SEPARATE OPINION OF JUDGE AGO

[Translation]

1. I entirely concur in the conclusion reached by the Court in defining as it has the method to be applied for the delimitation of the respective areas of continental shelf to be attributed to Tunisia and Libya. I especially approve the Court's endorsement, by so large a majority, of the idea that the "area of delimitation" must be considered as composed of two distinct sectors (para. 14), with the first being predominantly characterized by the fundamental unity of the east-northeast direction of the Libyan and Tunisian adjacent coasts, from Ras Tajoura to Ras Ajdir and from Ras Ajdir to the westernmost point of the Gulf of Gabes, and the second, on the other hand, by the quasi-opposite relationship of the coasts of the two countries as from the point last mentioned, at which the Tunisian coast, with the Sahel promontory, veers north-east in the direction of Ras Kaboudia. As is only consistent, I am wholly gratified to note that the Court has concluded from this that it must, for these two sectors, adopt two delimitation lines at different angles, the first running perpendicular to the coastline and notionally linking the endpoint of the land frontier with the point where the line in question intersects the parallel passing through the western extremity of the Gulf of Gabes (34° 10′ 30″), and the second running seaward from that point at a bearing of 52° to the meridian. For I feel that the delimitation resulting from the adoption of this broken line in two segments constitutes, in the light of all the possible factors to be taken into account in the circumstances, a good illustration of that "equitable solution" which the final text of Article 83 of the 1981 draft convention on the Law of the Sea indicates as the result to be attained by a delimitation carried out between two States with adjacent or opposite coasts.

2. On the other hand, I have a few reservations with regard to the justification given for the inclination of the line in question, in particular where its first segment is concerned. The Judgment bases itself in the first place, for the purposes of that justification, on a finding of fact : namely that, up to 1974 – considering only the area within 50 miles of the coastline, one could say up to the present time – the two States Parties to the dispute spontaneously adopted as the eastern limit of the Tunisian licences and concessions for hydrocarbon exploration and exploitation, and as the western limit of the Libyan licences and concessions, a line running from Ras Ajdir at a bearing of 26° to the meridian and consequently more or less perpendicular to the coastline. It is only by way of supplementary justification that reference has also been made to a historico-juridical argument drawn from the *modus vivendi* – to employ the same term as the Judgment

– which existed between the Powers responsible for the external relations of the two countries concerned before their accession to independence and was consecrated by the *de facto* observation of a boundary between the two countries' respective maritime jurisdictions over fishing, in particular sponge-fishing. This boundary also followed a line perpendicular to the coastline at the point of intersection with the land frontier.

3. Truth to tell, I am unable to share the opinion of the majority of the Court concerning the alleged absence of any genuine "maritime boundary" between the two countries during the period preceding decolonization. It is an established fact that in 1914 Italy, which had acquired sovereignty over the territories of Tripolitania and Cyrenaica through their cession to it by the Ottoman Empire under the 1912 Treaty of Lausanne, proposed to the authorities responsible for the external relations of the Regency of Tunisia under the French protectorate the adoption as a limit between the maritime activities of the two countries of a line being the "normal to the general direction of the coastline" and bearing approximately north-northeast. And it is likewise an established fact that the Protectorate authorities, when this proposal had been submitted to them, did not insist on the adoption of a line bearing north-east at 45° and made no opposition to the implementation – provisional or otherwise – by the Italian authorities of the Government of Tripolitania of the maritime boundary they had proposed. It is not known whether, in the years which followed, there was any exchange of diplomatic correspondence on the subject between the two countries, but the conclusive fact appears to me to be that on 16 April 1919 the Italian Government of Tripolitania and Cyrenaica issued "Instructions for the surveillance of maritime fishing in the waters of Tripolitania and Cyrenaica" and that Article 3 of these Instructions – which the Judgment itself quotes in paragraph 93 – stated literally as follows :

> "As far as the sea border *[confine di mare]* between Tripolitania and Tunisia is concerned, it was agreed *[fu convenuto]* to adopt as a line of delimitation the line perpendicular *[normale]* to the coast at the border point, which is, in this case, the approximate bearing north-northeast from Ras Ajdir."

Given the official and public character of these "Instructions", it is unthinkable that they should not have been known to the authorities of the neighbouring Protectorate, which would not have failed to remonstrate with Tripoli and Rome if the assertion as to what had been "agreed" on the subject of the "sea border" between Tunisia and Libya had aroused any objection or disagreement on their part. I also note that the "Instructions" in question were not confined to recalling the existence of an "agreed" sea border but extended the boundary for the purposes of fishing surveillance, along a line perpendicular to the coastline, well beyond the extent of the three-mile territorial sea. It is of no avail to object against all this that, over a distance of eight miles on the near side of Tripolitania's maritime bor-

derline with Tunisia, just as in the case of that of Cyrenaica with Egypt, the Instructions provided that foreign vessels found not to possess a fishing licence duly issued by the Italian maritime authorities would be liable to be ordered away but not to the graver sanction of seizure. This concession was motivated simply by a desire to avoid disputes as to the actual position of the vessel at the time of the infringement and therefore did not affect the determination of the maritime border in the slightest. As the Judgment recalls in paragraph 94, the Maritime Director for Tripolitania subsequently had occasion to confirm these same regulations by the Instructions on maritime surveillance of 25 June 1931, which, once again, did not arouse the least reservation or objection on the part of the relevant authorities in the Protectorate.

4. In my view, all these facts go to prove the undeniable existence at that time, on the part of those authorities, of an acquiescence in the proper sense of the term, connoting consent evinced by inaction or, as MacGibbon well expresses it, by "silence or absence of protest in circumstances which generally call for the positive reaction signifying an objection" ("The Scope of Acquiescence in International Law", *British Year Book of International Law,* XXXI, 1954, p. 143) or then again, as Sperduti says, by "the passivity observed towards a situation by a person . . . who had been entitled to object to it" ("Prescrizione, consuetudine e acquiescenza in diritto internazionale", *Rivista di diritto internazionale,* 1961). In the circumstances, there was nothing surprising in this absence of negative reaction, considering that the adoption of a sea border representing "the drawing of a perpendicular to the coast at the point of its intersection with [the] land frontier" (*I.C.J. Reports 1969,* p. 34, para. 51) indisputably constitutes, in relation to a coastline with the characteristics of the African coast on either side of Ras Ajdir, the most equitable method of delimitation and the one which best safeguards the equality of the rights of the two adjacent countries. It is therefore, I conclude, difficult to deny that, up to the time of Libya's and Tunisia's accession to independence, it was no mere embryonic maritime boundary, lacking any definitive effect, that existed between the two countries, but a genuine delimitation which first and foremost concerned their respective territorial waters but which also extended considerably farther, if only for the purpose of delimiting the respective surveillance zones for maritime fishing.

5. I am accordingly convinced that the order and hierarchy of the arguments put forward by the Court to justify adoption of the practical method it selected for indication to the Parties, as governing the determination of the first segment of the line delimiting the areas of continental shelf appertaining respectively to Tunisia and Libya, should have been reversed. The existence of a delimitation extending beyond the outer limit of the territorial waters, a delimitation which for four decades prior to the accession of the two States to independence was respected without any difficulty arising, should, I feel, have been considered as the basic fact

which it was also incumbent upon the Parties to observe after independence, by virtue of the same principles of general international law in the succession of States, and the same principles proclaimed by the Organization of African Unity, which the Court has evoked where the land frontier of 1910 is concerned. In saying this, I do not in any way intend to minimize the importance of the fact that, in granting licences and concessions for the exploration and exploitation of the hydrocarbon resources of the subsoil of the sea-bed, the Parties, up to a certain date and as far as a certain latitude, both kept to the same perpendicular to the coastline. All I wish to say is that it is this second fact which strikes me as supplementing and, above all, confirming the first, rather than the reverse. The continuity noted in the conduct of the Parties concerned, throughout two distinct successive periods, reveals to my mind that Tunisia and Libya, when granting licences and concessions for the exploration and exploitation of the hydrocarbon resources of the subsoil of the sea-bed, were both implicitly aware of the existence of a particular delimitation line which had traditionally served as a maritime boundary between them and, logically, could not but apply also, as duly extended out to a certain distance from the two adjacent coastlines, to the determination of the new boundary between the respective areas of continental shelf.

6. In other words, the existence of a roughly continuous line, following a direction perpendicular to the coastline or, more precisely, a bearing of 26° to the meridian, a line along which, south of the 34th parallel at least, the licences and concessions granted by the two bordering States are juxtaposed without overlap, acquires in my view its full proper value, for the purpose of the desired solution to the problem of delimiting the respective continental shelf areas of those States, if it is realized that it is simply grafted upon the other line, already historically and legally established, which itself constitutes the delimitation of the territorial waters and the zones of fishing surveillance. In point of fact, it can be said that just one and the same line is involved. This line, originally devised to serve certain specific and limited purposes, has in fact simply been extended more recently to serve new and more important ends ; there is therefore every inherent justification for considering it – in the sector to which my words relate – as the single delimitation line of the waters, sea-bed and subsoil between the two neighbouring States. Seen from that viewpoint, I believe that the reasoning, valid in itself, which has been put forward in support of the Court's decision – to which, as I have said, I entirely subscribe – will be seen to emerge reinforced.

(Signed) Roberto AGO.