SEPARATE OPINION OF JUDGE AJIBOLA

I have voted in favour of the Judgment in this case in which the Court, in effect, dismissed the claims of both Denmark and Norway. The Court rejected the submission of Denmark "that Greenland is entitled to a full 200-mile fishery zone and continental shelf area vis-à-vis the Island of Jan Mayen". It also rejected Norway's submission that outright median lines constitute the boundary for the purpose of delimitation of the relevant areas of the continental shelf and fisheries zones between Greenland and Jan Mayen. Furthermore, I am firmly and strongly supportive of the decision of the Court as to the applicable laws both in terms of the area of the continental shelf and that of the fishery zone. The decision once again reinforces and confers a seal of approval upon the jurisprudence of the Court consistently enunciated and firmly established since the *North Sea Continental Shelf* cases in 1969.

The reason why I feel I must write this separate opinion is that there are some areas of the Judgment which I personally consider are in need of further elaboration, and which I now intend to deal with.

Basic Procedural Issue

There seem to be some procedural problems relating to jurisdiction which require a measure of clarification in this case, even though no preliminary objections have been raised by Norway. There are sufficient indications contained both in the written pleadings and, even more so, in the oral arguments of the Parties, which of necessity enjoin a careful appraisal.

The initial application of Denmark as presented to the Court is a request:

> "to decide, in accordance with international law, where a single line of delimitation shall be drawn between Denmark's and Norway's fishing zones and continental shelf areas in the waters between Greenland and Jan Mayen".

On the other hand, Norway's response to the Danish application is a submission that the Court must draw two lines. In Norway's own words, the Court is asked:

> "*to adjudge and declare that:*
>
> (1) The median line constitutes the boundary for the purpose of delimitation of the relevant areas of the continental shelf between

Norway and Denmark in the region between Jan Mayen and Greenland;

(2) The median line constitutes the boundary for the purpose of delimitation of the relevant areas of the fisheries zones between Norway and Denmark in the region between Jan Mayen and Greenland".

In other words the request of Norway is not for a dual-purpose single line as requested by Denmark but rather one line for the continental shelf boundary and the other one for the fishery zone.

Added to the question of a line or lines is the second contention of Norway that, in a case of this nature, the actual delimitation cannot be effected by the Court; that the Court should rather content itself with a mere declaratory judgment. On this point Norway asserts that

> "the adjudication should result in a judgment which is declaratory as to the bases of delimitation and which leaves the precise articulation (or demarcation) of the alignment to negotiation between the Parties" (CR 93/9, p. 52).

As was observed in the Judgment of the Court, this particular view of Norway affects the mode of presentation of its case. For example, while Denmark in all its submissions and oral arguments lays claim to a 200-mile limit off the coast of Greenland, Norway restricts itself throughout to a claim repeatedly based on the median line.

The third argument of Norway — still on procedure — is that the unilateral application as filed in this case is inappropriate to the matter in hand. Norway says:

> "Delimitation is inherently unsuitable for cases brought by unilateral application unless there is some form of agreement on the part of the respondent as to the role and powers of the Court." (CR 93/9, p. 81.)

This assertion of Norway — coupled with others already mentioned — is sufficient to compel the Court to consider carefully, even *proprio motu*, whether this is not a case in which the question of its competence and apparent jurisdiction is not being called into question by Norway. Perhaps the case is a "unicum" for this reason. Virtually all the celebrated cases on maritime delimitation were submitted to the Court on the basis of a Special Agreement between the parties. Thus (1) the *North Sea Continental Shelf* cases *(Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)*, (2) the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, (3) the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* all fell within the category of cases brought to the Court by Special Agreement.

In this regard, a few questions need to be raised and examined:

Is it possible for the Court, in the light of all the submissions of both Parties and of their written pleadings and oral arguments, to draw any line/lines of delimitation as requested by Denmark? Should the Court in fact draw a dual-purpose single line as requested by Denmark or two lines as demanded by Norway? What form of judgment should the Court have handed down in this case — should it have given merely a declaratory judgment or have aimed at a full settlement of the case?

Norway's request for two coincident single lines is not without reason and quite understandable. Of the two strands of maritime delimitation involved in this case one is the continental shelf boundary, which Norway considers to be governed by the Agreement entered into between it and Denmark on 8 December 1965 as well as the 1958 Geneva Convention on the Continental Shelf and on the basis of which Norway argues it is already in place between both Parties. The second delimitation involved is that of the fishery zone which Norway contends should also be delimited by the median line — even though it ultimately agrees that customary international law is applicable in that context. In the light of such statement of fact, it may therefore be quite logical for Norway to advance this request.

There is also the issue of a special agreement as raised by Norway in fairly emphatic terms:

> "It seems to be oblivious of the basic legal principle that the consent of parties is required in order to have the Court engage in a delimitation of maritime areas — just as the consent of parties would be required for them to effect the delimitation themselves." (CR 93/9, p. 50.)

Has Norway any ground to advance this view so strongly? Norway does not give the Court its reasons and no authority is cited to this effect. But a careful examination of the provisions of some relevant Conventions may throw sufficient light on the way in which Norway has approached this particular problem.

Article 6, paragraph 1, of the 1958 Geneva Convention on the Continental Shelf states:

> "Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined *by agreement between them.*" (Emphasis added.)

In fact this is the Convention that both Parties agree is binding on them with respect to the delimitation of the continental shelf. Similarly Article 74 of the 1982 United Nations Convention on the Law of the Sea (which is not yet in force), deals with the delimitation of exclusive economic zones between States with opposite or adjacent coasts and primarily stipulates that such a delimitation "shall be effected by agreement on the

basis of international law". The same form of words advocating "Agreement" is to be found in Article 83 of the 1982 Convention which deals with delimitation of the continental shelf between States with opposite or adjacent coasts. There are similar provisions in other Geneva Conventions of 1958 especially the Geneva Convention on the Territorial Sea and the Contiguous Zone (see Article 12).

However, it cannot validly be argued that the absence of an agreement — be it special or general — can prevent the Court from carrying out its task of deciding any legal matter referred to it for a decision on the merits. That may be the reason why all Norway can urge in the circumstances is "judicial restraint". Hence Norway elects to:

> "remind the Court of the restraint articulated on the exercise of its judicial functions in the case concerning the Northern Cameroons (*I.C.J. Reports 1963*, p. 3) or of the substantial thought that was devoted to this and to cognate subjects by the late Judge Sir Hersch Lauterpacht . . .".

It is my considered opinion that Norway's appeal for caution in this regard is misplaced and that the Court is right in rejecting it. Once an application is properly and validly placed before the Court, it is in duty bound to deal in accordance with international law with all such disputes as are submitted to it. To that end, it is required to apply international conventions, international custom, general principles of law recognized by civilized nations, judicial decisions, etc. Here it may be desirable to quote the important provision of Article 38, paragraph 1, of the Statute which empowers:

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, . . . [to] apply:
>
> *(a)* international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> *(b)* international custom, as evidence of a general practice accepted as law;
>
> *(c)* the general principles of law recognized by civilized nations;
>
> *(d)* subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

In my opinion, there is no doubt that this case clearly falls within the ambit of paragraphs *(a)* and *(b)* above. The relevance and the application of international conventions, whether bilateral or multilateral, are clear and there are many of them invoked in this case, notably the 1958 Geneva Convention on the Continental Shelf and the 1965 Treaty between both

Parties. Customary international law is also invoked in this case, especially with regard to the fishery zone.

Therefore, if the Court is of the opinion that it should give more than a declaratory judgment and proceed to draw a line or lines in this case, it has a sufficient mandate and competence to do so. If the Court considers that the solutions advocated by either Denmark or Norway, or even both of them, fail to accord with the correct application of the general principles of international law in order to settle this dispute, it is free to apply whatever it considers to be just and proper in accordance with the law.

According to the Danish application, the jurisdiction of the Court is validly invoked since both Parties have accepted, by their declarations, its compulsory jurisdiction under paragraph 2 of Article 36 of the Statute and the case has also been brought in a manner that accords with the provisions of Article 40, paragraph 1, of the same Statute. Whatever may therefore be the objection or hesitation of Norway in relation to this case, it cannot hold water in the light of its declaration of acceptance of the compulsory jurisdiction of the Court, and the Court is fully empowered to determine any issue placed before it, in order to reach an effective decision on the merits of the dispute in question, whether in relation to the drawing of one or more lines, and despite the fact that no special agreement has been entered into between the Parties in this case.

If Norway strongly felt (as it vigorously contends) that the Court for whatever reason has no jurisdiction or is incompetent in any way to draw any line whatsoever in a matter of this nature, it was free to raise a preliminary objection as to jurisdiction and admissibility before the Court. But this, Norway has failed to do.

One may therefore ask why Norway did not pursue this line of action. My hypothesis is that the answer is to be found in Norway's oral arguments, when it explains that:

> "Norway was therefore faced with a dilemma. On the one hand, it did not wish to file preliminary objections to the jurisdiction of the Court, *in view of the optional clause declarations of the Parties and the broad scope of Article 36, paragraph 2, of the Statute.*" (CR 93/9, p. 50; emphasis added.)

So, Norway anticipates — perhaps rightly — that if a preliminary objection had been raised in relation to Denmark's application before the Court, it could well have been rejected by the Court as the final arbiter on this issue or any issue for that matter, having regard to the power of the Court under Article 36, paragraph 6, of the Statute.

Conclusion on the Issue of Procedure

Perhaps I may effectively summarize this view of mine by referring to the attitude of the Court in the case concerning the *Northern Cameroons (Cameroon* v. *United Kingdom)* (*I.C.J. Reports 1963*, p. 17) where it dealt

with the issue of what one may consider "technicalities" or formal requirements — which to my mind constitute the most serious problem in this case before the Court. The attitude of the Court was clear when it declared that it would not allow mere formalities to prevent it from doing justice on any substantive matter pertaining to any dispute placed before it. In that regard, it stated specifically that it was following the line of reasoning of the Permanent Court of International Justice. What the Court is most concerned with is that the matter before it must "reveal the existence of a dispute in the sense recognized by the jurisprudence of the Court . . .".

The classical pronouncement of the Court on this point was expressed in the following terms:

> "The Court cannot be indifferent to any failure, whether by Applicant or Respondent, to comply with its Rules which have been framed in accordance with Article 30 of its Statute. The Permanent Court of International Justice in several cases felt called upon to consider whether the formal requirements of its Rules had been met. In such matters of form it tended to 'take a broad view'. (*The 'Société Commerciale de Belgique'*, P.C.I.J., Series A/B, No. 78, p. 173). The Court agrees with the view expressed by the Permanent Court in the *Mavrommatis Palestine Concessions* case (P.C.I.J., Series A, No. 2, p. 34):
>
> > 'The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law.'" (*I.C.J. Reports 1963*, pp. 27-28.)

Once the Court is convinced that there is an issue or issues in dispute (and I presume that this is so in the case before us), then it ought to proceed to a decision on the merits.

Perhaps it may be considered judicially appropriate to refer at this stage to the final award in the *Delimitation of the Continental Shelf between the United Kingdom and France* case, where the Court of Arbitration dismissed all the preliminary objections alleging a lack of jurisdiction, in favour of dispensing substantial justice between both parties, thereby deciding positively on the dispute as presented to it. Maybe justice is not doing "something, nothing" (to borrow the words of Shakespeare in *Othello*), especially in this Court whose decision is final and binding without any possibility of an appeal to any other or further appellate court.

LINE OR LINES

Drawing a line or lines of delimitation in maritime boundary cases is nothing new for the Court; one may even say that it is familiar with the exercise. For example, such a request was made to the Court in the *Gulf of*

Maine case in 1984 when, by special agreement between Canada and the United States of America, the Chamber was requested to describe and determine the course of the maritime boundary in terms of geodetic lines connecting geographic co-ordinates of points between the coasts of the two Parties. In the present case, as already stated, there is no special agreement to guide the Court. It is also observed from the available evidence and arguments before the Court, that while Denmark has presented some relevant materials to assist in the drawing of the requested single line of delimitation, Norway was not sufficiently forthcoming in this regard, or at best the materials are scanty. Detailed geodesic base lines and base points connecting geographic co-ordinates in terms of destinations, longitudes and latitudes are sufficiently provided by Denmark, especially in its final submissions. The issue is even further complicated in that the materials supplied by Denmark are based on its request and assumptions for a single line delimitation, and not on two lines. Of course, as has already been indicated, Norway stresses that the Court should reject the submission of Denmark relating to a single line, and urges the need for judicial circumspection.

Once one has concluded that the Court can draw any line/lines, the next issue on which the Court must decide is whether to draw a dual-purpose single line or two coincidental lines. Whatever decision is reached on this point must accord with the relevant applicable law in this case. It cannot be denied that the Court is dealing with two distinct institutions of maritime delimitation — the continental shelf boundary and the fishery zone — in response to Denmark's request on which Norway joins issue with it. The present case is not like *Libya/Malta* where the Court's role was confined to the delimitation of the continental shelf. Whatever may be the ultimate decision in this case, it is only prudent, judicially desirable and even legally mandatory to keep, at least prima facie, these two régimes distinct, since separate decisions have to be taken on each of them. The two lines may eventually coincide by operation of the applicable law (which in effect may amount to a distinction which will not ultimately make any difference), but the distinction must first be drawn quite independently.

I am, therefore, persuaded that separate legal consideration has to be given to the régime of the continental shelf area apart from that of the delimitation of the fishery zone.

This case will undoubtedly constitute a landmark in the development of the jurisprudence of this Court on maritime delimitation. In this respect, as already mentioned, one can consider it to be unique, and the Court is now asked, perhaps for the first time, to tackle this question head-on. In a number of cases adjudicated upon either by the Court, its Chamber or arbitral tribunals, parties have invariably, in their *compromis*, agreed on

single line delimitation. It is also observed that judges have put questions to the parties on this particular issue on a number of occasions. For example, during the oral proceedings in the *Tunisia/Libya* case, the question was put as to whether, in view of the *identity* between the provisions of the 1982 Convention on the delimitation of the continental shelf boundary and the exclusive economic zone, the delimitation of these two areas ought or ought not to be different, and whether the circumstances to be taken into consideration in each area should not be different as well. The conflicting approach of parties to these two jurisdictions is better described by Professor Prosper Weil in his book on *The Law of Maritime Delimitation — Reflections* where he advanced this germane hypothesis:

> "It is obvious what is at stake here. If one of the parties has obtained, by agreement or through judicial means, a continental shelf delimitation which seems to it to be unfavorable, it will quite naturally seek to obtain a different delimitation for the exclusive economic zone; the other party, in contrast, will want to extend to the exclusive economic zone the favorable delimitation it has obtained for the continental shelf." (P. 118.)

Judges and jurists alike are very much aware of this development, not only in respect of litigation and arbitrations on the issue of drawing a single line, but also with regard to State practice which has in fact favoured a single line, perhaps because of the convenience it offers. Opinions are divided too. There are judges whose beliefs and reasoning support the unity of delimitation by a single line, while there are others who believe that there should be a duality of delimitation lines in appropriate cases. The case-law thus far, as already indicated, has tended to approach the issue with caution. One is not very much surprised by this, since the issue was left unresolved during the debate at UNCLOS III on the nature of the relationship between these two jurisdictions. However, a careful study of Article 74 and Article 83 of the 1982 Convention on the Law of the Sea (which, even though not yet in force, nonetheless reflect the current international customary law), may throw some light on this problem.

The régime of the exclusive economic zone was treated independently under Article 74, while that of the continental shelf jurisdiction was dealt with under Article 83. The two Articles use identical language. Again, it is also correct to suggest that whatever the argument might be in favour of the duality of delimitation lines, it has been whittled down by the provision of Article 56, paragraph 3, of the 1982 Convention which states that "The rights set out in this article [on the exclusive economic zone] shall be exercised in accordance with Part VI" (which deals with the continental shelf). However, this point which seems to favour the unity of delimitation should not be pressed any further. One should perhaps go back to the history and background of the continental shelf theory, which attained

undisputed recognition and acceptance after the 1945 Truman Proclamation, and which also established the distinction between the water column and rights to the sea-bed and the duality of these two maritime jurisdictions.

The differentiation, or perhaps confusion, is even more pronounced with the current innovation of creating fishery zones to coexist with the exclusive economic zone. However, in this particular case of delimitation involving Greenland and Jan Mayen, the facts are such as to render inevitable the concept and even the application of a duality of lines. It is not denied by both Parties that they are bound in their treaty relations by Article 6 of the 1958 Geneva Convention on the Continental Shelf. Thus it becomes imperative for the Court, in this case, to consider and adjudge independently on the continental shelf régime and the fisheries jurisdiction.

It must be recognized, and accepted, that a single delimitation line has the advantage of convenience and practical utility. That, in fact, must be the reason why the State practice leans heavily towards this solution. The issue of vertical superimposition of rights is a problem and complication that States would prefer to avoid. What is relevant here, is the applicable law and the legal consideration to be given to the problem of a single delimitation line as claimed by Denmark.

The present situation is not to be compared with the situation in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* where the Chamber made the following observation:

> "With regard to this second aspect, the Chamber must observe that the Parties have simply taken it for granted that it would be possible, both legally and materially, to draw a single boundary for two different jurisdictions. They have not put forward any arguments in support of this assumption. The Chamber, for its part, is of the opinion that there is certainly no rule of international law to the contrary, and, in the present case, there is no material impossibility in drawing a boundary of this kind. There can thus be no doubt that the Chamber can carry out the operation requested of it." (*I.C.J. Reports 1984*, p. 267, para. 27.)

Again, the situation in the case in hand is unlike that which prevailed in the *North Sea Continental Shelf* cases where the Federal Republic of Germany, though a signatory of the 1958 Geneva Convention on the Continental Shelf, had never ratified that Convention; this fact in effect excluded the consideration of the 1958 Geneva Convention on the Continental Shelf, as distinct from the current trend in the customary international law which is much influenced by the 1982 Montego Bay Convention on the Law of the Sea.

It has further been argued in some quarters that the need for a duality of

maritime delimitations has been marginalized considerably since the physical characteristics of the sea-bed, which used to be a distinct consideration, now seem to be merging with the exclusive economic zone and that it can no longer be maintained that the equitable criteria for the two régimes of maritime delimitation are justifiable. Another point advanced is that the "distance criterion" must now apply to the continental shelf boundary as it applies to the exclusive economic zone. These points were made in paragraph 34 of the Judgment in the *Libya/Malta* case. Relating this current trend of customary international law to the case in hand may not be appropriate, because in the present case the Parties are specifically bound by the 1958 Geneva Convention on the Continental Shelf which came into force in 1964, was ratified by Denmark in 1963, and also ratified by Norway in 1971 and which both Parties recognize is binding upon them. It may be appropriate to conclude the statement of my views on this particular question by quoting again from Professor Weil's *Law of Maritime Delimitation — Reflections* which recognized this problem couched in the following terms:

> "one cannot exclude the possibility that a continental shelf delimitation agreement concluded at a time when the theory of natural prolongation prevailed, may have been inspired by physical considerations now out of date. Its extension to the exclusive economic zone would in that case no longer be convincingly justifiable." (P. 135.)

ENTITLEMENT VERSUS DELIMITATION

Initially, the application of Denmark to the Court seems to present no problem, as it takes the form of a simple straightforward request to the Court for a single line delimitation, in accordance with international law, of the fishery zone and continental shelf area in the waters between Greenland and Jan Mayen. However, the subsequent submissions of Denmark present both legal and geophysical difficulties. In its Reply the Danish Government submits that the Court should:

> "(1) . . . adjudge and declare that Greenland is *entitled* to a *full 200-mile fishery zone and continental shelf* area vis-à-vis the Island of Jan Mayen; and consequently
>
> (2) . . . draw a single line delimitation of the fishery zone and continental shelf area of Greenland in the waters between Greenland and Jan Mayen at a distance of *200 nautical miles* measured from Greenland's baseline, the appropriate point of which is given by straight lines (geodesics) . . ." (emphasis added).

This claim of Denmark drew a sharp reaction from Norway and the claim of 200 miles by Denmark on behalf of Greenland was characterized as "eccentric". In the words of Mr. Haug, which were subsequently supported and substantially repeated by Professor Brownlie (counsel for Norway):

> "while the first application was simply for a single line of *delimitation*, the principal submission was changed to ask for a declaratory judgment of *entitlement* to a full 200-mile fishery zone and a full 200-mile continental shelf vis-à-vis the Norwegian island of Jan Mayen ...
>
> The question of entitlement is sensitive for States in various regions of the world. In my respectful submission a decision which appeared to give some degree of support for the *eccentric Danish thesis* would militate against the development of a stable régime of maritime boundary delimitation in the future." (CR 93/5, pp. 13 and 15; emphasis added.)

Is Denmark's claim one of entitlement or delimitation? Is the Danish submission lacking in clarity as argued by Norway? In the *Libya/Malta* case, Libya sought to undermine the claim of Malta because of its (Malta's) size and insular nature, but the Court remarked that "the entitlement to the continental shelf is the same for an island as well as for a mainland". The issue of entitlement emanates from the State's sovereignty over the coast to which such rights attach with regard to its continental shelf *ipso facto* and *ab initio*. The rules and principles of international law confer on Greenland a basic entitlement relating to the continental shelf, no less than that which they confer on Jan Mayen; this in effect ensures an equal entitlement prima facie to both coasts. Therefore, Greenland is entitled to claim the 200-mile outer limit (where such can be claimed) just as Jan Mayen is equally entitled to claim the same. If, therefore, Greenland is claiming in this case an outer boundary limit line of 200-miles within the waters between it and Jan Mayen, where the entire distance between the two of them is 250 miles, then it is not difficult for one to understand Norway's argument that this is a claim for entitlement rather than a request for a delimitation.

The Danish position is clearly stated in its Reply, as follows:

> "The Government of Denmark does not, however, question Jan Mayen's status as an island under international law, as is evidenced by the fact that Denmark did not object to the establishment of Jan Mayen's 200-mile fishery zone to the east towards the open sea ... [The] Danish contention is that *an equitable boundary* line in the waters between Greenland and Jan Mayen 'should be drawn

> along the outer limit' of Greenland's fishery zone — to borrow the term used by Norway in describing the delimitation line between Iceland and Jan Mayen." (Reply, p. 152, para. 414; emphasis added.)

Having regard to the above statement of the position taken by Denmark, one can perhaps understand and even sympathize with its reasons for asserting such a claim, which to my mind is more of a claim of entitlement than a call for a delimitation. What amounts to an equitable boundary or an equitable solution for that matter is for the Court, not Denmark, to decide. The principle of non-encroachment is bound to take into consideration the whole of the relevant area, including the area in dispute, as well as the area of overlapping entitlement and any areas in the process of delimitation.

The position was made clear in 1969 in the *North Sea Continental Shelf* cases when the Court stated:

> "More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, — namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted." (*I.C.J. Reports 1969*, p. 22, para. 19.)

The reasons for Denmark's submission requesting the 200-mile fishery zone and continental shelf vis-à-vis Jan Mayen are not far fetched. One reason may perhaps be found in its argument that Norway must "concede" to Greenland the same 200 miles outer limit as it conceded to Iceland by virtue of an agreement which it sees as constituting a precedent. But another reason is the undeniable difference in size (and coastal lengths) of Greenland and Jan Mayen. Denmark initially considered Jan Mayen to be a rock (possibly falling within the scope of Article 121 of the 1982 Convention on the Law of the Sea), but later conceded that it is an island; albeit one which "sustains no population... and has never done so" — "the visualization of Greenland as a mainland and of Jan Mayen as a small island detached from its mainland coast" (CR 93/1, pp. 25 and 23).

Over two centuries ago, Vattel wrote that "A dwarf is no less of a man than a giant. A small Republic is no less of a State than the most powerful Kingdom." (*Dictionnaire de la terminologie du droit international*, Paris, Sirey 1960, under "Egalité", p. 248.) Thus however small the island of Jan Mayen may be, this cannot affect its rights under international law with respect to the issue of entitlement and the non-encroachment principle.

Finally, on this point, I am inclined to support this view which receives support from a relevant paragraph of the Judgment in the *Aegean Sea Continental Shelf* case, where the Court again confirmed that:

> "The reason is that legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf.... it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State." (*I.C.J. Reports 1978*, p. 36, para. 86.)

Equitable Principles and Delimitation

I have no difficulty whatsoever in agreeing with the Court in the matter of the applicable law in this case. After observing that it has never had occasion to apply the 1958 Geneva Convention, the Court proceeds to state that since both States are parties to that Convention, and there being no joint request for a single maritime boundary as in the *Gulf of Maine* case, then the 1958 Geneva Convention is applicable to the delimitation of the continental shelf boundary between Greenland and Jan Mayen. The Court then goes on to say that Article 6, paragraph 1, of the Geneva Convention is applicable to the continental shelf, but that does not mean that this treaty law is to be interpreted and applied exclusively and without reference to international customary law on the subject or independently of the fact that a fishery zone is also located in these waters. It is the role of customary international law that I wish to amplify here in order to emphasize its importance and relevance, as well as touching on its genesis in order to appreciate once again the evolution of the applicability of equitable principles and their development over the past four decades.

To begin with, one may ask what is the customary international law applicable in this case? The Court boldly enunciated it in its 1985 Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* in the following terms:

> "*Judicial decisions are at one* — and the Parties themselves agree (paragraph 29 above) — in holding that the delimitation of a continental shelf boundary must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an *equitable result.*" (*I.C.J. Reports 1985*, p. 38, para. 45; emphasis added.)

Thus one can say that the relevance of equitable principles, as a fundamental legal régime governing maritime boundary delimitation, has now been firmly entrenched by the jurisprudence of the Court supported by international arbitral tribunals. It may therefore be desirable, before examining these rules and principles of international law, to quote a full statement of their content:

> "What general international law prescribes in every maritime delimitation between neighbouring States could therefore be defined as follows:
>
> (1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of *an agreement*, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by *recourse to a third party* possessing the necessary competence.
>
> (2) In either case, delimitation is to be effected by the application of *equitable criteria* and by the use of *practical methods capable of ensuring, with regard to the geographic configuration* of the area and other *relevant circumstances*, an equitable result." (*I.C.J. Reports 1984*, pp. 299-300, para. 112; emphasis added.)

A careful analysis of this definition will show that it is a very comprehensive and all-embracing statement, and that the principles it formulates are essential to a fair and just judgment. But that is not to say that it has not given rise to certain attendant problems and criticisms. However, before going into this, it may be necessary to re-examine its historical background in a nutshell, in order to justify and fortify the Court in its adherence to this fundamental norm of international law in the field of maritime boundary delimitation and also to stress its apparently universal acceptability.

Equitable principles in maritime delimitation as established today are not the "creation" of the Court. Perhaps one can regard the Court's role as that of a "foster parent". The applicability of equitable principles received its first authoritative formulation in 1945, as the Court recognized when it stated that:

> "Such a review may appropriately start with the instrument, generally known as the 'Truman Proclamation', issued by the Government of the United States on 28 September 1945. Although this instrument was not the first or only one to have appeared, it has in the opinion of the Court a special status." (*I.C.J. Reports 1969*, p. 32, para. 47.)

Before that date, ideas had been advanced by jurists, publicists and technical experts on various theories of how best to approach the nature and extent of conflicting rights exercisable over the continental shelf. Two principles emerge from the Proclamation. The first is that the coastal States have original, natural and exclusive or even vested rights to the continental shelf of their shores, to the exclusion of other coastal States. This principle is reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf. The first two paragraphs of that Article are important enough to mention here:

> "1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
> 2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State."

The other principle which is more relevant to this opinion relates to agreements based on "equitable principles". It lays down that boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles". As a part of its assignment of developing and codifying international law, the International Law Commission of the United Nations took up this juridical project between 1950 and 1956 but no definite rule was formulated by the Commission, and the general trend of opinion among its members was still in favour of agreement or referral to arbitration. However, during this period, the Commission referred the matter to a Committee of Hydrographical Experts which eventually produced, in 1953, a report favouring equidistance — understandably enough, given its convenience. It should be noted that equidistance was only one of the four methods suggested to the experts. Even after the adoption of the Report of the Committee of Experts in favour of equidistance, there were still doubts and hesitation in the minds of some of the members of the Commission:

> "on such grounds for instance as that its strict application would be open, in certain cases, to the objection that the geographical configuration of the coast would render a boundary drawn on this basis inequitable" (*I.C.J. Reports 1969*, p. 35, para. 53).

An independent observer in the arena of maritime boundary delimitation would have no difficulty in discerning the existence of a "running battle" between the two schools of thought in this field, with those upholding equitable principles on one side, and those advocating the "equidistance principle" on the other side, each constantly pointing out the defects and weaknesses in the arguments of the other. The so-called "equidistance principle" continues to win the battle as far as State practice is concerned, because of its relative convenience (which cannot be denied), but that is all that can be said for it, since the method is quite inadequate to meet all global situations, especially where the geographical configuration would render such a method inequitable as in the present case. It is because of this patent defect in the method that the Court rejected it as not forming part of the customary law and deserving the status of nothing more than one method among others.

Historically therefore, as I have pointed out above, the equitable principle, as developed over the years from the time of the Truman Proclamation to the period when it received the attention of the International Law Commission, has now been fully developed and has achieved the status of an accepted rule of law within the jurisprudence of the Court and that of international arbitral tribunals.

In common law, the traditional role of equity as a system standing separate from the law is sharply at variance with its role and meaning in international law, and especially in the field of maritime boundary delimitation. "The classical role of equity" as known to common law

> "is to modify the rule of law where it might, if strictly applied, work injustice. Thus law and equity working together should serve the end of justice by introducing flexibility, adaptability and even limitations upon the application of legal rules." (Sir Robert Jennings in *Staat und Völkerrechtsordnung*, pp. 400-401.)

What then is meant by equity or equitable principles in maritime boundary delimitation? An answer was given in the 1982 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, where the Court defined that concept in the following terms:

> "Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. 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.)

The Court shed light on this as far back as 1969, when it defended it as follows:

"in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field" (*I.C.J. Reports 1969*, p. 47, para. 85).

Some of the grey areas of equity need to be examined and considered here. Take for example the maxim that equality is equity, or "equity did delight in equality". Well, that may be positively so in common law, but may not necessarily hold good in the field of international law. Hence in 1969, the Court pronounced that "Equity does not necessarily imply equality" and went on to state that:

"There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with restricted coastline." (*Ibid.*, pp. 49-50, para. 91.)

In the *Gulf of Maine* case in 1984, the Chamber was confronted with a choice between the criteria applicable, and resolved to favour and apply one that was "long held to be as equitable as it is simple — equal division". Perhaps, in the absence of any special circumstance, the Judgment in the *Gulf of Maine* case is a good example of equity implying equality. In that case, the Chamber concluded:

"In short, the Chamber sees in the above findings confirmation of its conviction that in the present case there are absolutely no conditions of an exceptional kind which might justify any correction of the delimitation line it has drawn. The Chamber may therefore confidently conclude that the delimitation effected in compliance with the governing principles and rules of law, applying equitable criteria and appropriate methods accordingly, has produced an equitable overall result." (*I.C.J. Reports 1984*, p. 344, para. 241.)

A similar conclusion was reached by another Chamber in 1986 in the *Frontier Dispute* case where it concluded that although

> "'Equity does not necessarily imply equality' (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 49, para. 91), where there are no special circumstances the latter is generally the best expression of the former" (*I.C.J. Reports 1986*, p. 633, para. 150).

But all these concordant declarations do not mean that there are no inherent problems with the "interpretation and application" of equitable principles. Even the Court in one of its Judgments alluded to these problems and draw a distinction as well as suggesting an amendment to an "unsatisfactory terminology":

> "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.)

In the present case, the Court has decided to start with a provisional median line which I perfectly agree with. Then it moves on to correct the line applying the equitable procedure in order to obtain an equitable result. Whatever may be the method or principle employed, the ultimate result is what is important — an equitable result likewise deriving from the principle.

There is also the criticism constantly levelled against the Court regarding its application of equitable principles, i.e., that its decisions are *ex aequo et bono* which can only be invoked when requested for under Article 38, paragraph 2, of the Statute of the Court. This contention that decisions of the Court are an exercise of discretion or conciliation has been refuted by the Court in many of its Judgments.

The Court made its position abundantly clear even in the Judgment in 1969 in the *North Sea Continental Shelf* cases:

> "Nevertheless, 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* . . ." (*I.C.J. Reports 1969*, p. 48, para. 88.)

A similar view was again expressed in the *Tunisia/Libya* case when the Court said that:

> "Application of equitable principles is to be distinguished from a decision *ex aequo et bono* . . . 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." (*I.C.J. Reports 1982*, p. 60, para. 71.)

This important assertion disclaiming the use of equity *ex aequo et bono* can also be found in the Judgment of the Chamber in the *Gulf of Maine* case and in the Arbitral Award in the *Guinea/Guinea-Bissau* case.

To conclude this discussion of equitable principles, and despite all of their alleged "defects", they have worked effectively for over two decades, and have received overwhelming support from the entire world community as reflected in the 1982 Convention on the Law of the Sea, and all the United Nations Conferences on the Law of the Sea. They are now the fundamental principles which customary international law brings to the task of maritime delimitation and perhaps constitute the *fons et origo* of its future development. The judicial process, like the law, is dynamic. It will continue to develop and be improved upon. The use of equitable principles in this field is definitely on course and equity is not floundering in uncharted seas. There will always be room for fine-tuning, but there is no doubt that the international customary law of maritime boundary delimitation, now solidly based on equitable principles, has come to stay.

SOLVING THE EQUATION

This present case is an important one in the history of the development of customary international law on maritime boundary delimitation. It is a delimitation case in which the Court has to resolve the dispute between the Parties even in the absence of a special agreement. It is also the first case relating to the maritime area of the North-East Atlantic where the effect of ice on that maritime area was an issue in the dispute. Moreover, and most importantly, this is the first case before the Court that has required a definitive interpretation and application of the 1958 Geneva Convention on the Continental Shelf, in particular Article 6, paragraph 1, thereof. In this case, both Parties agree that they are bound by the provisions of the Convention which was signed by Denmark on 29 April 1958, and subsequently ratified on 12 June 1963; Norway acceded to it on 9 September 1971.

Hence, the first direct inference is that the median line method of delimitation is applicable to any matter of maritime delimitation in respect of the continental shelf boundary between Greenland and Jan Mayen. Even the Danish Memorial admits (on p. 59, para. 210) and confirms that the 1958 Convention remains in force as between both States.

The point of departure, however, between Denmark and Norway is that while Norway insists that the median line as stipulated in Article 6 of the 1958 Convention applies without any condition or reservation, Denmark argues that the rule in Article 6 is one of equidistance-special circumstances, and that Jan Mayen is a special circumstance *"par excellence"*.

The crux of the matter is accordingly the question of whether Jan Mayen is a special circumstance *par excellence.* Unfortunately, Denmark did not elaborate on what it considered to constitute a special circumstance of that kind. From the evidence before the Court, it was established by Denmark and apparently conceded by Norway, that Jan Mayen is a relatively small, isolated and uninhabited island. As to population it was common ground between both Parties that there are about 25 persons on the island at any given time, and that their presence is mainly connected with meteorological activities. In paragraphs 206 and 207 of the Danish Memorial, Jan Mayen was described as a desolate island without natural resources of any significance. Mining and hunting activities were once attempted there, but have since been abandoned. It has no harbour (natural or artificial) and even attempts to construct a port there for a fishing base were subsequently given up. The question is whether this geographical, economic, and social feature of Jan Mayen is enough to give it the status of a special circumstance *par excellence* in international law. Some of the important considerations that could so qualify Jan Mayen may now have to be received.

The first such consideration is whether Jan Mayen is a rock. If it is a mere rock, then its legal position may have to be related to Article 121, paragraph 3, of the 1982 Convention on the Law of the Sea in which a rock is defined as that "which cannot sustain human habitation or economic life of [its] own" and "shall have no exclusive economic zone or continental shelf". So it is clear from this definition that if Jan Mayen is a rock, it may not be entitled to an exclusive economic zone and continental shelf, unlike an island. But here there can be no doubt, especially after Denmark's presentation of its arguments at the hearings, that Jan Mayen is not a rock but an island. This legal status of Jan Mayen was accepted by Denmark during the oral presentation of its case, and Jan Mayen was also referred to as an island in its pleadings. If, therefore, Jan Mayen is not a rock but an island, it can be defined under Article 121, paragraphs 1 and 2, as "a naturally formed area of land surrounded by water, which is above water at high tide" and:

> "the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention, applicable to other land territory" (United Nations Convention on the Law of the Sea, Part VIII, Art. 121).

The conclusion which must inevitably be reached here is that since Jan Mayen is acknowledged to be an island, it is entitled to the considerations that would normally be attached to *other land territory*. Hence, it is like any territory entitled to its own continental shelf and fisheries zone in the same manner as Greenland, and for this purpose cannot constitute a special circumstance.

Another suggestion on special circumstances that may be worthy of consideration at this point is whether Jan Mayen is an incidental special feature. If it is, it may then amount to a special circumstance under Article 6 of the 1958 Geneva Convention. Perhaps it is necessary to put in perspective the important provision of Article 6, paragraph 1, which is the Article being examined here:

> "Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite 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 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." (Emphasis added.)

Here, it is difficult to assert that Jan Mayen is an incidental special feature. In this regard, the decision in the *North Sea Continental Shelf* cases may well be very relevant, even though there is no similarity between the geographical situation in the case between the Federal Republic of Germany, Denmark and the Netherlands, and this case before the Court. In the geographical situation of this case, there is no consideration of "quasi-equality as between States", as was found to exist in the *North Sea Continental Shelf* cases *(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*.

It may therefore not be correct to state that Jan Mayen will have such a distorting effect in any sense whatsoever. The median line issue here is not between mainland Norway and Greenland — the distance between which is well over 700 miles with high seas in between. It follows that the issue of a small island close to the median line or located in such a way as to bring about a distorting effect does not arise in this case and for this reason the issue of incidental special features does not arise.

What again is left to be considered here is whether, as in the *North Sea Continental Shelf* cases, there is a geographical situation which may bring Jan Mayen into the ambit of provisions relating to the "presence of islets, rocks and minor coastal projections" (*I.C.J. Reports 1969*, p. 36, para. 57). As I have already pointed out, the situation here is different. Jan Mayen is neither an islet, nor a rock, nor a minor coastal projection.

Having treated the question of special circumstances as it relates to the equidistance method under Article 6, paragraph 1, of the Geneva Conven-

tion on the Continental Shelf, I shall now turn my attention to the other side of the equation referred to in the jurisprudence of the Court as "relevant circumstances". While one may venture to say that special circumstances relate to geophysical peculiarities in respect of coasts of States, the term "relevant circumstances" is perhaps wider in scope, but similar in purpose and content.

However, an examination of the pronouncements by the Court on "relevant circumstances" as a pertinent consideration in cases of maritime boundary delimitation points to some ways in which international law continues to develop.

In the *North Sea Continental Shelf* cases, the Court states:

> "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. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case." (*I.C.J. Reports 1969*, p. 50, para. 93.)

On the other hand, not all factors that come within the category of "relevant circumstances" in general are in fact relevant in every case. This again was made clear by the Court in the *Libya/Malta* case when it declared that although there was no legal limit to the considerations which the State might take into account yet "only those that are pertinent to the institution of the continental shelf as it has developed within the law . . . will qualify for such inclusion" (*I.C.J. Reports 1985*, p. 50, para. 48).

It is now clear that, apart from geographical configuration, "relevant circumstances" also accommodate all other circumstances such as population, socio-economic structures, security, conduct of the parties, etc., where these are relevant. The equitable principles of customary international law which, as already stated, constitute the applicable law in this case with regard to the fishery zone, equally require account to be taken of proportionality (as in the case of the continental shelf) or what should better be called the disparity of coastal lengths of the Parties, as a relevant circumstance. If we therefore take a critical look at the length of the coastline of Greenland in comparison with that of Jan Mayen we may say that the difference is clear (the length of the coast of Greenland is 524 kilometres, while that of Jan Mayen is 54.8 kilometres). It is also clear that under the equitable principles of customary international law such a disparity of coastal lengths is a relevant circumstance to be taken into consideration because:

> "While every case of maritime delimitation is different in its circumstances from the next, only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law, to be attained." (*I.C.J. Reports 1985*, p. 55, para. 76.)

A clear picture has now emerged of the possible link between the concept of "relevant circumstances" as enshrined in the equitable principles of customary international law and "special circumstances" as a noticeable peculiarity in the geographical configuration of the coastlines of Greenland and Jan Mayen. This link (or what has been termed the "footbridge" by one great jurist) was a component of the decision reached by the Anglo-French Court of Arbitration, an arbitral tribunal that had the opportunity of applying the provisions of Article 6, paragraph 1, of the Geneva Convention on the Continental Shelf in 1977. In its Award the link was effected thus:

> "In short the rôle of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistance-special circumstance 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. In addition, Article 6 neither defines 'special circumstances' nor lays down the criterion by which it is to be assessed whether any given circumstances justify a boundary line other than the equidistance line. Consequently, even under Article 6 the question whether the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter of appreciation in the light of the geographical and other circumstances." (*Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, p. 45, para. 70.)

We now have all the necessary components or ingredients of the equation which has to be resolved in this case and in all subsequent cases on maritime boundary delimitation. On the one hand, the provision of Article 6, paragraph 1, of the Geneva Convention on the Continental Shelf enjoins all States to settle all their delimitation matters by *agreement* and then goes on to say that, if this fails the equidistance method should be applied unless there are "special circumstances". On the other hand, general international law also postulates that all delimitation matters should be resolved by agreement between the parties and that, in the event of a failure to reach agreement, equitable principles should be applied. Such an equitable procedure must have regard to "relevant circumstances".

In the first case, the resolving of delimitation matters by agreement is common to both sets of provisions. There is also a requirement to give

consideration to geophysical or other peculiarities which are termed either "special circumstances" or "relevant circumstances" and the method advocated by the Convention is equidistance, while general international law requires the application of equitable principles. Thus the end result of solving the equation is special circumstances/equidistance being equal apparently to relevant circumstances/equitable principles. In other words agreement/special circumstances/equidistance equals agreement/relevant circumstances/equitable principles. One however is encapsulated in the other as was found by the Court of Arbitration in the Anglo-French case which declared that

> "In the view of this Court, therefore, the rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article 6." (*RIAA*, p. 48, para. 75.)

In my final appraisal, therefore, the supreme contribution of current customary international law as compared to the special circumstances-equidistance rule (as in this case where both these institutions of maritime boundary delimitation have to be considered) is that the ultimate rule of law is the application of equitable principles; this is the contemporary law on this matter. In conclusion to this part of my opinion I should like to give a classic example of solving equations similar to the one that presents itself in this case. It reads thus:

> "The Court accordingly finds that the Geneva Convention of 1958 on the Continental Shelf is a treaty in force, the provisions of which are applicable as between the Parties to the present proceedings under Article 2 of the Arbitration Agreement. This finding, the Court wishes at the same time to emphasise, does not mean that it regards itself as debarred from taking any account in these proceedings of recent developments in customary law. On the contrary, the Court has no doubt that it should take due account of the evolution of the law of the sea in so far as this may be relevant in the context of the present case." (*Ibid.*, p. 37, para. 48.)

This decision is inter-temporal in tone, but there is no doubt that it reflects the current view of the law on maritime boundary delimitation — law is dynamic and moves with the times.

(Signed) Bola AJIBOLA.