the genesis of the *ex aequo et bono* provision in Article 38 which has provoked so much reference in the cases on the application of equity in maritime boundary delimitations.

59. It is clear from this drafting history that earlier drafts of the Article were amended to allow for the possibility that parties could make their own agreements and ask the Court to embody them in a judgment, which the Court would do provided it conformed to general principles of law and justice. Thereafter even more flexibility[3] was introduced by introducing a separate *ex aequo et bono* provision not necessarily tied to "general principles of law and justice", and enabling the Court to make an order in accordance with its sense of justice if the parties so consented. There was clearly an ampler latitude given to the Court in an *ex aequo et bono* provision standing on its own rather than if the Court were to depend on a clause merely enabling it to decide in accordance with general principles of law and justice. However the greater

[1] *Documents concerning Action Taken . . ., op. cit.*, p. 157.
[2] *Ibid.*, p. 211.
[3] "The notion *ex aequo et bono* had been little used before its addition to the PCIJ's Statute and was included there, with little debate, arguably to give the Court somewhat greater flexibility." (Janis, *Encyclopedia of Public International Law*, Vol. 7, p. 75.)

reach of that clause necessitated the safeguard of resting it upon the agreement of parties.

60. The expression *ex aequo et bono*, viewed against this drafting history, shows quite clearly that the concept travels far beyond equity *intra legem* or *praeter legem* as discussed below[1]. It refers to a decision untrammelled by rules of law but depending purely on the tribunal's sense of justice. When, as in the present case, the Court uses equitable concepts and procedures which enter its jurisdictional field through routes other than Article 38 (2) and so long as the Court does not act *contra legem*, it is acting in a field far removed from the vast expanses of equity *ex aequo et bono*. However, within its far more limited field of operation, it is well entitled to use the full and appropriate range of equitable principles, procedures and methods without being inhibited by concerns that it is travelling beyond its jurisdiction.

61. If the conceptual roadblock represented by *ex aequo et bono* is out of the way, a clearer path opens out for a fuller and more confident use of equity in the development of the law of the sea. This aspect was well summarized in the *North Sea Continental Shelf* cases, where the Court observed in the clearest terms:

> "when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute." (*I.C.J. Reports 1969*, p. 48, para. 88.)[2]

(b) *Absolute equity*

62. This term, also inapplicable to the present case, connotes the application of a just and fair solution irrespective of whether it overrides exist-

[1] Chaim Perelman, in his study of lacunae in the law, makes the point in the context of arbitrations and judicial decisions in public international law, that a request for a decision *ex aequo et bono* could be read "dans le sens *contra legem*" (*Le problème des lacunes en droit*, 1968, p. 327).

[2] For similar expressions by other tribunals, see the statement of the Court of Arbitration in the Anglo-French Continental Shelf Arbitration Award (*RIAA*, Vol. XVIII, paras. 70 and 245; see, also, Guinea/Guinea-Bissau Arbitral Award (*Revue générale de droit international public* (1985), Vol. 89, paras. 88 and 90) referring to the Judgment of this Court in the *North Sea* cases, and holding that its own function, likewise, was not to decide *ex aequo et bono*.

ing rules or principles of positive law, however well entrenched they may be. It is a disregard of the letter for the spirit of the law, a disregard of technicalities in favour of justice[1]. This would come close to the connotation of equity *ex aequo et bono* as discussed in the preceding section.

63. An illustrative and well-known example in the jurisprudence of international law of the use of the expression "absolute equity" is to be found in the *Orinoco Steamship Co.* case, 1910, where, in the words of the Permanent Court of Arbitration, the *compromis* required the US-Venezuelan Mixed Claims Commission to "give their decisions on the basis of absolute equity without regard to objections of a technical nature, or to the provisions of local legislation . . .". The umpire's recognition of local legislation in dismissing the claims on account of failure to exhaust local remedies and the debtor's failure to notify the cession of the debt in accordance with local legislation, was held to be a decision not in accordance with absolute equity and thus to be in disregard of the *compromis*[2].

64. The methods of equity *ex aequo et bono* and of absolute equity are not the methods of international law. "Above all, it is necessary to stop viewing equity as something which is in opposition to the law or as supplying a corrective to the law."[3]

(c) *Equity* praeter legem

65. This sense of equity refers to filling in gaps and interstices in the law. Even where there is no rule of law to provide for a matter, a decision has nevertheless to be reached, for the judicial function does not permit the court to abdicate the responsibility of judgment because the law is silent[4]. Consequently, the gap[5] has to be filled in some manner. Some would say that the judge is free to act in his discretion. Others would say

[1] See also Bin Cheng, "Justice and Equity in International Law", *Current Legal Problems*, 1955, p. 203.

[2] 1 Scott, *Hague Court Reports* (1916), p. 226.

[3] Shabtai Rosenne, "The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law", in A. Bloed and P. van Dijk (eds.), *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, 1988, p. 108.

[4] See O. Schachter, "International Law in Theory and Practice", 178 *Recueil des cours* (1982-V), Chap. IV, "General Principles and Equity", p. 85.

[5] The question whether there is a "gap" in the law or whether there is always a rule or principle of law which is capable of extension and application to the case in hand is a nice jurisprudential one which it is not necessary to examine here at length. For a fuller, and perceptive, discussion, see Vaughan Lowe, "The Role of Equity in International Law", 12 *Australian Yearbook of International Law* (1988-1989), pp. 58-63.

the judge then falls back upon equity as a guide. It is in this latter sense that the expression equity *praeter legem* is generally used.

66. In support of the view that equity should guide the judge in such cases, it could be said that judicial discretion does not then roam unbridled and at large, but, rather, is used in a disciplined way along the lines indicated by equitable concepts and principles. Within the parameters of those guidelines, that discretion will then be exercised though no rule of law has so far been formulated to govern the case.

67. Equity *praeter legem* receives juridical justification also from the fact, outlined elsewhere in this opinion, that the body of general equitable principles, as part of "general principles of law", is itself part of international law. Indeed, viewed strictly from that point of view, it ceases to be a category of its own but is merely an application of the law itself.

68. In the context of maritime delimitation, there are dicta in the jurisprudence of the Court that strongly support the view that the process in operation is one of the application of equity *praeter legem*:

> "Is not the conclusion therefore justified, to round off the enumeration of those international acts which refer to equity, that these acts constitute applications of the general principle of law which authorizes recourse to equity *praeter legem* for a better implementation of the principles and rules of law? And it would not be premature to say that the application of the principle of equity for the delimitation of the areas of the continental shelf in the present case would thus be in line with this practice." (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 141, Judge Ammoun, separate opinion[1].)

This aspect also receives some attention in the discussion, under item head VII *(f)* below, of the methods of equity.

(d) *Equity* infra legem

69. This is the category most relevant to the Judgment of the Court, for it is within its confines that the equity used by the Court has been administered. As the Court observed in the *North Sea Continental Shelf* cases:

> "when mention is made of a court dispensing justice or declaring the

[1] See, also, the separate opinion of the same judge in *Barcelona Traction, Light and Power Company, Limited, Second Phase* (*I.C.J. Reports 1970*, pp. 332-333), in relation to equity *praeter legem* and the sense which Papinian, the author of that expression, gave to it.

> law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules" (*I.C.J. Reports 1969*, p. 48, para. 88).

This was clearly a reference to equity *infra legem*[1].

70. In relation to the general jurisprudence of the Court, the operation of equity *infra legem* has been well summarized by Shabtai Rosenne in terms that:

> "It [the Court] has permitted the first steps to be taken towards creating a conception of international equity, not *contra legem* in the sense that it is sometimes said that a decision *ex aequo et bono* may be a decision *contra legem*; but *intra legem*, it being the substantive law, and not the agreement of parties, that calls for its application."[2]

71. Judge Ammoun offered an important warning against exceeding the limits of equity *infra legem* when he said, with reference to its opposite, equity *contra legem*:

> "This conception of Equity, which really consists of a possible derogation from general law in a particular case, has never been applied in international law. An international court which conferred such jurisdiction upon itself would appoint itself a legislator." (*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 333, para. 42.)

72. With special reference to maritime delimitation, a comprehensive doctrinal study has noted that:

> "the doctrine of equitable principles applicable to maritime delimitation has already achieved, both with regard to its procedural and substantive elements, a degree of clarity and predictability which is sufficient for it being recognized as a fundamental norm operating within, and not outside, the law"[3].

(e) *Equity* contra legem

73. Needless to say, equity as used in the Judgment is not of this category. The notion of equity being in opposition to the law and competing with it in some way by offering a set of alternative principles is not the

---

[1] The fact that the judge must function *infra legem*, while the arbitrator is free of those constraints, is mentioned by Aristotle in a passage quoted by Grotius: "'For the arbitrator has regard to what is fair, but the judge follows the law'" (*De Jure Belli ac Pacis*, Bk. III, Chap. XX, sec. XLVII, Kelsey, trans., *Classics of International Law*).

[2] Shabtai Rosenne, *The Law and Practice of the International Court*, 1965, Vol. II, p. 605.

[3] Barbara Kwiatkowska, "The International Court of Justice Doctrine of Equitable Principles Applicable to Maritime Delimitation and Its Impact on the International Law of the Sea", in A. Bloed and P. van Dijk (eds.), *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, p. 158.

image of equity that properly sets out the role of equity in international law. This aspect has already been discussed in Section II. In international law, equity is rather a force that supplements the law and helps it forward on its course of delivering just results in disputes between parties.

> "[T]he International Court has been very careful — and in this respect it may be possible to speak of a 'position' since fundamental questions of judicial policy are involved — to formulate its resort to 'equity' not in terms of 'opposition' to 'law', but in terms of fulfilling the law and if necessary supplementing it."[1]

Judge Hudson, in the *Diversion of Water from the Meuse* case, also stressed this aspect when he said,

> "A sharp division between law and equity, such as prevails in the administration of justice in some States, should find no place in international jurisprudence." (*P.C.I.J., Series A/B, No. 70*, p. 76, separate opinion.)

IV. The Routes of Entry of Equity

74. There are many routes of entry of equity into international law, and equity has been drawn into the judgmental process in this case through several of them. A concentration of attention on only one or other of these routes of entry can constrict the full scope of operation of equity in a given case.

(a) *Equity as required to be applied by treaties*

75. In relation to the matter before the Court, there is, of course, the pre-eminent example of Articles 74 and 83 of the 1982 Law of the Sea Convention expressly making equity applicable in the delimitation of maritime boundaries.

76. The invocation of equity by treaty is often a means by which a developing branch of the law is brought into line with contemporary thinking, thereby enabling perspectives which have not yet crystallized into legal rules to make their impact upon the law in question. The Law of the Sea Convention exemplifies this process, which can also be seen in treaties regarding contemporary concerns relating to earth resources such as food and space and in regard to economic matters and the settlement of disputes. Thus, the International Covenant on Economic, Social and Cultural Rights, 1966, deals with the "equitable distribution" of world food supplies (Art. 11); and the Convention on International Liability for Damage Caused by Space Objects requires compensation to be determined in accordance with "international law and the principles of justice

[1] Shabtai Rosenne, "The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law", *op. cit.*, pp. 88-89.

and equity". The Charter of Economic Rights and Duties of States, 1974, likewise uses terms such as "equity", "equitable", "just", "equitable sharing", "equitable prices", "equitable terms of trade" (see Arts. 10, 14, 26, 28, 29); and the Protocol of the Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity specifically draws equity into the settlement of disputes (Arts. 29 and 30)[1].

77. The specific invocation of equity by the Montego Bay Convention thus follows a time-honoured practice in international law, which can be traced back through the centuries[2].

(b) *Equity as contained in customary international law*

78. Customary international law has been invoked in the Judgment as a source of equity, especially in the context of giving meaning to the expression "relevant circumstances" under international law (Judgment, para. 56). Those relevant circumstances have been shown to be assimilated with the special circumstances of Article 6 of the 1958 Convention, as both are intended to enable the achievement of an equitable result *(ibid.)*.

79. The Court is required by Article 38 (1) of its Statute to decide such disputes as are submitted to it "in accordance with international law". There is an impressive body of authority to the effect that equity is part of customary international law. Friedmann, writing of the changing structure of international law, has observed:

> "There is thus overwhelming support for the view developed by Lauterpacht, Manley Hudson, De Visscher and Dahm that equity is part and parcel of the modern system of administration of justice."[3]

---

[1] See, further, Monique Chemillier-Gendreau, "Equity", in Bedjaoui (ed.), *International Law: Achievements and Prospects*, 1991, pp. 274-275.

[2] Cf. the Jay Treaty of 1794, which, by Article 7, provided that the Commissioners appointed under the Treaty to decide the matters in contention between Britain and the United States should decide the claims "according to the merits of the several cases and to Justice, Equity and the Law of Nations". Judge Hudson has listed numerous bilateral treaties entered into during the intervening centuries which provide for the application of equity — such as the 1795 United States-Spain Treaty, the 1840 Great Britain-Portugal Treaty and the 1926 and 1930 Danish Treaties with Finland and Iceland, respectively. See M. O. Hudson, *The Permanent Court of International Justice, 1920-1942*, 1943 (1972 reprint), p. 616 (footnotes).

[3] Friedmann, *The Changing Structure of International Law*, 1964, p. 197, citing Hersch Lauterpacht, *Private Law Sources and Analogies*, 1927, para. 28; Manley Hudson, *The Permanent Court of International Justice*, 1972 ed., p. 617; Charles De Visscher, "Contribution à l'étude des sources du droit international", 60 *Revue de droit international et de législation comparée* (1933), pp. 325, 414 *et seq.*; Dahm, 1 *Völkerrechts* (1958), pp. 40 *et seq.*

So, also, Judge Hudson observed in his individual opinion in the *Diversion of Water from the Meuse* case, "What are widely known as principles of equity have been long considered to constitute a part of international law . . ."[1] — a view which received the support of Judge Jessup in the *North Sea Continental Shelf* cases[2]. In the *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland)*[3], Judge Dillard cited this opinion with approval. Judge Hudson, writing extra-judicially, has observed, "equity is an element of international law itself"[4].

80. In regard to the law of the sea and the delimitation of boundaries of the continental shelf and the exclusive economic zone, equity has been recognized by this Court as part of international law — as in the *North Sea Continental Shelf* cases[5], and the *Tunisia/Libya* case[6]. Thus in the *North Sea Continental Shelf* cases, the Court considered it inequitable that the convexity or concavity of a coastline should deny equal treatment to States with coastlines that are comparable in length[7]. The requirement of a degree of proportionality between the shelf awarded to a State and the length of its coastlines was likewise looked upon as a principle of equity. So, also, equity did not require a "refashioning" of geography[8].

(c) *Equity as a general principle of law*[9]

81. There are several categories of general principles of law applied by international law; and equitable principles, concepts and procedures, such as have been applied in the Judgment, find a place in more than one of them.

82. Citing the *Gentini* case concerning international law's recognition, through equity, of the principle of prescription, while denying recognition of local laws of prescription, Professor Bin Cheng states:

> "The process applied in the *Gentini Case*[10] of tracing a general principle from rules of positive law universally applied *in foro do-*

---

[1] *Loc. cit.*
[2] *I.C.J. Reports 1969*, p. 84.
[3] *I.C.J. Reports 1974*, p. 63, fn. 1.
[4] *The Permanent Court of International Justice, 1920-1942*, 1972 ed., p. 617.
[5] *I.C.J. Reports 1969*, p. 48, para. 88.
[6] *I.C.J. Reports 1982*, p. 60, para. 71.
[7] *I.C.J. Reports 1969*, pp. 49-50, para. 91.
[8] *Ibid.*
[9] The phrase is used in this form rather than in the now inappropriate phraseology referring to "civilized nations". Sir Humphrey Waldock preferred the expression "general principles of law recognized in national legal systems", and the shortened expression "the general principles of law" is perhaps adequate for present purposes (see *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 136, Judge Ammoun, separate opinion).
[10] *Venezuelan Arbitrations of 1903*, p. 720.

> *mestico* through the general feeling of mankind for the requirements of equity and to equity itself, is a striking reminder of Descamps' proposal for the application in international law of 'objective justice' or 'equity' as evidenced by the *'conscience juridique des peuples civilisés'* and confirms the belief drawn from the *travaux préparatoires* of the Statute of the Permanent Court of International Justice that this proposal is not very different from the ultimately adopted formula of 'the general principles of law recognised by civilised nations' in Article 38 I *(c)* of the Court's Statute."[1]

Many classifications of such general principles are possible and the first three items in a five-fold classification by Schachter[2] show again under how many heads of this classification the principles of equity used by the Court could have been drawn:

> "(1) The principles of municipal law 'recognized by civilized nations'.
> (2) General principles of law 'derived from the specific nature of the international community'.
> (3) Principles 'intrinsic to the idea of law and basic to all legal systems'..."

83. Equity in its general sense, such as the Court has used, finds a place in all of these categories. Regarding the first clause, which of course is the language of Article 38, paragraph 1 *(c)*, of the Statute of the International Court of Justice and the Permanent Court of International Justice, Schachter points out that some of the participants at the drafting stage of this clause had in mind equity and principles recognized by the "legal conscience of civilized nations"[3]. Elihu Root, who prepared the draft finally adopted, had intended however to refer to principles actually recognized and applied in national systems[4]. It would be correct to say also that international law, as discussed by eminent commentators[5] and by this Court, has looked for universal acceptance by legal systems rather than purely municipally adopted principles for this purpose. Equity clearly comes under this head . Part C of this opinion deals with the universal aspect of equity in some greater detail.

---

[1] *General Principles of Law as Applied by International Courts and Tribunals*, 1987, pp. 377-378.
[2] *Op. cit.*, p. 75.
[3] *Ibid.*
[4] *Ibid.*, p. 76.
[5] See Wilfred Jenks, *Common Law of Mankind*, 1958, p. 106; Wolfgang Friedmann, *The Changing Structure of International Law*, 1964, pp. 188-210; and Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1987, p. 377.

84. The second category would comprise such principles as *pacta sunt servanda*[1] which came into international law from the natural law tradition which was inextricably linked with equity in the broader sense. The third category includes such ideas as reciprocity and equality of parties before a tribunal, which are basic to all law.

85. The special influence of equity in its general sense is evident in all these categories and as the concept of a common law of mankind gathers momentum and principles relating to an equitable sharing of resources become more urgently required, this route of entry of equity will perhaps assume increasing importance in developing the law of the sea.

86. Schwarzenberger, in commenting on "general principles of law recognised by civilised nations" as contained in the Statute of the Court, lists seven achievements of the draftsmen of that clause. One of them, which fittingly summarizes this discussion is that, "They [the draftsmen] opened a new channel through which concepts of natural law could be received into international law."[2] Equity would represent a heavy item of traffic along that channel.

(d) *Equity as embodied in the decisions of courts and tribunals*

87. Article 38, paragraph 1 *(d)*, of the Court's Statute mentions that, subject to the consideration that decisions of the Court shall have no binding force except between the parties and in respect of the particular case, judicial decisions shall be a subsidiary means for the determination of the law.

88. The jurisprudence of this Court has now reached a stage where a considerable body of equitable principles is contained within the decisions of the Court and where there is frequent resort to equity as an aid towards the process of decision[3]. Through their adoption by the Court, they have thus entered the mainstream of international law.

89. The *Fisheries* case (*I.C.J. Reports 1951*, p. 116) is an outstanding

[1] Schachter, *op. cit.*, pp. 79-80.

[2] As set out in his Foreword to Bin Cheng's *General Principles of Law as Applied by International Courts and Tribunals*, 1987, p. xi.

[3] See, for example, *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 48, para. 94:

> "It must first of all be observed that it would be difficult on an equitable basis to make distinctions according to any quantitative test... The protector State may, of course, be disinclined to take up the case of the single small shareholder, but it could scarcely be denied the right to do so in the name of equitable considerations."

early example[1], but since then there has been much development of this concept in the context of maritime delimitation through a series of decisions of this Court making explicit references to the application of equitable principles.

90. The heavy reliance in the Judgment on judicial decisions thus draws in equity through yet another source. Dependence on such cases as the *North Sea Continental Shelf* cases, the *Libya/Malta* case and the *Gulf of Maine* case has provided avenues not only for the entry of equity into maritime delimitation but for the construction, out of those equitable principles, of a coherent body of equity-based maritime jurisprudence. Any consideration of problems relating to the law of the sea must thus, as in this case, have regard to this considerable body of decisions which, through their adoption of equitable principles, have made the fertilizing influence of equity an integral part of maritime law.

(e) *Equity as expounded in the writings of the publicists*

91. Going back to the fountainheads of international law, one sees that Grotius incorporated into international law the idea that equity could complement the administration of international justice, for he cites Aristotle's references to "the perception of what is fair", "the quality of fairness", and "justice"[2]. Aristotle's definition of justice as "the correction of that in which the law, by reason of its general character, is at fault" is also cited. Indeed, Grotius' comment goes so far as to suggest even the application of equity "outside the rules of justice, properly so-called". Grotius is no doubt here using the term "rules of justice" in the sense in which we would speak of "rules of law".

92. One cannot fail to note, in this regard, the heavy reliance by Grotius on natural law, in his pioneering work on the construction of the basic principles of the law of the sea. The law of the sea may perhaps be described as an area of international law which is particularly sensitive to equitable influences.

93. The process initiated by Grotius goes on to this day and the great publicists of each generation have, through their own writings, incorporated considerations and principles of equity into their contributions, which have been assimilated into the corpus of public international law[3].

---

[1] See S. Rosenne, *The Law and Practice of the International Court*, 1965, Vol. II, p. 605.

[2] Grotius, *De Jure Belli ac Pacis* (1646), Bk. II, Chap. XVI, sec. XXVI; see, also, Bk. III, Chap. XX, sec. XLVII (Kelsey, trans., *Classics of International Law*, 1925, pp. 425, 824).

[3] With specific reference to the law of the sea, a number of eminent modern publicists, some of whom have been referred to in this opinion, are keeping up this tradition and making a distinguished contribution to this fast-developing field.

(f) *Equity as justice*

94. In the *North Sea Continental Shelf* cases, the Court stated, "Whatever the legal reasoning of a court of justice, its decisions must by definition be just and therefore in that sense equitable." (*I.C.J. Reports 1969*, p. 48, para. 88.) Equity as part of justice which the court is bound to administer then becomes part of its general jurisprudence. Equity in the sense of a quest for the just solution offers a firm substratum for a considerable part of the Court's reasoning.

95. In his separate opinion in *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judge Fitzmaurice, citing a standard work on equity (*Snell's Principles of Equity*, 26th ed., 1966, pp. 5-6), said:

> "as the author of the passage cited points out . . . equity is not distinguishable from law 'because it seeks a different end, for both aim at justice . . .'. But, it might be added, they can achieve it only if they are allowed to complement one another." (*I.C.J. Reports 1970*, p. 86, para. 36.)

96. In *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, this Court observed,

> "Equity as a legal concept is a direct emanation from the idea of justice. The Court whose task is by definition to administer justice is bound to apply it." (*I.C.J. Reports 1982*, p. 60, para. 71.)

This Court and its predecessor have of course been careful to point out that the fact that it dispenses justice does not entitle it to ignore the rules of law. The need to administer justice does not, in the words of the Permanent Court, entitle it to "base its decision on considerations of pure expediency" (*Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A, No. 24*, p. 15).

97. Kelsen and some other authorities[1] have expressed the view that the Court's function is to decide cases in accordance with international law and on no other grounds. Kelsen says, for example, that the Statute of the Court requires that the Court decide disputes in accordance with international law and does not mention justice, thus leading to the view that the Court is not authorized to decide disputes in accordance with justice[2].

98. Such views, with great respect, do not take into account the fact that much of international law already embodies equity, and that equity was a principal route through which many basic concepts entered the corpus of

[1] E.g., Judge Koretsky in *North Sea Continental Shelf* cases (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands, I.C.J. Reports 1969*, p. 165.

[2] Kelsen, *The Law of the United Nations*, 1950, p. 366.

international law and became part of it. They also do not take into account the fact that to shut the gates to the entry of this stream of influence into the corpus of international law is to cramp the development of the latter.

(g) *Equity as drawn in by the United Nations Charter*

99. The Charter of the United Nations in Article 1 sets out as one of the Purposes of the United Nations that "To maintain international peace and security" it shall "bring about by peaceful means, and in conformity with the principles of justice and international law, [the] adjustment or settlement of international disputes . . .". The International Court has been set up within that framework as one of the principal organs of the United Nations and is thus obliged to act in the adjustment and settlement of international disputes "in conformity with the principles of justice and international law". Equity as an inherent part of justice, if not of international law itself, thus enters into the Court's jurisprudence. Its significance in this regard can be measured from the fact that the maintenance of international peace and security being among the foremost of the objects of the United Nations and all its agencies, a primary means of achieving this object, namely, the principles of justice and international law must themselves have primary importance. Indeed, justice and equity are inherent attributes of peace itself, which is foremost among the objects international law aims at achieving[1]. The obligatory nature of this aspect becomes clearer when one considers also that the earlier draft of the Charter contained the words "*with due regard* to justice and international law" which were changed to *"in conformity with"* as the earlier phrase was not considered to be sufficiently emphatic[2].

100. So, also, the Preamble to the Charter expresses as one of the fountainheads of the whole concept of the United Nations the determination of the peoples of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". Shabtai Rosenne rightly uses this aspect to point out that the unity of equity with law and justice must therefore be seen in terms of a "monad" of equity, law and justice (connoting a lack of opposition among them)

[1] See *Annuaire de l'AAA*, 1972/1973, Vol. 42/43, Editorial by Boutros Boutros-Ghali, p. 4, on the need for international lawyers of the future "à affronter les problèmes complexes d'un monde nouveau, où le droit international devrait établir une paix durable, juste et équitable".

[2] *Documents of the United Nations Conference on International Organization*, Vol. VI, San Francisco, 1945, p. 454.

rather than the "triad" of law, justice and equity conceptualized by Sohn[1].

101. It needs scarcely to be stressed that every portion of the Charter is as basic to the operation of the Court as the Court's own Statute, for the two are one integrated document. The Court's warrant to use equity in this case as in all others is thus mandatory and comes direct to it from its fundamental statutory source. It is worthy of note, also, that the intimate linkage of justice and equity as set out in the United Nations Charter, with the law of the sea, was eloquently underlined by the President of UNCLOS III, Mr. H. S. Amerasinghe, at the very commencement of the Conference, when he said, in his opening address as President:

> "If the Conference resolved to be guided by the principles of justice and equity, and if it showed a spirit of mutual understanding, goodwill and compromise, it would not only be living up to the high expectations of the United Nations Charter but also handing down to posterity one of the supreme achievements of the Organization."[2]

(h) *Equity as embodied in State practice*

102. A number of items of State practice have been placed before the Court in support of propositions concerning their respective positions which the Parties seek to infer from them. State practice would within limits be evidentiary of customary international law. In so far as the State practice relied upon relates to the delimitation of maritime boundaries, it is important to note that equitable considerations, such as the principle of equidistance, often provide the background against which States negotiate on such matters. The resulting arrangements may therefore incorporate principles of equity. To the extent that State practice helps to build up international law, international law would then have, built into it through this source, some of the principles of equity. Concretized in this fashion, their equitable origins may be obscured, but we may nevertheless sometimes recognize them in the State practice they helped to evolve.

---

[1] S. Rosenne, "The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law", *op. cit.*, pp. 88-89. Sohn's view was expressed in "The Role of Equity in the Jurisprudence of the International Court of Justice", in *Mélanges Georges Perrin* (1984), p. 303.

[2] *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. I, p. 4, para. 16.

V. A priori *and* a posteriori *Employment of Equity*

(a) *The positive or* a priori *use of equity to construct a result*

103. The positive use of equity would of course be illustrated in the Court's Judgment by the application of equitable concepts and the use of equitable procedures and methods towards the achievement of an equitable result.

(b) *The negative or* a posteriori *use of equity to test a result*

104. This has been touched on already in paragraphs 31-42. It was there pointed out that the application of the equidistance principle, itself a principle of equity, can on occasion yield a result which is not equitable, as pointed out by this Court on more than one occasion. Where there is a vast disproportion in coastlines, as in the *Libya/Malta* case, that would be a means for using equity in the sense of testing whether the result would be inequitable. So, also, in the present case, the vast disproportion between the lengths of the coastlines of Greenland and Jan Mayen has been used in testing whether the result obtained by equitable principles and methods is in fact inequitable. Such a role of equity can indeed be looked at as "not so much the positive assurance of an equitable result as the negative avoidance of an inequitable one"[1], but it has both practical value and theoretical justification.

105. The use of equity in this sense is analogous to the use of injustice as a test of justice, which has a long history in philosophical thought. Although justice by its very nature is incapable of comprehensive formulation, injustice by its very nature is often a matter of instant detection. Likewise, though that which is equitable cannot be formulated in advance in terms of a comprehensive set of rules[2], that which is inequitable can be readily identified as such when a situation has occurred or a proposal is mooted.

106. This line of thought regarding justice has an ancient lineage[3]. Aristotle wrote in the *Nicomachean Ethics* regarding the sense of injustice that, "The many forms of injustice make the forms of justice quite

[1] Prosper Weil, *The Law of Maritime Delimitation: Reflections*, 1989, p. 166.

[2] Cf. Kelsen, *Was ist Gerechtigkeit?*, 2nd ed., Vienna, 1975, p. 43 — "Ich weiss nicht und kann nicht sagen was Gerechtigkeit ist... und kann nur sagen was Gerechtigkeit für mich ist" ("I do not know and cannot say what justice is... and can only say what justice is to me").

[3] See Julius Stone, *Human Law and Human Justice*, 1965, p. 316.

clear"[1], a theme also taken up by modern jurists[2]. Whereas the response to the concept of justice is merely contemplative, the response to a situation one senses as unjust is a more positive one[3]. The enlistment of the sense of injustice in the service of justice thus enjoys strong philosophical justification. The "sense of injustice" is "largely retrospective and corrective", while "the deficiencies it identifies can be finally repaired only by a body of doctrine that is prospective and creative"[4]. This is an illustration of the fact that "theories of justice in all their rich diversity of content and mode of presentation, cannot safely be discarded even from the most practical concern"[5].

107. In short,

> "We are confronted here with the difference between, on the one hand, the question of the definition of equity *in abstracto* and, on the other hand, the question of whether a *concrete* situation, measure or decision is equitable."[6]

108. All this is not to say, however, that relevant rules of equity applicable to a given object can never be formulated in advance. They can, up to a point, as the juristic learning on that topic matures, but they can never be formulated totally and the sense of injustice or the sense of the inequitable will always continue to offer assistance in the pursuit of the equitable solution.

109. With reference to boundary delimitation, no code of justice or equity, however precisely formulated, can cover all possibilities in advance. However, a solution once presented, can immediately attract a sense of injustice, which would then result in its rejection and the search for another which does not produce the same reaction. The stress upon the need for an equitable solution and the rejection of any solution which, though reached in accordance with equity, is inequitable, is thus one which has philosophical support.

---

[1] *Nicomachean Ethics*, V.i.5. See, also, Aquinas' *Commentary on the Nicomachean Ethics*, 5.1. Cf. Plato's *Republic*, 440C-D.

[2] See E. N. Cahn, *The Sense of Injustice*, 1949; Julius Stone, *op. cit.*, p. 316.

[3] Cahn, *op. cit.*, p. 13.

[4] I. Jenkins, "Justice as Ideal and Ideology", in *Nomos, Justice* 191, cited in Stone, *op. cit.*, p. 317.

[5] Stone, *op. cit.*, p. 321.

[6] P. van Dijk, *Nature and Function of Equity in International Economic Law*, Grotiana New Series, 1986, Vol. 7, p. 5.

VI. The Uses of Equity

110. The uses of equity are manifold and more than one of them may be in operation simultaneously in a given case such as that before the Court. This aspect of equity is best appreciated by using any of the well-known classifications of the use of equity. Oscar Schachter's analysis, for example, in his course on general international law at the Hague Academy in 1982 itemized five uses[1]:

(a) equity as a basis for "individualized" justice tempering the rigours of strict law;
(b) equity as introducing considerations of fairness, reasonableness, and good faith;
(c) equity as offering certain specific principles of legal reasoning associated with fairness and reasonableness, to wit, estoppel, unjust enrichment and abuse of rights;
(d) equity as furnishing equitable standards for the allocation and sharing of resources and benefits;
(e) equity as a broad synonym for distributive justice and to satisfy demands for economic and social arrangements and redistribution of wealth.

111. To this list may be added some others such as those listed below as methods of operation of equity. There may be some overlap between the two groups, for some of these uses of equity may also be listed as methods and vice versa.

112. Of the five categories listed above, it is clear that at least the first four have relevance to this case.

113. *(a)* Though Schachter mentions "individualized justice" in the sense of tempering the rigours of strict law, equity can be used to deliver "individualized justice" without in fact operating in conflict with a rule of law. The use of equity in this sense for maritime delimitation was well put by Judge Jiménez de Aréchaga in the *Tunisia/Libya* case:

> "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." (*I.C.J. Reports 1982*, p. 106, para. 24, separate opinion.)

[1] Schachter, *op. cit.*, p. 82.

114. In many cases of maritime disputes including the present this aspect is of great relevance, for each case calls for individualized treatment within the context of whatever rules of customary or treaty law may be relevant. No conflict with those rules is implied but an operation within them, as more fully discussed in the section on equity *intra legem.* This use of equity to help shape the decision to the "factual matrix" of the case is very much in use in the present case as evidenced by the variety of factors considered by the Court, at least one of which — the ice factor — has perhaps not been considered in the Court's jurisprudence before.

115. The rationale of the individualized approach was also well expressed by Judge Jiménez de Aréchaga in the following terms:

> "Its [the Court's] 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 fair for that case. Equity is thus achieved, not merely by a singular decision of justice, but by the justice of that singular decision."[1]

116. *(b)* Equity as considerations of fairness and reasonableness is also clearly in operation in this case.

117. *(c)* Equity as the basis of specific principles of legal reasoning has also been used, as when the Court considers whether the conduct of parties has been such as to amount to an estoppel. This becomes relevant in the present case in assessing, for example, the effect of the past conduct of the Parties in relation to equidistance in demarcating boundaries.

118. *(d)* Equitable standards for the allocation and sharing of resources and benefits of course lie at the heart of this dispute and in the context of the sharing of natural resources it has been shown elsewhere in this opinion that equity is playing an increasingly important international role.

119. Useful analogues to equity's role in relation to the sharing of maritime space come from space law and riparian law. Space law takes in the concept in the Moon Treaty, 1979 (Agreement governing the Activities of States on the Moon and other Celestial Bodies), which prescribes "the *equitable* sharing by all States parties" in the benefits derived from those resources and also in the allocation of "slots" for the geostationary communication satellites in outer space. The relevant treaties dealing with the allocation of these slots, such as the Convention of the International

[1] E. Jiménez de Aréchaga, "The Conception of Equity in Maritime Delimitation", in *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago,* 1987, Vol. II, p. 232.

Telecommunication Union, invoke equity for this purpose through their reference to "equitable access" as a goal[1].

120. A closer analogy, where a resource is to be divided between two States, would be the rights of littoral and riparian States to lakes and rivers. The Lac Lanoux Arbitration of 1957 between France and Spain[2] is an illustration of equitable principles of good faith and a just balance between the interests of the parties being used to determine the respective rights of two States. The Helsinki Rules on the Uses of the Waters of International Rivers (adopted by the International Law Association in 1966) and the Resolution on Pollution of Rivers and Lakes (adopted by the Institut de droit international in 1979) show a heavy dependence on equity in relation to the sharing of resources.

121. *(e)* Equity in the sense of distributive justice and redistribution of wealth is not involved in the present case. With reference to maritime boundary delimitation, this Court has observed:

> "While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 60, para. 71.)

VII. The Methods of Operation of Equity

(a) *Through balancing the interests of the parties*

122. True equity, it has been said, "consists in holding in the best equilibrium the considerations of equity invoked by both parties"[3]. The Judgment in this case has considered a number of circumstances and evaluated their resultant effect in a manner that can be so described. This is not only a well-accepted method of equity, but has ample support from the jurisprudence of this Court and of arbitral tribunals in maritime delimitation cases.

123. In the *Tunisia/Libya* case, the Court defined its task as an obliga-

---

[1] M. A. Rothblatt, "Satellite Communication and Spectrum Allocation", 76 *American Journal of International Law* (1982), p. 56.

[2] *International Law Reports*, 1957, pp. 139, 141.

[3] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1987, pp. 48-49, citing the *Pinson* case (1928) as contained in *Jurisprudence de la commission franco-mexicaine des réclamations* (1924-1932), p. 133.

tion "to balance up the various considerations which it regards as relevant in order to produce an equitable result" (*I.C.J. Reports 1982*, p. 60, para. 71).

124. Judge Jiménez de Aréchaga, in his separate opinion in the same case, pointed out that:

> "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." (*Ibid.*, p. 106, para. 24. See, also, *ibid., Judgment*, paras. 71 and 107 on the "balancing process".)

The process outlined by Judge Jiménez de Aréchaga describes very closely the process followed in the Judgment of the Court.

125. This notion of the balancing of considerations to reach an equitable result goes back very far in international law. The decisions of the Commissions set up under the Jay Treaty of 1794[1], and authorized to employ equity in their determinations, have been analysed as having been reached through "the necessary process of adjustment, of the weighing of one consideration against another"[2].

126. A reference to the process of balancing up all relevant considerations was made also in the *North Sea* cases where the Court observed:

> "In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others." (*I.C.J. Reports 1969*, p. 50, para. 93.)

127. The Tribunal hearing the *Delimitation of the Continental Shelf between the United Kingdom and France* case[3] also engaged itself specifically in the task of balancing the factors presented to it by the respective parties in determining the boundary line in the Channel Islands.

128. Of comparative interest, from a related area of the law, is the following methodology described in Article V, paragraph 3, of the Helsinki Rules on the Uses of Waters of International Rivers:

---

[1] A Treaty of Amity, Commerce and Navigation between the United States of America and Great Britain providing for the creation of three mixed commissions of American and British nationals to settle a number of outstanding questions between the two countries.

[2] Moore's analysis, as cited by H. Lauterpacht in *The Function of Law in the International Community*, 1933, p. 121, fn. 4. See, also, p. 132.

[3] Decision of 30 June 1977, *RIAA*, Vol. XVIII, pp. 87-95, paras. 180-202.

"The weight to be given to each factor is to be determined by its importance in comparison with other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole."

(b) *Through an equitable interpretation of a rule of law or of a treaty or set of facts*

129. One of the important functions of the equitable approach in all judicial processes is to provide a method of interpretation. This can relate to the interpretation of a rule of law or of a document, or indeed of a set of facts. Literal interpretations, wedded to the letter of the law and to formalism, contrast with liberal interpretations, based upon an equitable approach. Whether it be a rule of law or a treaty or a factual situation that is under interpretation, the same duality of approach is possible, with widely varying consequences.

130. Schwarzenberger spells out this aspect of equity in terms that,

"The rule of equity, as it has grown, demands reasonableness and good faith in the interpretation and application of treaties."[1]

131. This could be more specifically addressed in terms of a choice not between two but among several available interpretations. In the words of De Visscher:

"Equity can be something other than an independent basis of decision, as when in a decision which in other respects is founded on positive law *(intra legem)*, the judge chooses among several possible interpretations of the rule the one which appears to him, having regard to the particular circumstances of the case, most in harmony with the demands of justice."[2]

132. In this case, one of the major questions addressed by the Court has been the interpretation, in accordance with equity, of the "special circumstances" mentioned by the 1958 Convention.

(c) *Through tempering the application of strict rules*

133. This is the classical Aristotelian concept of equity, described thus by Aristotle, in the *Nicomachean Ethics*:

"The reason for this is that law is always a general statement, yet there are cases which it is not possible to cover in a general

[1] Schwarzenberger, "Equity in International Law", *Yearbook of World Affairs*, 1972, p. 346, at p. 357.

[2] Charles De Visscher, *Theory and Reality in Public International Law*, trans. P. E. Corbett, Princeton, 1957, p. 336.

statement . . . This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality."[1]

134. Equity could thus adopt a dominant attitude and correct a law that is defective, or adopt a soft or more lenient interpretation of a law, thus tempering its rigidity without conflicting with it. The former attitude is, as already noted, inapplicable to international law.

135. However, the latter aspect of flexibility, which is relevant, is captured by Aristotle in the same work in his comparison of the indefiniteness of equity to the "leaden rule used by Lesbian builders", which "is not rigid but can be bent to the shape of the stone"[2]. In the context of maritime delimitation, each case presents upon the facts a different shape from every other, and equity adjusts itself around that shape in the manner described because it is flexible, where a rigid rule would scarcely do it justice. The Judgment in this case does no less.

(d) *Through the choice of an equitable principle*

136. This is an aspect relevant to the judicial processes involved in the present case, for there are many equitable principles (and procedures and methods) that can be used. The Court, for reasons stated, has made its choice among these in deciding upon the line of delimitation it has chosen.

137. The judicial function by its very nature involves a choice among competing principles all of which in one way or another have relevance to the matter in hand. What principles a court adopts from the range of choice available is determined by a weighing of considerations such as those of relevance, immediacy to the problem, practical value in the particular circumstances, and the degree of authority of the principle. These are matters in which a court's experience and sense of judgment will provide it with guidance. In such situations, an important additional guide would be, within the limits of choice available in law, the court's sense of justice, fairness and equity.

138. In relation to maritime delimitation, apart from a few specific principles such as the equidistance-special circumstances rule (which have already emerged), it would be a matter for the court, among the range of general principles (and procedures and methods) available, to make such a choice as is in accordance with law and its sense of justice.

139. This is another illustration of what Julius Stone describes as the "element of evaluative choice" that is part and parcel of the judicial process[3]. To use another expression of that eminent jurist, "leeways of judi-

[1] Aristotle, *The Nicomachean Ethics*, H. Rackham (trans.), Loeb Classical Library, revised ed., 1934, pp. 315 and 317.

[2] *Ibid.*

[3] See Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, p. 305.

cial choice"[1] exist within the concept of equity, as indeed they do in most departments of the law. The fact that international law is involved, rather than domestic law, does not alter the nature of the judicial process. Equity never was nor ever will be a completely objective department of legal knowledge. In the words of a well-known treatise, "Equity may play a dramatic role in supplementing the law or appear unobtrusively as part of legal reasoning."[2]

(e) *Through the use of judicial discretion*

140. Some aspects of this have already been dealt with in so far as judicial discretion relates to the choice of an appropriate principle for application. Judicial discretion also comes into operation in regard to the choice of an appropriate solution from among a range of choices, all of them equally available on the basis of the Court's reasoning. Indeed, this aspect is particularly relevant in the present case, for, in theory, an infinite number of possible lines of delimitation would be available within the framework of the principles which the Court has chosen to follow.

141. This aspect assumes even more relevance having regard to the express averment in paragraph 90 of the Judgment that the adjustment of the median line would be within "the measure of discretion conferred on the Court by the need to arrive at an equitable result". I agree with this assertion of judicial discretion, for it is an explicit averment of what is often an implicit assumption. It is essential to point out, if one may borrow the combined judicial and academic wisdom of O. W. Holmes and Julius Stone, that, in matters such as this, there are no unique answers which are "'right' in some absolute sense, as if judgment consists of 'adding up one's sums correctly'"[3]. The court, as distinct from an arbitrator or conciliator, works within certain parameters set by law[4]. It exercises its discretion within the parameters thus set, and, where it uses the flexible tools of equity, it uses them *infra legem.* But yet, as with every exercise of judicial discretion, there is a range of choices available to the judge within a broad framework of permissible limits. Where the choice falls within that range depends upon the judge, and how he makes his choice depends on the guiding principles he employs. This is not an area of lacunae in the law, for, though the law can offer guiding principles, it is by its very nature incapable of covering entirely the innumerable permutations and combinations of fact that present themselves in a given case.

---

[1] Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, p. 304.

[2] Ian Brownlie, *Principles of International Law*, 4th ed., 1990, p. 26.

[3] Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, p. 305; and O. W. Holmes, Jr., "Path of the Law", 10 *Harvard Law Review* (1897), pp. 465-466.

[4] This distinction between the modes of operation of a judge and arbitrator was noted by Aristotle in a passage picked up by Grotius (see p. 233, footnote 1, above).

142. The use of judicial discretion may not be one of the great illuminated places of the law but, within it, equity is *par excellence* one of the lights[1] available to a judge in determining his preference amidst the leeways of choice available[2]. Equity here may consist of specific principles that have emerged from equity, or equity in the broad and general sense already discussed. Either way equity can enter international law and make a vital contribution to its continued development. Since the use of judicial discretion within the prescribed parameters is thus a necessary and intrinsic part of the judicial process, a court exercising its discretion in a case such as this does not exceed its judicial function in making its considered choice, within those limits, on the basis of its sense of the fair and equitable. Nor does it need to feel inhibited, in the exercise of that very proper function, by concerns that it is trespassing beyond the limits of the judicial function. Viewed thus, the whole spectrum of equitable applications, uses and methods stretches out before the Court, enabling the best choice to be made from the range available within the limits of its authority.

(f) *Through filling in gaps and interstices in the law*

143. This has already been dealt with in the context of equity *praeter legem.*

(g) *Through following equitable procedures*

144. This has already been dealt with in classification I *(b)* above.

(h) *Through the application of equitable principles already embedded in the law*

145. Many principles of equity such as unjust enrichment, good faith, contractual fairness and the use of one's property so as not to cause damage to others are already embedded in positive law. In the field of international law the position is the same. When one applies such a rule of

[1] There could of course be several others, especially in a municipal forum, where a judge may consciously or unconsciously lean towards, for example, a utilitarian, an analytical positivist, a realist, or other philosophical stance in making his decision. See C. G. Weeramantry, "The Importance of Philosophical Perspectives in the Judicial Process", 6 *Connecticut Journal of International Law* (1991), p. 599.

[2] On leeways of choice in judicial discretion, see, generally, Julius Stone, *Human Law and Human Justice*, 1965, pp. 304-312. See also Lon L. Fuller, *The Morality of Law*, revised ed., 1969, for a view of the choices available, ranging from what Fuller calls the morality of aspiration, high up on the scale, to the morality of duty lower down. The more idealistic judge would make his choice higher up the scale than the more pragmatic. The highest points of the scale would be unsuitable for practical use.

positive law, one is thus giving effect at the same time to a principle of equity. At what precise time a particular rule of equity takes on also the mantle of a rule of law is often a difficult question to decide. The results reached would often be the same, and probing the matter further may then be a merely academic exercise.

(i) *Through its use in negative fashion to test a result*

146. This has already been dealt with in classification V *(b)* above.

VIII. The Stages of Equitable Decision-Making[1]

147. It is perhaps helpful, in analysing a judgment involving the use of equity, to note that equity has not been applied in one sweeping operation, but that it is a careful and ordered process involving sequential stages which can be separately examined. The Judgment of the Court in this case applies equity in this ordered fashion and has my support in regard to the decision taken at each of these stages. These stages could of course be differently analysed, but the following stages perhaps represent the Court's approach to the problem.

(a) *The identification of the area of the dispute*

148. The earlier part of the Judgment carefully considers this aspect in some detail (para. 21), specifying the three areas involved. The extent of the relevant area is also specified.

(b) *The preparatory phase of assembling the relevant circumstances*

149. As in this case, the next task that presents itself is to assemble the relevant circumstances. In so doing, the Court would independently assess the relevance of each circumstance. The Judgment of the Court indicates what circumstances it considers relevant. The particular circumstances involved in this case are referred to in Part B of this opinion.

150. In working on this preparatory phase the Court would be guided by the equitable procedure of considering every item relevant to the matter under examination. The decision whether a matter has relevance or not would naturally be dependent also on any applicable rules of law, for the equity the Court is here using is not equity *contra legem.* This

[1] See, on this aspect, Michel Virally ("L'équité dans le droit. A propos des problèmes de délimitation maritime", in *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago*, 1987, Vol. II, pp. 526-530), which makes a three-fold division. For a more elaborate analysis into five stages, see J. Charney, "Ocean Boundaries between Nations: A Theory for Progress", *op. cit.* See, also, for a four-fold classification into identification of area, identification of method, application of practical method and assessment of equitability, M. D. Evans, *Relevant Circumstances and Maritime Delimitation*, 1989, pp. 87-88.

aspect is of crucial importance in determining for example whether such circumstances as population or economic factors should be taken into account.

(c) *The decisional phase*

151. This has a three-fold aspect — decisions in regard to the appropriate rules, whether of law or equity that have to be employed; decisions in regard to the assessment of the facts found to be relevant under head *(b)*; and the application of rules of law or equity to those facts to produce a practical result.

152. Once the relevant circumstances are determined, their weight has to be assessed. What weight would, for example, be given to the ice factor in this case in working out a principle of fair division? What is its weight both intrinsically and when matched against the other relevant factors? What is the weight to be given to proportionality in the light of the disproportionate coastal lengths involved?

153. Thus each factor needs to be assessed for its intrinsic importance and for the weight it carries amidst the totality of relevant factors.

(d) *The confirmatory phase*

154. The Court would then reach a result, but that result needs to be tested, for equitable principles or procedures do not automatically lead to an equitable result. As already noted, while equidistance might represent an equitable principle or method, it could lead to a result which is not equitable. A result must not be unjust. The philosophical underpinnings of this concept have already been discussed in relation to the *a posteriori* use of equity in category V above.

155. This short survey of the handling of equity in the Judgment, and of possible approaches to the application of equity, will show the multitude of heads and the diversity of routes through which equity becomes available to the Court. It is hoped, also, that this analysis will have shown the inevitability of the entry of equity into a problem such as that confronting the Court, the productive role it can play through judicial decision and otherwise in constructing the law of the future and the fact that equity is a vital and integral part of positive law which one neglects only at the cost of legal development.

UNCERTAINTIES IN THE USE OF EQUITY

156. It is intrinsic to the operation of equity that there are some uncertainties in regard to the extent of its application and the results which emerge. This has already been noted in an earlier part of this opinion.

Some of the causes of these uncertainties, with special reference to maritime delimitation, are separately considered below with a view to addressing the question whether there is in equity, as is sometimes alleged, a quality of uncertainty which renders it an unsuitable instrument for determining the claims of parties in a matter such as this.

(a) *Absence of mechanisms for precise quantification*

157. To expect greater precision is to ignore the very nature of equity[1]. One is reminded here of the Aristotelian aphorism that only so much precision can be achieved as the subject-matter will allow. The factual material which equity deals with is in most cases rarely assessable in quantifiable terms. Equity has no fine balances at its command to weigh human conduct, no graded units of value with which to measure the particular mix of varied factors a given case may present. It makes in most cases an overall assessment on the basis of legal principle and human experience and will not be able, in mathematical fashion, to produce a result precisely calibrated to match the circumstances, if, indeed, such a result were at all possible, having regard to the nature of the subject-matter.

158. When therefore a court, as in this case, translates an equitable finding into a delimitation, it is only in terms of an assessment of the equities as closely as it can and not with any suggestion that the resulting cartographic delimitation mirrors the exact ratio of equities involved. Certainties such as are contended for here do not exist even in the realm of the law, leave alone the realm of equity[2].

(b) *Lack of definiteness in the scope of equity*

159. Equity's seeming weakness in defying comprehensive definition[3], or precise quantification is at the same time one of its strengths, for it has

[1] Judge Manley Hudson points out:

> "The conceptions introduced into the law as principles of equity cannot be listed with definiteness; but they are not to be discarded because they are vague, for that is a quality attaching to international law itself..." (*The Permanent Court of International Justice, 1920-1942* (1972 reprint, intro. by L. B. Sohn), p. 617.)

[2] On the belief in legal certainty even in law, as opposed to equity, see Julius Stone, *The Province and Function of Law*, 1946, pp. 204-205:

> "[T]he defence of legal 'certainty' insofar as it assumes that certainty can be attained by continuing to adhere closely to logical development of the 'principles of law', is defending what has never existed. The appearance of certainty and stability in legal rules and principles conceals existing uncertainty."

[3] O. Schachter, *op. cit.*, p. 82: "No concept of international law resists precise definition more than the notion of equity."

given it the flexibility to make a prime contribution to the development of the law. Try as one may to achieve the desirable goal of certainty, this remains elusive, for

> "the finest legal dissertations on equity will never succeed in completely eliminating what is perhaps an irreducible core of judicial subjectivism..." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 90, para. 37, joint separate opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga).

Elsewhere in this opinion, reference has been made to the series of seminal principles equity has contributed to international law. These have proceeded from its quality of flexibility, its ability to handle new situations for which legal precedent affords no guidance, and its conformity with justice and fairness. In maritime delimitation law, likewise, these qualities will no doubt assist it in shaping that body of law in equitable fashion, and each individual decision based on equity, such as the present case can contribute to this end. The day equity is completely captured in a definition or formula, its creativity would be at an end.

(c) *Lack of crystallization of equitable results*

160. In the special field of the law of the sea, equitable concepts remain largely undefined and their theoretical foundations unclear. This is but natural, particularly in such an actively developing field, for as De Visscher has observed,

> "if one views the matter historically, rules of law have at all times been largely the offshoots of equity before being crystallized within the positive legal order" [1].

The danger of overconceptualization of equitable principles has indeed been noted by this Court in the context of the law of the sea [2], however great the apparent need to concretize the application of equity in this field.

(d) *Changing nature of the law of the sea*

161. An additional circumstance making for uncertainty in this field should also be noted — namely that the uncertainties of equity are com-

---

[1] Charles De Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public*, 1972, pp. 8-9:

> "envisagées du point de vue de la formation historique de leur contenu, les règles de droit ont de tout temps été largement tributaires de l'équité avant de se cristalliser dans l'ordre juridique positif."

See, also, M. D. Blecher, "Equitable Delimitation of Continental Shelf", 73 *American Journal of International Law* (1979), pp. 83-88.

[2] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 92.

pounded, in relation to the law of the sea, by the fact that the law of the sea itself has been undergoing a process of spectacular change. Some cases such as the 1969 *North Sea Continental Shelf* cases and the 1982 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case occurred before the Law of the Sea Convention was signed, whereas others such as the 1985 *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case and the 1985 *Guinea/Guinea-Bissau* cases occurred after. Maritime delimitations such as are sought in this case straddle the Geneva Convention of 1958 and the Montego Bay Convention of 1982, with all the conceptual changes occurring between 1958 and the present day.

162. Not only was a new dimension given by that Convention to the applicability of equity but the very concepts to which it was being applied — such as that of the exclusive economic zone — were in a state of dynamic evolution. New concepts unknown in the 1950s such as that of the exclusive economic zone were gathering strength even as older concepts such as that which based the continental shelf on a natural prolongation were losing momentum. It is no cause for surprise that flexible principles superimposed upon so fluid a subject should have failed to produce a greater predictability of legal result.

(e) *The resort to fact-intensive rather than rule-intensive procedures*

163. An important aspect which the Court must address in maritime delimitation cases is the extent to which it should concentrate on the variable facts of each separate case rather than on a search for overriding rules which are common to all[1]. The juristic literature describes the former as fact-intensive rather than rule-intensive procedures, and points to the concentration on fact-intensive procedures as an additional cause of uncertainty in this area of the law. However, the type of enquiry involved in the present case necessarily requires heavy reliance on fact-intensive procedures. Additionally, the crystallization of equitable rules relating to delimitation has not yet reached a stage of sufficient maturity to be a comprehensive guide[2]. Fact-intensive procedures must therefore continue to play a significant role in maritime delimitations.

164. In the history of maritime delimitation, there have indeed been attempts to reduce the solution of this problem to rule-intensive procedures specified with nearly mathematical precision[3]. The effort at one

[1] Schachter, *op. cit.*, p. 87.
[2] See, generally, Schachter, *ibid.*.
[3] As perhaps best illustrated by J. L. Azcárraga's suggestions running to three pages of mathematical formulae titled "Nuestra Fórmula Matemática", in *La Plataforma Submarina y el Derecho Internacional*, 1952, pp. 82-84. The formulae allocate different areas of shelf according to three fixed factors — number of inhabitants, length of coast and area of territory.

stage to erect the concept of equidistance into a rigid rule was another attempt at rule-intensive solutions aimed at achieving a predictable certainty of result.

165. The self-limiting nature of such formulae is clear, especially in the light of later experience revealing the relevance of numerous factors, some of which may not have been foreseen, and some of which — such as State conduct — cannot possibly be the subject of pre-set assessments. Legal concepts cannot thus be locked into the rigours of mathematical method.

PART B. PARTICULAR INVOCATIONS OF EQUITY IN MARITIME DELIMITATION

Long-standing Recognition of Equity in the Law of the Sea

166. Apart from the general applicability of equity in international law which would, in any event, draw it into disputes in relation to the law of the sea, it has also been specifically drawn into the law of the sea by treaty, proclamation, judicial and arbitral decisions and State practice. Equity has long been specifically drawn into the law of the sea in this fashion. This aspect is dealt with in the Judgment of the Court and I shall deal with it only in outline. It will suffice for present purposes to note that its invocation in the Truman Proclamation (of 28 September 1945) was coeval with the very birth of the continental shelf doctrine. The statement in that Proclamation that the determination of boundaries, where the continental shelf extended to the shores of another State or was shared with another State, was to be *in accordance with equitable principles* was a significant early indication that the law of the sea would, in its formative phase, lean heavily on equity.

167. A landmark event was the Geneva Convention of 1958 which will be considered below. However, even before this, the régime of equity in this field was well established:

> "It is generally admitted that in State practice prior to the Geneva Conference of 1958 the tendency was to refer in general terms to the delimitation of continental shelf boundaries or '*equitable* principles' . . ." (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 91, Judge Padilla Nervo, separate opinion.)

168. In the jurisprudence of this Court in maritime disputes, the equitable approach received recognition in 1951 in the Anglo-Norwegian *Fisheries* case[1]. The development of this trend, through a series of

[1] *I.C.J. Reports 1951*, p. 142. See, also, S. Rosenne, *The International Court of Justice*, 1957, pp. 427-428.

cases[1] until the latest decisions of this Court, has entrenched equity as a key legal factor in this field. This trend is evident also in the arbitral decisions[2].

169. In the deliberations during UNCLOS III, the role of equity in relation to the law of the sea progressively achieved increasing recognition, till it became enshrined as a cardinal principle in the final draft of the Convention, in Articles 74 and 83. In achieving this status, equity displaced other suggested criteria such as equidistance which had appeared in earlier drafts as the prime consideration for delimitation. Indeed, a deep concern for equitable considerations permeates the Convention (see Arts. 160 (2) *(d)*, 161 (1) *(e)*, 162 (2) *(d)*, 163 (4), 274 *(a)*).

170. So much importance has equity gained in this regard that it has been described as "currently gaining ground as the central principle of maritime boundary delimitation over the 1958 equidistance-special circumstances rule"[3].

The Use of Equity in the 1958 Geneva Convention

171. The 1958 Geneva Convention on the Continental Shelf provides by Article 6 that, where the same continental shelf is adjacent to the territories of the two States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them:

> "In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

172. Judge Oda has observed that, although not specifically mentioned in Article 6, the idea of an equitable solution lay at the basis of that provision[4] which can perhaps be regarded as having inferentially attracted equity into delimitation.

---

[1] *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 3; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, *I.C.J. Reports 1982*, p. 18; case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 246; and *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, *I.C.J. Reports 1985*, p. 13.

[2] See, in particular, the decisions of the Court of Arbitration in the *Delimitation of the Continental Shelf between the United Kingdom and France* case, *RIAA*, Vol. XVIII, pp. 3 ff.; and *Chile/Argentina Beagle Channel Arbitration, International Legal Materials*, 1978, pp. 36 ff.

[3] H. W. Jayewardene, *Regime of Islands in International Law*, 1990, p. 316.

[4] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 246, para. 144, dissenting opinion of Judge Oda.

173. There are two pointers in the Article to the area of enquiry in which the Court should engage itself —

(i) any agreement between the parties, and,
(ii) in the absence of such agreement, whether any line other than the median line is justified by special circumstances.

174. Under each of these heads, there are matters which arise for consideration.

175. Under the first head, there is the Agreement of 1965 between Norway and Denmark which is considered in the Judgment of the Court. I respectfully express my agreement with the conclusion of the Court that that Agreement does not relate to the maritime area in dispute in the present case.

176. Under the second head, the Court has been addressed on a number of factors — relative populations, proportionality of coastlines, respective landmasses and economic importance to the appurtenant coast, to mention a few. These matters will receive consideration later in this opinion. It is my view that none of them can be ruled out *in limine* on the basis of a general principle of irrelevance relating to any one category.

177. As was observed by the Court of Arbitration in *Delimitation of the Continental Shelf between the United Kingdom and France* in 1977:

> "the rôle of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistance-special circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles"[1].

The Use of Equity in the 1982 Montego Bay Convention

178. The "equitable solution" formula contained in the Convention (Arts. 71 (1) and 83 (1)) — a compromise between that favoured by the equidistance group[2] and that favoured by the equitable principles group[3] — gave further recognition to the role of equity.

---

[1] *RIAA*, Vol. XVIII, p. 45, para. 70.

[2] "The delimitation of the Exclusive Economic Zone/Continental Shelf between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median or equidistance line, taking into account any special circumstances where this is justified." (Doc. NG 7/2/Rev.2, 28 March 1980, cited by Brown, "Delimitations of Offshore Areas: Hard Labour and Bitter Fruits at UNCLOS III", *Marine Policy* (1981), p. 180.)

[3] "The delimitation of the exclusive economic zone between adjacent or/and opposite States shall be effected by agreement, in accordance with equitable principles taking into account all relevant circumstances and employing any methods where appropriate, to lead to an equitable solution." (Doc. NG 7/10/Rev.2, 28 March 1980, cited by Brown, *op. cit.*)

179. As is observed in a contemporary text on the régime of islands under international law:

> "The most distinctive feature of the provision [on the economic zone and continental shelf in the Informal Single Negotiating Text] was the abandonment of the 1958 equidistance-special circumstances model in favour of a formula based on the principle of equitable delimitation."[1]

180. The acceptance by both groups[2] of phraseology including "an equitable solution" despite the wide disparities in the positions of the two groups gives equity a position of special importance in this sensitive and controversial area of international law, thus creating a special need for a fuller investigation of all the implications of the phraseology so adopted[3].

Categories of Relevant Factors Are Not Closed

181. In paragraphs 122-128 above dealing with the operation of equity through the balancing of interests, attention has been given to the way in which the various relevant circumstances are weighed against each other. Reference was there made to the *North Sea* cases which stated that there was no legal limit to the considerations which States take account of for this purpose[4]. So, also, in the *Libya/Malta* case, this Court observed:

> "For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion." (*I.C.J. Reports 1985*, p. 40, para. 48.)

182. No complete list can be made, if for no other reason than that each case is unique and one can never foretell what circumstances may surface or achieve importance in the unknown disputes of the future. Moreover,

---

[1] H. W. Jayewardene, *The Regime of Islands in International Law*, 1990, p. 320.

[2] See *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. XV, pp. 39-42, for the discussion on the compromise text formulated by the President, and for its acceptance by the two groups concerned.

[3] It is not necessary for present purposes to enter into discussions of the question whether the provisions of the Convention have acquired the force of customary international law. That question is not free of controversy — see Jennings, "Law Making and Package Deal", in *Mélanges offerts à Paul Reuter*, Paris, 1981, pp. 347-355; L. A. Howard, "The Third UN Conference on the Law of the Sea and the Treaty/Custom Dichotomy", 16 *Texas International Law Journal* (1981), pp. 321-345; H. Caminos and M. R. Molitor, "Progressive Development of International Law and the Package Deal", 79 *American Journal of International Law* (1985), pp. 871-890; and M. C. W. Pinto, "Maritime Security and the 1982 UN Conference on the Law of the Sea", *Maritime Security, The Building of Confidence*, UNIDIR, 1993, p. 9, at pp. 40-46.

[4] *I.C.J. Reports 1969*, p. 50, para. 93.

each item — such as State conduct or national security — is infinitely variable and, more often than not, is itself a conglomerate of factors which themselves need to be assessed and evaluated. This Court's description of each as "monotypic"[1] thus aptly captures its individuality.

183. It may be noted that, although the 1961 Helsinki Rules on the Uses of Water of International Rivers, contained in Article V, paragraph 2, a list of relevant factors, the list is expressly stated to be non-exhaustive.

184. From these preliminary observations to what extent can the process be carried forward of developing equitable principles in relation to maritime delimitation?

185. Since "there is no legal limit to the considerations which States may take account of"[2], it would seem, for example, that they cannot be limited to the purely geographic. Geographic factors may perhaps be used as the starting point for an enquiry of this nature, and it is right to stress their importance. However the equitable solution yielded by the application of the principles of equity is not attained by the mere application of geographically based principles such as the equidistance principle. In the anxiety to concretize equitable principles by relating them to demonstrable and quantifiable data such as geographic data we may perhaps shut out important considerations relevant to equity. Definiteness of principle is no doubt an important value to be striven after[3], but it could be bought at too high a price at an incipient stage of development of a legal concept.

186. Among the factors taken into consideration in the *Tunisia/Libya* case were not merely geographical factors but historical and political factors as well. Among these were the history of the enactment of petroleum licensing by each party and the grant of successive petroleum concessions[4], and such indicia as were available of the line or lines which the parties themselves had considered equitable or acted upon as such[5].

187. When one ventures outside the areas of pure geography and geology, one encounters considerations which are of immense importance in the real world — matters such as population, security, history, practical usability, political status and economic dependence. Doubtless they will

---

[1] *I.C.J. Reports 1984*, p. 290, para. 81.

[2] *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 50, para. 93.

[3] See Shigeru Oda, "Delimitation of a Single Maritime Boundary", in *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago*, 1987, Vol. II, p. 349.

[4] See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 83, para. 117.

[5] *Ibid.*, p. 84, para. 118. See, also, Jiménez de Aréchaga, "The Conception of Equity in Maritime Delimitation", in *International Law at the Time of Its Codification: Essays in Honour of Roberto Ago*, 1987, Vol. II, p. 232.

have different values in individual cases varying from the minimal to the immensely influential and these will need to be taken into consideration and evaluated.

188. In the *Delimitation of the Continental Shelf between the United Kingdom and France*, the United Kingdom relied upon such matters as demography and economics[1] and, though the court did not regard them as exercising a decisive influence on the delimitation, it held that they could support and strengthen, but not negative, any conclusions indicated by the geographical, political and legal circumstances[2]. To quote Judge Jiménez de Aréchaga again:

> "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." (*I.C.J. Reports 1982*, p. 109, para. 35.)

189. Equity was by very definition the process by which situations which could not be provided for by the specific letter of a legal rule were taken into account where the purely mechanical application of the rule would shut them out. It would be a negation of that flexibility which is a characteristic of equity if we were at this early stage in the development of maritime demarcation to introduce into it the very element of rigidity which equitable doctrine was devised to prevent. As this Court observed in *Tunisia/Libya*, no attempt should be made to overconceptualize the application of the principles and rules applicable to the continental shelf (*ibid.*, p. 92, para. 132).

The Equidistance Principle

190. It is necessary to consider the status of the equidistance method, as Norway lays great store by it, not only in its own right but also by virtue of the 1965 Agreement between the Parties.

191. Speaking in general terms, three possible ranks may be assigned to this rule:

(i) the status of a mandatory rule either under customary international law or, where parties are bound by the Convention, in the absence of agreement or justification of a different rule by other circumstances;

(ii) a status of priority over other equitable factors to be considered;

(iii) a status of parity with other equitable factors.

---

[1] *RIAA*, Vol. XVIII, pp. 84-85, paras. 171-173.
[2] *Ibid.*, p. 90, para. 188.

(i) *Is it a mandatory rule?*

192. In the *North Sea Continental Shelf* cases, this Court, while viewing the equidistance rule as one of great practical convenience and wide applicability, held that the equidistance method was neither prescribed by a mandatory rule of customary international law (*I.C.J. Reports 1969*, p. 46, para. 83, p. 53, para. 101) nor an inherent necessity of continental shelf doctrine (*ibid.*, pp. 35-36). Placing the rule in the context of its equitable origins, the Court observed:

> "It was, and it really remained to the end, governed by two beliefs; — namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles. It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement, — and in pursuance of the second that it introduced the exception in favour of 'special circumstances'. Yet the record shows that, even with these mitigations, doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable." (*Ibid.*, pp. 35-36, para. 55.)

193. The *Gulf of Maine* case also made this clear:

> "The Chamber must therefore conclude in this respect that the provisions of Article 6 of the 1958 Convention on the Continental Shelf, although in force between the Parties, do not entail either for them or for the Chamber any legal obligation to apply them to the single maritime delimitation which is the subject of the present case." (*I.C.J. Reports 1984*, p. 303, para. 125.)

194. This Court tersely summarized the jurisprudence on this point when it observed in the *Libya/Malta* case,

> "The Court is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which *must* be used . . ." (*I.C.J. Reports 1985*, p. 37, para. 43.)

195. If the rule is to have a mandatory status under the Convention, this can only occur in the absence of agreement and in the absence of justification by special circumstances. Where special circumstances exist, as they do in this case, the equidistance rule cannot in any event be mandatory.

196. Although the equidistance rule may be basically equitable in conception and origin, it is by its very nature and definition inflexible, contrasting in this respect with the flexibility of equity which enables the latter

to accommodate itself to varying and unforeseeable conditions which must depend on each particular case.

(ii) *Does it have priority over other factors?*

197. This Court also expressed itself on this aspect in the *North Sea Continental Shelf* cases, when it said that this rule did not have a privileged status in relation to other methods [1]. State practice, as the Court observed, often resorted to this rule but it showed also that in many cases other criteria had been resorted to, when they were found to offer a better way to reach agreement.

198. As the Chamber observed in the *Gulf of Maine* case, "Nor is there any method of which it can be said that it must receive priority" (*I.C.J. Reports 1984*, p. 315, para. 163).

199. In the *Libya/Malta* case, this Court observed that

> "the equidistance method has never been regarded, even in a delimitation between opposite coasts, as one to be applied without modification whatever the circumstances" (*I.C.J. Reports 1985*, p. 48, para. 65).

(iii) *Does it have parity with other factors?*

200. The previous discussion shows that the equidistance rule, important though it be, is one of the multiple factors that need consideration in the context of any delimitation case. What can be said of these different factors is that they may assume different degrees of importance in the context of different cases, but that there is no ranking order among them. This was the position under the 1958 Convention but, after the 1982 Convention, the matter has been made clearer still.

201. It is perhaps not without significance that the equidistance rule does not appear in either Article 74 or Article 83 of the Convention on the Law of the Sea, 1982, although the Revised Single Negotiating Text (RSNT) of 1976 [2], and the Informal Composite Negotiating Text (ICNT) of 1977 [3] as well as the two revised texts of the latter contained a reference to the median or equidistance line "where appropriate" [4].

202. The Court of Arbitration in *Delimitation of the Continental Shelf between the United Kingdom and France*, 1977, placed the equidistance rule in context when it observed that:

---

[1] *I.C.J. Reports 1969*, pp. 45-46, para. 82.

[2] See *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. V, pp. 164 and 165. Articles 74 and 83 were then numbered 62 and 71, respectively.

[3] See *ibid.*, Vol. VIII, pp. 16 and 17.

[4] See *ibid.*, Vol. XIII, pp. 77-78.

> "even under Article 6 [of the 1958 Convention] it is the geographical and other circumstances of any given case which indicate and justify the use of the equidistance method as the means of achieving an equitable solution rather than the inherent quality of the method as a legal norm of delimitation"[1].

The Court went on to observe that the equidistance method, like any other method, was "a function or reflection of the geographical and other relevant circumstances of each particular case"[2].

203. The status of parity of the equidistance method when compared with others was well expressed by the Arbitral Tribunal in the dispute between Guinea and Guinea-Bissau, 1985, when it said:

> "Le tribunal estime pour sa part que l'équidistance n'est qu'une méthode comme les autres et qu'elle n'est ni obligatoire ni prioritaire, même s'il doit lui être reconnu une certaine qualité intrinsèque en raison de son caractère scientifique et de la facilité relative avec laquelle elle peut être appliquée."[3]

The "Special Circumstances" Principle

204. "Attempts made at the Geneva Conference on the Law of the Sea to strike out the alternative of 'special circumstances' and to make the equidistance method the only rule were rejected by a large majority." (*North Sea, I.C.J. Reports 1969*, p. 93, Judge Padilla Nervo, separate opinion.) This is readily understandable when one considers that

> "in certain geographical circumstances which are frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity . . ." (*ibid., Judgment*, p. 49, para. 89).

205. This principle articulates the rule of procedural equity that all material circumstances relevant to the matter in hand should be taken into account in reaching an equitable result and that no legally relevant circumstances should be left out of consideration unless there is compelling reason to do so.

206. As was observed by the Court of Arbitration in *Delimitation of the Continental Shelf between the United Kingdom and France* in 1977:

> "the rôle of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistance-special circumstances rule', in effect, gives particular expression to a

[1] *RIAA*, Vol. XVIII, pp. 45-46, para. 70.
[2] *Ibid.*, p. 57, para. 97.
[3] *Revue générale de droit international public* (1985), Vol. 89, p. 525, para. 102.

general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles"[1].

207. Every case is different and, while general guidelines exist such as the equidistance principle in the absence of other or competing factors, it is for the Court to decide in each case what are the appropriate factors to be taken into account and what weight should attach to them. It is too early in the history of maritime delimitation for any determining principles to be laid down by this Court as to the relative importance of one factor over the other. It may be that when these determinations are made on a case-by-case basis, some guidelines will in course of time emerge.

The "Relevant Circumstances" Principle

208. As the Court of Arbitration observed in 1977 in *Delimitation of the Continental Shelf between the United Kingdom and France*:

> "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 [i.e., geographical and other relevant circumstances of each particular case] and of the fundamental norm that the delimitation must be in accordance with equitable principles."[2]

209. It is also to be stressed, before approaching a consideration of each of these factors, that they will be approached not from the standpoint of either Norway or Denmark but from the standpoint of the two territories in question — Jan Mayen and Greenland — as if these were independent territories competing for maritime rights, for it is clear that whatever maritime rights these territories enjoy are generated by their relevant coastlines and not by considerations that they are part of some larger political entity.

210. I agree with the Court in its careful consideration and overall evaluation of the various relevant factors enumerated by it. While doing so, I would like, however, to emphasize that consideration should not be limited to factors which are geophysical in their nature.

211. In each case there surfaces for consideration a varied mix of factors. Apart from the different nature of the mix in each case, any one factor, such as population or economy, will naturally present itself differently in each case. For example, the population factor may be of little relevance or no relevance in one case, while in another it may assume considerable

[1] *RIAA*, Vol. XVIII, p. 45, para. 70.
[2] *Ibid.*, p. 57, para. 97.

significance. So, also, with economic factors or indeed any other factor one may care to name. Any general proposition that population or economy are irrelevant because, unlike geophysical configurations, they may change with time is juristically untenable and not in conformity with the flexibility of equity.

212. In other words, I respectfully endorse the findings the Court has reached on the respective items arising for consideration in this case. Access to fishery resources is a matter to which the Court has rightly devoted particular care and attention and I am in agreement with this approach and with its resultant effect upon the overall delimitation. I would, however, add a few observations on some of the matters considered.

(a) *Population*

213. For example, while agreeing with the weight the Court gives to the population factor in the present case, I would stress that no general proposition can be laid down that the population factor is in all cases irrelevant.

214. One can visualize a case where a particular coast has sustained a teeming population for several centuries and the coast facing it has no population whatsoever and has been uninhabited as far as historical memory extends. Cases such as that need to be considered as and when they arise and cannot be left out of consideration on any general principle that the population factor is irrelevant. Such an approach would be contrary to equitable principles and procedures.

215. Reference may also be made in this context to the Anglo-French Arbitration, in which it is significant that among the factors advanced by the United Kingdom was the fact that the Channel Islands were "populous islands of a certain political and economic importance"[1]. The Court observed that it "accepts the equitable considerations invoked by the United Kingdom as carrying a certain weight"[2].

216. It is true that factors such as population or lack of it are changeable over time. A piece of land which is today barren and uninhabited may in a hundred years be the centre of a numerous and thriving population just as a thriving population of today may, for reasons which cannot now be foreseen, be reduced to a few struggling survivors some generations from today. These are factors inherent in the nature of human life and settlement but on the basis of such lack of certainty, these factors ought not, in my view, to be totally disregarded by an overriding general principle applicable in all cases.

[1] *RIAA*, Vol. XVIII, p. 93, para. 197.
[2] *Ibid.*, p. 93, para. 198.

217. When the Law of the Sea Convention spelt out in Article 121 (3) that rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf, it was perhaps giving expression to the concept that population and economic life are relevant to the enjoyment of exclusive economic zones and continental shelf entitlements. It was not rocks *per se* that were excluded from these rights but rocks which lacked the possibility of sustaining habitation or economic life, thus indicating the importance of these factors in attracting exclusive economic zone and continental shelf entitlements, in an appropriate case.

218. The Law of the Sea Convention could not have adopted a divided rationale in its different parts on this vital question, and if it considered population and economic life to be a vital and determining factor in regard to the question whether rocks attracted these entitlements, it could not have considered that in regard to other geographical configurations population and economic life were irrelevant and to be ignored.

(b) *Economic factors*

219. Similar considerations apply to economic factors. On this aspect, it must be pointed out that this is an area in which the jurisprudence of the Court has not thus far been conclusive, despite the trend of recent decisions to treat economic factors as irrelevant. In the *Gulf of Maine*[1], when the dispute was clearly about resources, Canada argued for the preservation of fishing patterns established over the past ten to fifteen years while the United States contended that it was virtually entitled to a monopoly over the Georges Bank fishery. Although the Chamber dismissed these arguments as irrelevant in law, yet it did not altogether ignore them, holding that data as to human and economic geography, although

> "ineligible for consideration as criteria to be applied in the delimitation process itself, may . . . be relevant to assessment of the equitable character of a delimitation first established on the basis of criteria borrowed from physical and political geography" (p. 340, para. 232).

In other words, these factors could in fact be used to test the equity of the result. The Chamber placed stringent limitations on such use, limiting it to cases where the results were

[1] *I.C.J. Reports 1984*, paras. 48 and 232 of Judgment.

> "radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned" (*I.C.J. Reports 1984*, p. 342, para. 237).

Yet we have here a recognition, however restricted, that such factors can play a part in the overall result[1].

(c) *State practice*

220. So, also, in considering individual acts of State practice, an important limiting factor is that the special circumstances and political considerations that lie behind a particular arrangement between two countries are often veiled in obscurity unless the parties themselves record or state those facts[2]. This is well illustrated in the present case in relation to Norway's own treaty with Iceland, for Norway herself accepts that there were special political considerations lying behind that arrangement. As stated in paragraph 560 of Norway's Counter-Memorial, "The political bargain struck between Norway and Iceland was exceptional . . .", and in the same paragraph, the arrangement giving Iceland a 200-mile zone is described as a "concession made in favour of Iceland" which "produced a boundary which reflects no norm of equitable delimitation". On Norway's own submission, these circumstances render an agreement atypical, which might otherwise be relied upon as an item of State practice.

221. Another variable factor in relation to State practice is the fact that the effect given to islands for equidistance purposes has sometimes been a partial effect, thus introducing an additional element of flexibility. For example, the Greece-Italy Agreement of 24 May 1977 gives to the Greek islands involved a varying effect, ranging from full effect for the large islands of Corfu, Kefallinia and Zakinthos to lesser effects for the islands of Othonoi and Mathraki.

222. Other instances of partial effect also exist, such as the Iran-Oman Agreement of 25 July 1974, where the presence of the small island of Umm al Faiyarin belonging to Oman does not cause a proportional deviation of the demarcation line between Oman and Iran. Had this island been given full effect, the line would have moved considerably closer to the Iranian coast than it appears on the map (Reply of Denmark, Ann. 71).

---

[1] See, generally on this aspect, D. W. Bowett, "The Economic Factor in Maritime Delimitation Cases", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, 1987, Vol. II, p. 45, esp. at pp. 58-63, pointing out, *inter alia*, that economic interests of States lay at the very heart of the 1982 Convention and that no part of the Convention is divorced from these economic interests.

[2] Rejoinder of Norway, p. 178, para. 605.

223. So also in the United Kingdom-Ireland Agreement of 7 November 1988 (Reply of Denmark, Ann. 72), the Scilly Isles have not been given full effect.

224. Nor is the jurisprudence of this Court markedly different in this regard. The Court itself has in more than one of its judgments given less than full effect to small islands in relation to the equidistance principle. The half-effect basis of delimitation was used in *Tunisia/Libya*[1] in regard to the Kerkennah Islands, and in the *Gulf of Maine* case[2] in regard to the Canadian Seal Island. The half-effect basis was also used by the Court of Arbitration in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom and France* in relation to the Scilly Isles, for

> "abating the disproportion and inequity which would otherwise result from giving full effect to the Scilly Isles as a base-point for determining the course of the boundary"[3].

(d) *The ice factor*

225. On the ice factor, likewise, one would hesitate to say that there can be a general proposition that it can have no bearing. In the present case, the factors are such that although the ice is a real geophysical factor that impinges on the usability of the waters in question, it is so situated that it does not make a difference significant enough to affect the result.

226. However, while in these days of climatic change there may be some changeability in drift ice patterns, there may well be cases where drift ice or the freezing of the seas for the greater part of the year have, throughout recorded history, rendered ice-bound the sector adjacent to the coastline of one party, while the sector adjacent to the coastline of the other remains largely unaffected. In such a case this seems indeed to be a factor pertinent to the question of equitable division, for it intrinsically affects the usability of the areas to be demarcated.

227. These are but extreme cases. However, they serve the purpose of showing that possible avenues of enquiry ought not to be foreclosed.

(e) *National security*

228. Similar considerations apply to factors bearing on national security which again will vary from case to case and may in a given case assume considerable importance. The observation in *Libya/Malta* cited in the Judgment (para. 81) to the effect that security considerations are not unrelated to the concept of the continental shelf bears this out (*I.C.J. Reports 1985*, p. 42, para. 51).

---

[1] *I.C.J. Reports 1982*, pp. 63-64, para. 79; p. 89, para. 129.
[2] *I.C.J. Reports 1984*, pp. 336-337, para. 222.
[3] *RIAA*, Vol. XVIII, p. 117, para. 251.

(f) *The conduct of parties*

229. Regarding the conduct of parties, this has been fully dealt with by the Court. Conduct can, in an appropriate case, assume importance as, for example, where it amounts to an admission or an estoppel, but I agree that it does not constitute an element which could influence the particular delimitation in the present case.

230. While the items of conduct relied upon do not thus become sufficiently significant to affect the present decision, the possibility must always remain open in future cases that any one or more of such factors can assume sufficient significance to affect a delimitation.

(g) *Disproportion in coastal length*

231. The disproportion in length of the coastlines, however, assumes importance in this case. The Court in its Judgment has dealt with this aspect at length and I am in agreement with the Court's reasoning and conclusion on this matter.

232. The equitable aspects involved in this question of disproportion or proportionality may be briefly set out as follows:

(a) Disproportion in coastal lengths of the magnitude present in this case is clearly a relevant circumstance requiring consideration both on the basis of prior decisions and on the basis of equitable principles.

(b) The principle of proportionality does not mean a division of maritime space on a proportionate basis. This Court observed in the *Libya/Malta* case that it rejects any attempt to "define the equities in arithmetical terms" (*I.C.J. Reports 1985*, p. 55, para. 75). As the Court there observed:

> "The Court does not consider that an endeavour to achieve a predetermined arithmetical ratio in the relationship between the relevant coasts and the continental shelf areas generated by them would be in harmony with the principles governing the delimitation operation." *(Ibid.)*

(c) The factor of proportionality applies only to coastlines and not to landmass, for "it is the coastal length that matters" (*ibid.*, p. 73, Judge Sette-Camara, separate opinion).

(d) Proportionality can legitimately be used as a test to verify the equity of a delimitation.

> "In the view of the Court, there is no reason of principle why the test of proportionality, more or less in the form in which it was used in the *Tunisia/Libya* case, namely the identification of 'relevant coasts', the identification of 'relevant areas' of continental shelf, the calculation of the mathematical ratios of the lengths of the coasts and the

areas of shelf attributed, and finally the comparison of such ratios, should not be employed to verify the equity of a delimitation between opposite coasts, just as well as between adjacent coasts." (*I.C.J. Reports 1985*, p. 53, para. 74.)

(e) The Court would use proportionality as an instrument for correcting disproportionality where —

"the flagrant disproportion in the lengths of coasts is such that the correction of any line according to a reasonable ratio is indispensable for achieving an equitable result" (*ibid.*, p. 73, Judge Sette-Camara, separate opinion. See, also, Anglo-French Arbitration, *RIAA*, Vol. XVIII, p. 58, para. 101).

(f) The application of the principle of proportionality is an instance of the use of the sense of injustice to test the justice of a result, as described in paragraphs 104-109 above.

(g) Even though the equidistance principle is based on equitable considerations, equidistance is only a prima facie solution. The fact of gross disproportionality as in this case would suffice to move the Court away from that prima facie solution.

(h) Such disproportion constitutes a special circumstance within the meaning of Article 6, paragraph 1, of the 1958 Convention as well as a relevant circumstance under customary international law.

PART C. EQUITY VIEWED IN GLOBAL TERMS

233. At the conclusion of this survey of the applications of equity in the Judgment of the Court, it would be appropriate to examine the concept briefly in global terms. Given the crucial importance of equity to the law of the sea, and given also that the law of the sea is still at a critical and formative phase, no examination of equity's influence upon the law of the sea is complete without a search for concepts, principles and attitudes that range further afield in a global sense. Such a universal view can only strengthen maritime law, both in its conceptual content and in its authoritative force. The concepts of equity currently drawn upon by international law do not represent the totality of the available corpus of equitable thought wherewith to strengthen the equitable approach to the problems of maritime law. Such perspectives can also offer insights of value in the determination of a case such as this.

234. The International Court of Justice, specifically structured to embody a "representation of the main forms of civilization and of the principal legal systems of the world" (see Article 9 of the Statute of the Court), is under a particular obligation to search in all these traditions and

legal systems for principles and approaches that enrich the law it administers, and in the context of the present case, this applies to the contributions that equity can make to the law of the sea.

235. A search of global traditions of equity in this fashion can yield perspectives of far-reaching importance in developing the law of the sea. Among such perspectives deeply ingrained therein, which international law has not yet tapped, are concepts of a higher trust of earth resources, an equitable use thereof which extends inter-temporally, the *"sui generis"* status accorded to such planetary resources as land, lakes and rivers, the concept of wise stewardship thereof, and their conservation for the benefit of future generations. Their potential for the development of the law of the sea is self-evident.

236. Such perspectives are to be found in many traditions and civilizations, and the ubiquitous nature of the principle of equity has already been noted in the jurisprudence of this Court.

237. With special reference to the Law of the Sea, Judge Ammoun observed in the *North Sea Continental Shelf* cases:

> "Incorporated into the great legal systems of the modern world referred to in Article 9 of the Statute of the Court, the principle of equity manifests itself in the law of Western Europe and of Latin America, the direct heirs of the Romano-Mediterranean *jus gentium*; in the common law, tempered and supplemented by equity described as accessory; in Muslim law which is placed on the basis of equity (and more particularly on its equivalent, equality) by the Koran and the teaching of the four great jurisconsults of Islam condensed in the Shari'a, which comprises, among the sources of law, the *istihsan*, which authorizes equity-judgments; Chinese law, with its primacy for the moral law and the common sense of equity, in harmony with the Marxist-Leninist philosophy; Soviet law, which quite clearly provides a place for considerations of equity; Hindu law which recommends 'the individual to act, and the judge to decide, according to his conscience, according to justice, according to equity, if no other rule of law binds them'; finally the law of the other Asian countries, and of the African countries, the customs of which particularly urge the judge not to diverge from equity and of which 'the conciliating role and the equitable nature' have often been undervalued by Europeans; customs from which sprang a *jus gentium* constituted jointly with the rules of the common law in the former British possessions, the lacunae being filled in 'according to justice, equity and good conscience'; and in the former French possessions, jointly with the law of Western Europe, steeped in Roman Law.
>
> A general principle of law has consequently become established, which the law of nations could not refrain from accepting, and which

> founds legal relations between nations on equity and justice." (*I.C.J. Reports 1969*, pp. 139-140, Judge Ammoun, separate opinion; footnotes omitted.)

238. The list of sources cited by Judge Ammoun provides a vast resource from which to quarry the elements of the universal sense of justice and fairness that underlies the meaning of equity. Some other important sources should also be mentioned — the fine analyses of justice in Greek[1] and Judaic[2] philosophy; the equity-impregnated concept of "dharma" in Hindu jurisprudence[3]; the elaborately researched concept of fairness and justice in Buddhism[4]; the Christian tradition of justice and conscience as "weightier matters of the law" as opposed to mere legalism[5]; and the Qur'anic injunction:

---

[1] Cf. the conflict between conscience and the unjust law as highlighted in Sophocles' *Antigone*, fifth century B.C. — Sophocles, *Antigone*, Eliz. Wyckoff (trans.), in *Complete Greek Tragedies II*, ed. D. Grene and R. Lattimore, 1960, University of Chicago Press, p. 170.

[2] "If mankind is to master the greatest of all arts, the art of living together in neighbourliness — if law is to light the march of the human spirit toward a closer understanding among nations — we must recognize the truth which was revealed to the Prophets of Israel, that equity is an integral component of justice." (Ralph A. Newman, "The Principles of Equity as a Source of World Law", 4 *Israel Law Review* (1966), p. 631.)

[3] The *Bhagavad Gita* gives righteousness a central place in world order (IV.7) and the very first word of this classic, described as the glory of Sanskrit literature, is the word *"dharma"* — see Juan Mascaró (trans.), Penguin Classics, 1962, p. 37; and the *Brihad Aranyaka Upanishada* characterizes *dharma* as the king of kings (1, 4-14). Kane's monumental treatise on the *dharmasastra* (P. V. Kane, *History of Dharmasastra*, 1946) sets out among the meanings of *dharma* the concepts of duty, right, justice and morality (Vol. 1, p. 1). Fritz Berolzheimer describes the philosophical positions regarding justice in ancient India as "the antecedents of later legal and ethical developments among the Greeks and Romans" (Berolzheimer, *The World's Legal Philosophies*, 1968, p. 37).

[4] See, generally, K. N. Jayatilleke, "The Principles of International Law in Buddhist Doctrine", 120 *Recueil des cours* (1967-I), pp. 443-567. World rulership is to be under a "kingless authority". That "kingless authority" is to be the law (p. 539); and righteousness is extremely important to the Buddhist conception of law (p. 449). Two conceptions underlie the Buddhist attitude towards law: *(a)* the rule of righteousness; *(b)* the happiness and well-being of mankind (L. P. N. Perera, *Buddhism and Human Rights*, 1991, p. 41).

[5] See Matthew 23 : 23. The expositions of conscience by mediaeval churchmen (such as the *Summae Confessorum* written to guide priests in assessing the moral conduct of penitents) were probably an influential source in shaping the thinking of the early English Chancellors (see A. W. B. Simpson, *A History of the Common Law of Contract*, 1975, p. 405. See, also, *ibid.*, pp. 377-379 and pp. 397-405). Their primary concern centred so much on conscience that the rubric under which early Chancery cases are to be found is not Equity but Conscience (see *ibid.*, p. 398), for in laying the foundations of equity jurisprudence, the Chancellor sat "as a judge of conscience, in a court of conscience, to apply the law of conscience . . ." *(ibid.)*.

"If thou judge
judge in equity between them
for God loveth those
who judge in equity" [1]

which has been the subject of extensive commentary over the centuries by the jurists of Islam [2].

239. The sophisticated notions of reasonable and fair conduct currently being unveiled by modern researches in African [3], Pacific [4] and Amerindian [5] customary law, and the principle of deep harmony with the environment which underlies Australian Aboriginal customary law [6] add to the reservoir of sources available.

240. What emerges is a notion of equity broad-based upon global jurisprudence which speaks therefore with greater authority. Notions of the supremacy of international law, its impregnation with concepts of righteousness, the sacrosanct nature of earth resources, harmony of human activity with the environment, respect for the rights of future generations, and the custody of earth resources with the standard of due diligence expected of a trustee are equitable principles stressed by those tradi-

[1] Surah 5, Verse 45, Yusuf Ali's translation. In particular, the technique of legal reasoning called *istihsan*, referred to by Judge Ammoun, accords an important role to equity. See, also, John Makdisi, "Legal Logic and Equity in Islamic Law", 33 *American Journal of Comparative Law* (1985), p. 63; H. Afchar, "The Muslim Conception of Law", *International Encyclopedia of Comparative Law*, Vol. VII, pp. 90-96, and the same author on "Equity in Musulman Law", in Ralph Newman (ed.), *Equity in the World's Legal Systems*, 1973, pp. 111-123.

[2] Their techniques of legal reasoning included *qiyas* (reasoning by analogy), *istishab* (presumption of continuity), *istislah* (considerations of public interest) and *istihsan* (a concept of equity). See Makdisi, *op. cit.*, pp. 40-45. The relevance to equity of some of them — such as *istislah* and *istihsan* — need scarcely be stressed.

[3] The individual's right of ownership of land is limited by the superior right of the social group to which he belongs — A. N. Allott, in Cotran and Rubin (eds.), *Readings in African Law*, 1970, p. 265. See also, T. O. Elias, *The Nature of African Customary Law*, 1956, p. 272: "It is this motive of the judge to do equity that is the most persistent characteristic of the African judicial process." See, also, M. Gluckman, *The Judicial Process among the Barotse of N. Rhodesia*, 1955, pp. 202-206; J. H. Driberg ("The African Conception of Law", *Journal of Comparative Legislation and International Law*, November 1934, pp. 230-246) discusses African law as an organic growth keeping in tune with the changing needs of society. On the felt standards of the community which are not themselves matters of law entering the process of judgment, see, M. Gluckman, *Order and Rebellion in Tribal Africa*, 1963, pp. 178-206.

[4] See, generally, Peter Sack, *Land between Two Laws*, 1973; and P. Hambruch, *Nauru: Results of the South Seas Expedition*, 1914. For the trust concept in traditional Hawaiian land law, see M. K. MacKenzie (ed.), *Native Hawaiian Rights Handbook*, 1991, p. 26.

[5] See K. N. Llewellyn and E. A. Hoebel, *The Cheyenne Way*, 1941; Charles F. Wilkinson, *American Indians, Time, and the Law*, 1987.

[6] See H. McRae, G. Nettheim, L. Beacroft, *Aboriginal Legal Issues*, 1991, pp. 44-56; *Mabo* v. *Queensland* (1992), 7 *Australian Law Journal* 408 (High Court of Australia).

tions — principles whose fuller implications have yet to be woven into the fabric of international law. Such an approach can also give to equity, especially in its application to the increasingly important area of planetary resources such as the sea, a deeper and more insightful meaning than it would bear if the search were less than universal. It also emphasizes the long-term perspectives that need to be kept in view as a developing branch of the law settles into the conceptual mould which gives it shape for the foreseeable future.

241. Two examples of such broader perspectives which are specially relevant to the law of the sea and which are drawn from two widely different legal traditions will illustrate this proposition. They highlight the principles of conservation of earth resources and safeguards against environmental pollution which are of particular importance to the law relating to such an important earth resource, and are not without relevance to maritime boundary delimitation cases. This case itself has highlighted the importance of conservation as a factor constituting the background to the dispute before it, for the near extinction of the capelin, one of the richest resources of this maritime region, was a compelling circumstance leading to the international negotiations preceding this case.

242. The first illustration of such a broader perspective comes from traditional legal systems such as the African, the Pacific, and the Amerindian, which contained a deeply ingrained respect for the earth, the atmosphere, the lakes and the seas, which the evolving law of the sea can consider with profit[1]. Among Pacific societies, for example, land had metaphysical connotations which prevented it from being seen as a saleable commodity like items of merchandise[2]. Respect for these elemental constituents of the inheritance of succeeding generations dictated rules and attitudes based upon a concept of an equitable sharing which was both horizontal in regard to the present generation and vertical for the benefit of generations yet to come[3].

---

[1] See, also, E. B. Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, 1989, for the recognition by diverse cultures that each generation is a trustee or steward of the natural environment for the benefit of generations yet unborn, and for the fact that intergenerational fairness can be addressed under principles of equity in accordance with a long tradition in international law of using equitable principles to achieve a just result.

[2] See P. Sack, *op. cit.*, pp. 33 and 37.

[3] See E. B. Weiss, *op. cit.*, p. 37,

> "The use of equity to provide equitable standards for allocating and sharing resources and benefits lays the foundation for developing principles of intergenerational equity. These principles can build upon the increasing use by the International Court of Justice of equitable principles to achieve a result that the Court views as fair and just."

243. The second illustration comes from Islamic law which enshrines another deeply relevant equitable idea — the idea that earth resources such as land cannot be the subject of outright ownership as is the case with movables, but are the subject of trusteeship for the benefit of all future generations. Such a juristic concept dictates the principle that such resources must be treated with the care due to the property of others and that the present must preserve intact for the future the inheritance it has received from the past. In such equitable principles may lie a key to many of the environmental concerns which affect the land, the sea and the air space of the planet.

244. Such transcending equities, as visualized by those systems, add new dimensions to the equitable framework within which the equities of the law of the sea can evolve, and add authority to this structure. They underscore the special responsibility of a tribunal delimiting maritime areas to pay due emphasis to the universal nature of the material out of which it is moulding the law of the future.

245. To place these conclusions in an elegant setting:

> "Behind the diverse facades of legal systems we discern the substantial identity of the underlying principles of equity which link legal systems together, as in a Gothic cathedral the multiplicity of its rhythms of stone unite with the fundamental impulses of the mind and of nature."[1]

246. Not without reason did the emerging law of the sea find in equity a general area of agreement among participants at UNCLOS who came to its meetings representing widely different backgrounds and widely divergent interests.

* * *

247. This brief survey of a vast topic — the contribution of equity to an individual decision — is intended to indicate the many ways in which it contributes to the process of judgment and can contribute to the development of the law of the sea. While not intended to be a comprehensive exposition, it could also serve the limited purpose of drawing attention to aspects of its operation which, by remaining implicit, may remain unexplored.

248. International law throughout its history has been richly interwoven with equitable strands of thought. Of equity perhaps more than of any other department of legal thought it could truly be said that, "Under

[1] Newman, *op. cit.*, p. 631.

the surface eddies created by the decisions of individual cases, there surges a mighty tide of the fundamental principles of justice." [1] That tide needs to be drawn into service to its fullest potential as the developing law of the sea moves towards its fuller maturity.

(Signed) Christopher Gregory WEERAMANTRY.

---

[1] See R. A. Newman, *op. cit.*, p. 621.