DISSENTING OPINION OF JUDGE ODA*

1. To my profound regret, I find myself unable to share the views of the Court on many essential points. First of all, the Court fails, in my view, to arrive at a proper appreciation of the "trends" at the Third United Nations Conference on the Law of the Sea, and interprets them simply by looking at a few provisions now standing in the draft convention. The Court largely ignores the changes that have occurred in the concept of the continental shelf and the impact that the new concept of the Exclusive Economic Zone may have on the exploitation of submarine mineral resources. It will be surprising to any student of the law of the sea to find that the words "Exclusive Economic Zone" appear only once in this lengthy Judgment, and then only in connection with historic sedentary-fishing rights (para. 100). Secondly, the Court suggests as the positive principles and rules of international law to apply in this case only equitable principles and the taking into account of all relevant circumstances (para. 133, A). This merely amounts to an uninformative rearrangement of the terms of the main question put to it. It appears simply to suggest the principle of non-principle. The Judgment does not even attempt to prove how the equidistance method, which has often been maintained to embody a rule of law for delimitation of the continental shelf, would lead to an inequitable result. Indeed, it gives that method rather short shrift. Furthermore, the line suggested by the Court in dealing with the practical method to be employed in application of the (unspecified) principles is not grounded on any persuasive considerations. It is in particular entirely obscure why it should feature a veering point at the parallel of the most westerly point on the coastline of the Gulf of Gabes. The Judgment appears, to my eyes, simply as one appropriate to a case *ex aequo et bono* such as might have been decided, if the Parties so agreed, in accordance with Article 38, paragraph 2, of the Statute. But the present case is certainly not one of that kind. Thus I feel bound to submit my own analysis of it, and, since it is my duty to found my assertions, this will involve going into considerable detail upon most of the essential points.

2. My analysis will be presented in the following order : Chapter I – Trends at the Third United Nations Conference on the Law of the Sea and the status of the draft convention on the Law of the Sea ; Chapter II – The traditional concept of the continental shelf ; Chapter III – Sedentary fisheries and historic rights ; Chapter IV – New trends in the concept of

* A synoptical table of contents appears at the end.

the continental shelf ; Chapter V – Impact of the concept of the exclusive economic zone on the concept of the continental shelf ; Chapter VI – Trends in the delimitation of the continental shelf/exclusive economic zone at the Third United Nations Conference on the Law of the Sea ; Chapter VII – Principles and rules of the delimitation of the continental shelf/exclusive economic zone ; Chapter VIII – Practical method suggested.

CHAPTER I. TRENDS AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA AND THE STATUS OF THE DRAFT CONVENTION ON THE LAW OF THE SEA

Section I. "Trends" as Interpreted by Tunisia and Libya

3. The Court had been requested, under Article 1, paragraph 1, of the Special Agreement signed by Tunisia and Libya on 10 June 1977, to render its judgment as to "Quels sont les principes et règles du droit international qui peuvent être appliqués pour la délimitation" (according to the French text supplied by Tunisia), or "What principles and rules of international law may be applied for the delimitation" (according to the English text furnished by Libya), of the area of the continental shelf appertaining to Tunisia and the area of the continental shelf appertaining to Libya, and in rendering its judgment the Court (according to the Tunisian text) is required "de tenir compte" of equitable principles and the relevant circumstances which characterize the area, as well as the "tendances récentes admises", or (according to the Libyan text), "the Court shall take its decision according to equitable principles, and the relevant circumstances which characterize the area, as well as the new accepted trends" in the Third United Nations Conference on the Law of the Sea (UNCLOS III). I use these French expressions in addition to the English ones because of alleged discrepancies between the translations made from the original Arabic into French by Tunisia and into English by Libya. Putting the last part first, it seemed clear that it would be indispensable, in ascertaining "the principles and rules of international law" to apply for the delimitation of the continental shelf, to take account of "equitable principles" and of "the relevant circumstances which characterize the area". However, the Parties professed to have divergent interpretations of the meaning of the "tendances récentes admises" or "the new accepted trends" at UNCLOS III, and of the role these should play in determining the "principles and rules of international law".

4. There were certain differences of opinion between Tunisia and Libya as to how the "tendances récentes admises" or "the new accepted trends" had taken shape. According to Tunisia, replying to a question I put to the Parties at the hearing on 9 October 1981 :

"The Conference itself has determined the process whereby the negotiating texts examined by it become admitted trends in the law of the sea. Thus in 1978 (A/CONF.62/62 of 13 April 1978) it decided to identify the outstanding issues still requiring negotiation, which signified that any non-contested provision of the Informal Composite Negotiating Text (ICNT), or any the contestation of which had been deferred, constituted a trend admitted at that date (which was the case with the concept of the exclusive economic zone, the régime of islands, etc.).

The process of identifying the hard-core issues calling for further negotiation and consultation with a view to reaching compromise solutions, which would be adopted by consensus or be found generally acceptable, led to the specification of seven issues of which one was the delimitation of maritime boundaries between adjacent and opposite States. This means that Articles 74 and 83 of the 1977 ICNT did not, at that stage, constitute trends admitted by the Conference.

The Conference had also laid down a process for the revision of the ICNT whereby a provision could only be modified if the new wording were adopted by a consensus or found by the "college" of the Conference to be likely to offer a substantially improved prospect of a consensus.

Thus this procedure, decided by consensus at a plenary sitting of the Conference, does not leave any room at all for individual interpretation of what may constitute an admitted trend. It is the Conference itself which decides what is admitted, among the points which had been left over for discussion, and its decision is expressed in the form of amendment of the negotiating text, known as the ICNT in the initial phase and as the draft convention (informal text) in the second phase. Finally, the officialization of the draft convention decided at the latest session definitively reinforced and crystallized the trends admitted within the Conference, which now cover the whole of the draft."

Thus Tunisia considered the provisions of the draft convention on the Law of the Sea (A/CONF.62/L.78) as reinforcing and crystallizing the "tendances récentes admises". Libya, on the other hand, took the following view in its reply :

"The process by which new trends were accepted in the conference was the 'consensus method' – which may or may not represent the position of each State on the point. 'Consensus' is a device to permit an appearance of agreement where voting would not. 'Consensus' may be influential in development of a rule of customary international law, but adoption of a provision by 'consensus' at an international conference does not by itself create such a rule."

Libya thus did not make clear its views on how the draft convention reflected new trends at UNCLOS III, but it does not apparently seem to have been its opinion that the actual provisions of the draft convention necessarily represented the "trends" of UNCLOS III. What is more, in 1977, when the Special Agreement between Tunisia and Libya was concluded, the decision of UNCLOS III recorded as A/CONF.62/62, and quoted by Tunisia, had not yet been taken. Thus it must be pointed out that both in 1977, the time of the conclusion of the Special Agreement, and in 1981, the time of the hearing, no common interpretation existed as to what would reflect the "tendances récentes admises" or "the new accepted trends".

5. If the trends of UNCLOS III or the provisions of the draft convention on the Law of the Sea had become established principles and rules of international law, particularly so far as concerns the delimitation of the continental shelf, the Court would naturally have been bound to take them into consideration in its judgment, even if it had not explicitly been asked to do so by the provisions of the Special Agreement. However, neither Tunisia nor Libya made the semantically contradictory suggestion that the "tendances" or "trends" *as such* formed part of the principles and rules of international law. Instead, Tunisia stated :

> "The Tunisian Government considers that the 'recent trends admitted' can form part of the principles and rules of international law *to the extent that* they may already have given rise to a sufficiently abundant practice to be considered as customary rules." (Emphasis added.)

Libya, on the other hand, stated :

> " 'Consensus' may be influential in development of a rule of customary international law, but adoption of a provision by 'consensus' at an international conference does not by itself create such a rule" ;

and

> "New accepted trends, within the meaning of Article 1 of the Special Agreement, fall within the purview of the principles and rules of international law for the purposes of that Article *only if and so far as* the Court concludes that they are generally accepted by States so as to have become principles and rules of customary international law." (Emphasis added.)

6. If the trends of UNCLOS III or the very provisions of the draft convention on the Law of the Sea had not achieved the status of established rules and principles of international law, how should the Court have taken them into account under the Special Agreement of 1977 ? Tunisia stated :

> "The 'recent trends admitted' which have not yet reached the threshold of customary law are nevertheless to be taken into consideration within the framework of Article 1, paragraph 1, of the Special Agreement, not as elements of the applicable law, for the two Parties are in agreement that the reference to these trends does not confer upon the Court a power to decide *ex aequo et bono,* but as factors in the interpretation of the existing rules."

On the other hand, Libya stated simply: "[I]t is for the Court to decide what weight should be given to any 'new accepted trends'." In view of these cautious interpretations, and given the care taken by both Parties to qualify even such limited endorsement as they accord the provisional results of the Conference, it would seem that the express reference to the trends of UNCLOS III in the Special Agreement of 1977 did not, in 1981, have such great significance as is generally thought or may once have been expected. The Court was not requested in delivering its Judgment to take the trends of UNCLOS III into account as an element separate from the principles and rules of international law, but was simply asked to have due regard to those trends as material to aiding an understanding of what the principles and rules of international law are. Yet it would have been natural for the Court, even without any request to that effect, to pay due regard to recent developments seen during the past decade in the course of the deliberations of the United Nations Sea-bed Committee and UNCLOS III, which may reflect the principles and rules of international law today.

7. Furthermore, since some provisions of the draft convention on the Law of the Sea were often referred to, both in the pleadings and at the hearing, in connection with the delimitation of the continental shelf, it would have been appropriate for the Court to express its general view on the status of that document in relation to the principles and rules of international law, and more especially to the development of that branch of the law of the sea concerned with lateral delimitation. Such a pronouncement would have involved the Court as a whole in a closer analysis of prevailing trends than it has seen fit to perform, and such an analysis, as I see it, ought to have led it to a more fundamental conclusion than underlies its judgment, and to a correspondingly different approach. As this analysis is essential to an explanation of my position, I propose to begin it by first sketching out how the draft convention was prepared.

Section II. The "Consensus" Formula of the Third United Nations Conference on the Law of the Sea

8. On 16 November 1973 the United Nations General Assembly, by General Assembly resolution 3067 (XXVIII), adopted by 117-0-10 votes, dissolved the United Nations Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction (Sea-bed Committee), which had been functioning for the previous six

years, and confirmed the decision taken by General Assembly resolution 3029 A (XXVII) to hold UNCLOS III from the end of 1973 onwards. In proposing the draft of this resolution to the Plenary Meeting, the First Committee on 25 October 1973 approved the following "gentlemen's agreement" :

> "Recognizing that the Conference at its inaugural session will adopt . . . its procedures, including its rules regarding methods of voting, and bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole and the desirability of adopting a Convention on the Law of the Sea which will secure the widest possible acceptance,
>
> [The General Assembly] expresses the view that the Conference should make every effort to reach agreement on substantive matters *by way of consensus* ; that there should be no voting on such matters until all efforts at consensus have been exhausted ; and further expresses the view that the Conference at its inaugural session will consider devising appropriate means to that end." (A/C.1/PV.1936 (provisional).) (Emphasis added.)

9. However, at the first (organizational) session of UNCLOS III, held in December 1973, no agreement was reached on the rules of procedure. Efforts to achieve an agreement during the inter-sessional meetings in February and June 1974 were also in vain. Difficulties mainly concerned the voting procedure, which, the delegates considered, might determine the character of the text to be adopted. The rules of procedure, discussions on which were prolonged for more than a week at the second session in Caracas, were finally adopted by the Conference on 27 June 1974. Just before their adoption, Mr. H. S. Amerasinghe, the President of UNCLOS III, read out the following declaration, which was adopted by consensus :

> "Bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole and the desirability of adopting a convention on the law of the sea which will secure the widest possible acceptance,
>
> The Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted." (UNCLOS III, *Official Records,* Vol. I, p. 52.)

Section III. Negotiating Texts

10. In the course of the second session, held in Caracas in 1974, which was actually the first substantive session, a great number of proposals was presented on subjects relating to the general problem of the law of the sea. The Secretariat of the Conference prepared a Working Paper of the Second Committee : Main Trends, the purpose of which was to "reflect in generally acceptable formulations the main trends which have emerged from the proposals submitted" either to the Sea-bed Committee or to the Conference itself and were to form a basis for its future work (A/CONF.62/C.2/WP.1, UNCLOS III, *Official Records,* Vol. III, p. 106).

11. At the third session, in 1975, there were very few official sessions of either the plenary or the three main committees. On 18 April 1975, the only day of substantive discussions at the plenary meetings, the President suggested that the chairmen of the three main committees should each prepare a single negotiating text covering the subjects entrusted to his committee, to take account of all the formal and informal discussions held thus far. It was understood that the texts would not prejudice the position of any delegation, and would not represent any negotiated text or accepted compromise, and that they would be a basis for negotiation (UNCLOS III, *Official Records,* Vol. IV, p. 26). Thereafter all the efforts of the chairmen of the three main committees were directed towards the preparation of such draft articles. Of course individual delegates were likely to have submitted suggestions for inclusion in these draft articles, but no consultations or negotiations among the delegates, or between the delegates and the respective chairmen, were reported at all. However, on the final day of the session, i.e., 9 May 1975, the President stated that the chairmen of the three main committees had each drafted a single negotiating text (*ibid.,* p. 27). The Informal Single Negotiating Text (ISNT) (A/CONF.62/WP.8 ; *ibid.,* pp. 137 ff.) was circulated at the close of the session. The ISNT was a mere compilation of the draft articles prepared and submitted separately by the chairmen of the three main committees, without even a continuous through-numbering of the articles belonging to the three separately prepared parts.

12. A note placed by the President of the Conference at the beginning of the ISNT explained its character very well :

> "In his concluding statement [on 18 April 1975] . . . the President stressed that the single text should take account of all the formal and informal discussions held so far, would be informal in character and would not prejudice the position of any delegation nor would it represent any negotiated text or accepted compromise. It should, therefore, be quite clear that the single negotiating text will serve as a procedural device and only provide a basis for negotiation. It must not

in any way be regarded as affecting either the status of the proposals already made by delegations or the right of delegations to submit amendments or new proposals." (*Ibid.* p. 137.)

The introduction to Part II, covering the subjects entrusted to the Second Committee and written by the Chairman of the Second Committee, reads in part as follows :

"The particular nature of this text did not allow the retention of all the trends reflected in document A/CONF.62/C.2/WP.1 [Working Paper : Main Trends, as referred to in para. 10 above] and in other proposals submitted either to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction or to the Conference. The aim of the Conference in adopting the new method for the future stage of its work would have been defeated had all trends been retained in this text. It was possible to amalgamate some of the alternative formulations but in other cases it was necessary to choose between conflicting proposals. In certain cases, a middle course was adopted.

The justification for the task entrusted to me is to be found in the particular nature of the single negotiating text as defined by the President and in the need to have a working instrument on the basis of which the process of negotiations can be intensified. I have endeavoured to accomplish this task to the best of my ability and express the hope that it will fulfil the purposes for which it was requested by the Conference." (*Ibid.,* p. 153.)

13. At the beginning of the fourth session, in the spring of 1976, the President of the Conference indicated that the next step should be the preparation by the chairmen of the three main committees of a revised single negotiating text in respect of each of their committees, and that this revised text would reflect, as far as possible, the result of the informal negotiations which had already taken place. Almost all the deliberations at this session were, in fact, held during informal meetings in camera, but various groups, regional or functional, also held a number of informal consultations. No report was submitted to the plenary meeting by the chairmen of the three main committees, and no single report on the work of the working groups within the main committees is to be found. What is clear is that on the last day of the session the Revised Single Negotiating Text (RSNT), consisting of three separate texts, with again separately numbered articles submitted by each of the three committees, was circulated (A/CONF.62/WP.8/Rev.1 ; UNCLOS III, *Official Records,* Vol. V,

pp. 125 f.). The note by the President, attached to this text, reads in part as follows :

> "These texts have been prepared entirely on their own responsibility [i.e., that of the chairmen of the three committees] and will have no other status than that of serving as a basis for continued negotiation without prejudice to the right of any delegation to move any amendments or to introduce any new proposals. The texts must not be regarded as committing any delegation or delegations to any of their provisions." *(Ibid.)*

14. During the fifth session, in the summer of 1976, there was not one official meeting of the Second Committee. All the deliberations concerning general problems of the law of the sea were held in informal meetings of the committee or in its negotiating groups. However, the report by the Chairman of the Second Committee, presented to the Plenary, reflects a general idea of the work which had been done in the Second Committee during this session. Six important subjects were given priority in this session and entrusted to five different negotiating groups for discussion, among them being "Definition of the outer edge of the continental margin" and "Delimitation of the territorial sea, the exclusive economic zone and the continental shelf between adjacent or opposite States". (*Ibid.,* Vol. VI, p. 136.)

15. For the sixth session, in 1977, there are also very few documents describing the deliberations on the subject, but immediately after the adjournment of this session the Informal Composite Negotiating Text (ICNT) (A/CONF.62/WP.10 ; *ibid.,* Vol. VIII) was circulated, in which, for the first time, articles were consecutively numbered from 1 to 303. A memorandum by the President of the Conference, attached to the ICNT reads, in part, as follows :

> "It was understood that while the President would be free to proffer his own suggestions on the proposed provisions of any part of the composite text, in regard to any matter which fell within the exclusive domain of a particular chairman that chairman's judgement as to the precise formulation to be incorporated in the text should prevail. The adoption of this procedure was a recognition of the fact that each chairman was in the best position to determine, having regard to the negotiations that had taken place, the extent to which changes in his revised single negotiating text should be made in order to reflect the progress achieved in the course of negotiations where, in the chairman's opinion, such progress justified changes in the revised single negotiating text and also to decide, even where the negotiations had not resulted in substantial agreement, whether such progress as had been achieved warranted changes which would be conducive to the

ultimate attainment of general agreement. It was also understood that, so far as issues on which negotiations had not taken place were concerned, there should be no departure from the revised single negotiating text unless it was of a consequential character. This understanding was scrupulously observed in the course of the preparation of the informal composite negotiating text. There is no question, therefore, of joint responsibility being assumed for the provisions of the text by the President and the chairmen of the three committees. The chairman of each committee bears the full responsibility for those provisions of the informal composite negotiating text which are the exclusive and special concern of his committee. This is not an enunciation of a new doctrine of collective irresponsibility.

The Conference also agreed that the composite negotiating text would be informal in character and would have the same status as the informal single negotiating text and the revised single negotiating text and would, therefore, serve purely as a procedural device and only provide a basis for negotiation without affecting the right of any delegation to suggest revisions in the search for a consensus. It would be relevant to recall here the observation made in my proposals regarding the preparation of this text that it would not have the character and status of the text which was prepared by the International Law Commission and presented to the Geneva Conference of 1958 and would, therefore, not have the status of a basic proposal that would stand unless rejected by the requisite majority.

Special attention was given, in the course of the preparation of the informal composite negotiating text, to the need for co-ordination between the different parts of the revised single negotiating text where there appeared to be contradictions or unnecessary repetition." (A/CONF.62/WP.10/Add.1 ; *ibid.*, p. 65.)

16. The seventh session in 1978 needed two weeks to agree on the organization of the work of the session and on 12 April 1978 it adopted the report of the General Committee (A/CONF.62/61) as amended. (Decisions printed as A/CONF.62/62 ; UNCLOS III, *Official Records*, Vol. X, p. 6.) It was agreed that this session should give priority to the identification and resolution of the outstanding core issues and that the Conference should also discuss and resolve all other issues which remained outstanding. Negotiating groups of limited size, but in which all delegations were free to participate, were established to deal with seven hard-core issues, which included the subjects "Definition of the outer limits of the Continental Shelf and the question of payments and contributions with respect to the exploitation of the continental shelf beyond 200 miles ; Definition of the outer limits of the continental shelf and the question of revenue sharing" and "Delimitation of maritime boundaries between adjacent and opposite States and settlement of disputes thereon". It was

further agreed that any modifications or revisions of the ICNT should be made in the following ways :

> "10. Any modifications or revisions to be made in the Informal Composite Negotiating Text should emerge from the negotiations themselves and should not be introduced on the initiative of any single person, whether it be the President or a Chairman of a Committee, unless presented to the Plenary and found, from the widespread and substantial support prevailing in Plenary, to offer a substantially improved prospect of a consensus.
>
> 11. The revision of the Informal Composite Negotiating Text should be the collective responsibility of the President and the Chairmen of the main committees, acting together as a team headed by the President. The Chairman of the Drafting Committee and the Rapporteur-General should be associated with the team as the former should be fully aware of the considerations that determined any revision and the latter should, *ex officio,* be kept informed of the manner in which the Conference has proceeded at all stages." (A/CONF.62/62 ; *ibid.,* p. 8.)

17. The seventh session, in the spring of 1978, and the resumed seventh session, in the summer of 1978, did not succeed in revising the ICNT, though a number of reports of committees and negotiating groups were presented at plenary meetings. Apart from the fact that the plenary held several formal meetings to discuss substantive matters in the spring, most of the discussions are believed to have taken place either at informal meetings of the committees or in the negotiating groups. The reports presented at the plenary meetings indicated that it was extremely difficult to reach agreement on outstanding issues in any committee or negotiating group.

18. Towards the end of the eighth session, held in the spring of 1979, letters from various regional groups were addressed to the President of the Conference, and several reports of committees and negotiating groups were presented to the Plenary, which held several formal meetings to deal with them. At the close of the eighth session, on 27 April 1979, the President and the chairmen of the main committees, together with the Chairman of the Drafting Committee and the Rapporteur-General, met, in conformity with paragraphs 10 and 11 of the decisions taken by the Conference on 12 April 1978 regarding the organization of work, as quoted in paragraph 16 above, to consider revision of the ICNT. The subject-matter that the team was expected to deal with was the outcome of the work of the negotiating groups on certain hard-core issues. According to the explanatory memorandum of the President of the Conference attached to the ICNT/Revision 1 :

"[The team] . . . recognized that it had to assume the responsibility of determining what criteria to apply in deciding whether a given text enjoyed widespread and substantial support in Plenary and, therefore, offered a substantially improved prospect of consensus. The President, it was recalled, had reiterated that the very nature of the concept of a package deal must mean that no delegation's position on a particular issue would be treated as irrevocable until at least all the elements of the 'package' as contemplated had formed the subject of agreement. Every delegation, therefore, had the right to reserve its position on any particular issue until it had received satisfaction on other issues which it considered to be of vital importance to it.

The team recognized that the discussion in Plenary had proceeded on the basis of the reports made by the Chairmen of Committees and Negotiating Groups and of the proposals and suggestions placed by them before the Plenary. In those circumstances, it did not feel empowered to consider any proposals not covered by these reports for the purpose of determining whether they commanded sufficient support in the Plenary to justify their incorporation in any revision at this stage. The President recalled that he had very clearly stressed in the Plenary that all outstanding proposals and issues would receive further consideration and that the revision contemplated would remain a *negotiating* and not a *negotiated,* text. It was accordingly agreed that the proper description of the status of the text could best be conveyed by the title 'Informal Composite Negotiating Text/Rev.1'.

. . . . . .

The team agreed that it was most important that the President should stress, in this explanatory memorandum, that it had been able to address itself only to the texts placed before the Plenary by the respective Chairmen and by the President and that, accordingly, as the President had already recognized in the Plenary, many issues and proposals had not yet received adequate consideration and should form the subject of further negotiation during the resumed session." (A/CONF.62/WP.10/Rev.1, pp. 18 f.)

Thus the first revision of the ICNT was prepared as Informal Composite Negotiating Text/Revision 1 (A/CONF.62/WP.10/Rev.1), on 28 April 1979. Further efforts were made at the resumed eighth session, in the summer of 1979, when a number of reports were received by the Plenary from the regional groups and the negotiating groups, as well as from the committees.

19. At the ninth session, in the spring of 1980, the Conference was able to carry negotiations to the stage where, after a formal debate in the Plenary on some reports from various groups, the collegium (previously called the team) found itself in a position to undertake the second revision,

thus producing Informal Composite Negotiating Text/Revision 2 (A/CONF.62/WP.10/Rev.2). In the explanatory memorandum by the President of the Conference, it was stated :

> "To avoid any misunderstanding as to the status of the second revision which is now presented, the President would wish to emphasize that it must be regarded as a *negotiating* text which provides, in the best judgement of the collegium, a better basis of negotiation and one that offers a substantially improved prospect of a consensus." (*Ibid.,* p. 22.)

20. During the resumed ninth session, in the summer of 1980, the results of the negotiations on outstanding issues in the main committee and in the Plenary were discussed during the general debate, and the collegium took note of those results and of the statements made in the course of the general debate. The conclusions reached by the collegium were reflected in the revision of the ICNT/Revision 2, and the collegium unanimously decided to adopt the title "Draft Convention (Informal Text)" for this third revision (A/CONF.62/WP.10/Rev.3). It was stated in the explanatory memorandum by the President that the observations made by him with regard to the nature of the ICNT/Revision 2 would apply with equal force to this new text. In other words, the draft convention (Informal Text) was not a *negotiated* text but still remained a *"negotiating* text", i.e., a basis for negotiation which had not itself been negotiated, and therefore was not to be represented as a set of proposals already enjoying a measure of multilateral acceptance.

Section IV. Draft Convention on the Law of the Sea

21. At the resumed tenth session, in the summer of 1981, the text of the draft convention was revised as the draft convention on the Law of the Sea (A/CONF.62/L.78) and the Conference recognized that the text as so revised would no longer be an informal text. It would now be

> "the official Draft Convention, subject to the following three conditions :
>
> *First,* the door would be kept open for the continuation of consultations and negotiations on certain outstanding issues. The results of these consultations and negotiations, if they satisfy the criterion in A/CONF.62/62, will be incorporated in the Draft Convention by the collegium without the need for formal amendments.
>
> *Secondly,* the Drafting Committee will complete its work and its further recommendations, approved by the Informal Plenary, will be incorporated in the text.
>
> *Thirdly,* in view of the fact that the process of consultations and

> negotiations on certain outstanding issues will continue, the time has, therefore, not arrived for the application of Rule 33 of the Rules of Procedure of the Conference. At this stage, delegations will not be permitted to submit amendments. Formal amendments may only be submitted after the termination of all negotiations." (*Ibid.*, p. xix.)

Thus even the 1981 draft convention is not yet a finalized text to be put to the Conference at its final stage for adoption.

22. Although the document entitled "Draft Convention on the Law of the Sea", which started as a paper suggested by the President of UNCLOS III, now has the status of an official document of the Conference, the draft still requires various procedures and ample time before it can eventuate in treaty law. It is expected that the "informally" edited draft convention on the Law of the Sea as a whole will be put to a vote or, preferably, adopted by consensus (or acclamation) at one of the sessions of the Conference to be held in 1982. Even if the Conference agrees to adopt this comprehensive text, it will still have to be signed by the plenipotentiary delegates of States. Even after being signed by States, the Convention must still be ratified in order to become effective. According to Article 308 of the draft convention, the Convention will enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession, but of course this article itself may be changed before being finally adopted by the Conference. Whether or not the obtaining of the specified number of ratifications will be difficult was, of course, not a matter for the Court to estimate. Although there is no doubt that when that number of ratifications has been obtained the Convention will be binding upon those States which have ratified or acceded to it, even this does not necessarily mean that the text of the Convention will then have embodied or crystallized pre-existing or emergent rules of customary law. (Cf. *I.C.J. Reports 1969*, p. 41, para. 69.)

23. It is however possible that, before the draft of a multilateral treaty becomes effective and binding upon the States parties in accordance with its final clause, some of its provisions will have become customary international law through repeated practice by the States concerned. In this connection, certain provisions of the draft convention, which have been inherited from the provisions of the 1958 Conventions on the Law of the Sea, may of course be regarded as already representing customary international law. In addition, what has been formulated with almost world-wide co-operation throughout the decade may contribute to the development of customary international law, quite apart from the entry into force of the draft as treaty law. However, the simple fact that the draft convention was prepared on the basis of the consensus formula adopted at UNCLOS III, and that this document was formalized at the suggestion of the President of the Conference and was declared as being no longer an

informal text, can hardly mean that the provisions of the draft convention are *now* regarded or should be regarded as reflecting the principles and rules of international law.

24. In UNCLOS III it was tacitly agreed that all items should be dealt with as a "package", and the suggestion of strict adherence to the consensus method as an axiomatic procedure has been closely followed. Such procedure and method is an experiment without precedent in the history of international law, and thus UNCLOS III can be described as a great laboratory or workshop of international law. The experiment started in an age when the ocean, occupying two-thirds of the globe, which had hitherto been considered mainly as an area for communication and the transport of goods between nations, began to attract the interest of all nations as an arena for the acquisition of natural resources. To the extent that the ocean was utilized only for purposes of communication and transport, there had been no cause to exclude interests other than one's own. In the present day, however, interests in the resources of the ocean, inevitably reflecting individual national goals, have become mutually exclusive. In these changed circumstances, what was really necessary was a new vision of the ocean to replace the longstanding concept of the freedom of the seas which had been valid during the age of maritime traffic. In point of fact, all the efforts deployed in the great workshop of UNCLOS III have been directed towards constructing an imposing edifice representing a régime of the ocean likely to be voted into existence irrespective of what it may bode for the future. Unable to cling to the aim of true world harmony, the delegates have felt compelled to content themselves with cobbling together a patchwork of ideas which are not necessarily harmonious. I would be the last person to underestimate the difficulty of securing acceptance of an entirely coherent vision, but as the views of some individual nations are bound to be sacrificed in the end, I have to say that such a sacrifice would only be worth making for the sake of such a vision.

25. As can be seen from the process whereby the ISNT, the RSNT and the ICNT were drafted, the draft convention on the Law of the Sea started as simply a compilation of texts separately presented by the three main committees of UNCLOS III on their own individual responsibility. In 1975, working in complete isolation, not only from one another but also from the majority of the member States, each chairman had to prepare the ISNT as a first draft of the series in the few weeks granted to him. Each chairman simply borrowed some provisions from the 1958 Conventions on the Law of the Sea, some of which, on the basis of long-term practice, had been considered established as customary rules without much reconsideration of their merits, or picked up some completely new institutions, which being formally or informally presented to the Sea-bed Committee or UNCLOS III, put forward a political compromise to settle strongly-opposed national interests which had by that time not received any exten-

sive discussion. Few efforts have been made to align these notions with the longstanding rules of customary international law, and a somewhat short-sighted political compromise is reflected in the so-called "package deal". This statement of mine is not meant to blame or criticize the persons engaged in the preparation of the draft at UNCLOS III, but is made simply to indicate the process of the preparation of the negotiating texts. Thus while neither collaboration among the main committees nor exhaustive studies by the delegates had presided over the completion of the first draft, in other words the ISNT, thereafter efforts to closely examine each provision were sometimes considered as hampering the progress of the Conference, again because of the "package deal" procedure and the consensus method. The delegates, discouraged from dealing with the various proposals put before them, and, despite their probably feeling some doubts and dissatisfaction, had to co-operate for the sake of building up a new uniform text. Thus we now have the draft convention on the Law of the Sea. Whether the result produced by this great laboratory of international law will prove to be really workable is something that will have to be judged in the future. The Court was not in a position, at least while the experiment was still going on in the laboratory, to depend on a half-finished product, and did not have to regard a simple glance at the formulated text of the draft convention as indicative of established or embryonic principles and rules of international law.

26. As stated before, there was at least agreement between the two Parties that the new (UNCLOS) trends could be applicable in the present case only to the extent that they had become customary international law. In this light, the above outline and summing up of the UNCLOS process should suffice to show that the Court did not have to attach great importance to the actual provisions of the draft convention on the Law of the Sea, at least at the stage they have reached at the beginning of 1982. Thus the Court should have sought enlightenment from UNCLOS III *not* in those provisions alone, but much rather in the progress of the *discussions* underlying them. By the same token, it should have cast the net wider and based its considerations of trends in the law of the sea over the past few decades on an altogether broader survey. In order to understand the trends in the law of the sea over the past few decades, in the context of the present case, it is extremely important to realize, for one thing, that the concept of the continental shelf has fluctuated for the past ten years or so and, for another, that the introduction of the new concept of the exclusive economic zone was calculated to have a great impact on the concept of the continental shelf.

CHAPTER II. THE TRADITIONAL CONCEPT OF THE CONTINENTAL SHELF

Section I. Early Claims to the Continental Shelf and Scholarly Views Thereon

1. Pre-history of the claims to the continental shelf

27. To deal with the delimitation of the continental shelf in early 1982, when the status of the 1981 draft convention on the Law of the Sea is not yet certain and it cannot, therefore, be regarded as a sure guide, it is essential to reflect upon how the concept of the continental shelf has emerged and become established in international law and to plot the curve of its development. The term "continental shelf" was not unknown even to lawyers before the Second World War. In the late 1930s, learning that a foreign fleet might be sent to the Eastern Bering Sea for the scientific investigation of salmon, the fishing industry on the Pacific coast of the United States successfully sought to have Bills introduced into Congress for the extension of the territorial seas, with a view chiefly towards monopolizing fishing sites. Accordingly a Bill passed by the Senate on 5 May 1938 provided that United States jurisdiction was to extend to all the waters and submerged land adjacent to the coast of Alaska lying within the limits of the continental shelf having a depth of water of 100 fathoms (approximately 200 metres) (US, S.3744, 75th Congress, 3rd Sess. (1938) ; 83 *Congressional Records,* IV, 4260, 6423). No action was taken on this Bill by the House of Representatives prior to adjournment. Further Bills were introduced in both Houses of Congress in order to extend jurisdiction, not so much in terms of the continental shelf, but rather by reference to certain geographical features, such as a depth of water of 100 or 200 fathoms. Nothing came of those Bills either.

28. However, the régime of the continental shelf had never constituted a part of international law prior to 1945. In this respect, mention should be made of the arbitral award given by Lord Asquith of Bishopstone in 1951 in a dispute between a British oil company and the Ruler of Abu Dhabi (*International Law Reports,* 1951, pp. 144 ff.). The question at issue was whether the British company which had been granted an exclusive oil concession covering the territory of Abu Dhabi should simultaneously have been granted an exclusive oil concession covering the continental shelf. The award rejected the contention of the British company that the concept of the continental shelf as territory of the coastal State was an accepted fact, particularly in 1939, when the company had been granted the concession, and that Abu Dhabi therefore could not grant it to others. This award clearly indicated the fallacy of considering the continental shelf as belonging *ipso jure* to the coastal State. It was thus *a fortiori* impossible to regard the continental shelf as being *ipso facto* subject to the jurisdiction of the coastal State within the ambit of any positive international law.

29. The methods for extracting oil advanced so far in the period after the Second World War that it became possible to build artificial installations out to sea. The possibility of exploiting resources, especially petroleum, contained in the continental shelf attracted the attention of the world. A number of States made claims to their offshore submerged areas with a view to securing the resources contained therein. The United States proceeded by claiming the submarine areas described in the well-known Truman Proclamation of 1945 :

> "I, Harry S. Truman, President of the United States of America do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.
>
> Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States subject to its jurisdiction and control . . ."

It was obviously the aim of the United States to prevent other States from drawing near the United States coast for the purpose of exploiting submarine mineral resources. It was at the same time indicated by the government authorities that, within the meaning of the Proclamation, the term "continental shelf" applied to areas where the sea-bed lay at depths not exceeding 100 fathoms. Many other coastal States followed this precedent, probably because they would have much to gain and nothing to lose by claiming the resources off their coasts. Some States asserted that the continental shelf formed part of their national territory ; others claimed a limited jurisdiction over the shelf for the purposes of exploitation of its resources ; while still others claimed ownership of the resources contained in the continental shelf. All these claimants, however, in one way or another, asserted an exclusive right to certain limited areas of the subsoil beneath the high seas. The areas defined as being subject to the control of their respective coastal States were sometimes measured in terms of distance from the coast. However, the 100-fathom isobath, as employed in the United States claim, or the 200-metre isobath became commonly understood as being the limit of the continental shelf.

2. Scholarly views on the continental shelf doctrine prior to the 1958 United Nations Conference on the Law of the Sea

30. While the concept of the continental shelf was quite new to international law in the post-war period, there were many arguments about it among scholars until the Convention on the Continental Shelf was adopted by the United Nations Conference on the Law of the Sea in 1958. These arguments may have been overtaken by events, but awareness of them enhances understanding of the basic character of the concept. Views

on the status of submarine areas varied greatly from scholar to scholar. Some simply took the concept of the continental shelf for granted, while others used borrowed ideas and views. Perhaps because of their lack of confidence in formulating a cohesive doctrine, many were content simply to list the various views on the subject. Hence it was not easy in the post-war period to glean from any scholar any solidly grounded views which could properly be considered as valid support for a claim to the continental shelf. This difficulty was aggravated by the failure of some publicists to make sufficiently clear distinction between *lex lata* and *lex ferenda.*

31. As often pointed out, there were certain precedents for the exploitation of submarine areas, and some scholars discussed the status of the latter in this connection. During the last century a coal mine which extended far out to sea was excavated off the coast of Cornwall. The decision of Sir John Patteson, arbitrator, in 1856 was that the right to own all mines and minerals lying under the high seas was vested in the Crown and, to give effect to the recommendation of the arbitrator, the Cornwall Submarine Mines Act was enacted in 1858 (21 & 22 Vic., Chap. 109, p. 624). As another example, the use of the subsoil beneath the sea had attracted a great deal of attention since the project of building a tunnel between England and France was first mooted in the 1870s. No question was raised as to the right of these two countries to build a tunnel under the high seas. These two examples indicate that there was nothing in international law prohibiting the utilization of the subsoil for the purposes of the exploitation of resources or communication.

In these cases the legal status of the submarine area was never discussed except in relation to their actual use ; that is, there was no examination of the concept in the abstract. No claim to anything more than a tunnel or a mine had ever been asserted in relation to submerged areas. It was well understood that the jurisdiction of the coastal State could be extended into the tunnel or the mine, though only so long as they might exist, but that it would not extend to any of the submarine areas as a whole. It should be noted that the principle of the occupation of submarine areas as *terra nullius* was taken to be applicable only to a coal mine or a tunnel.

32. Oppenheim-Lauterpacht held that the subsoil of the sea could be occupied only by the construction of a tunnel extending from the territory of the coastal State (*International Law,* Vol. I, 8th ed., 1955, p. 630). The views maintained by Colombos are expressed in his statement that

> "[i]t would . . . be unreasonable to withhold recognition of the right of a littoral State to drive mines or build tunnels in the subsoil, even when they extend considerably beyond the three-mile limit of territorial waters, provided that they do not affect or endanger the surface of the sea" (*International Law of the Sea,* 4th ed., 1959, p. 62).

H. A. Smith understands the principle of occupation to mean the building of a tunnel or the digging of a coal mine (*The Law of the Sea,* 3rd ed., 1959, p. 82). This view was widely held by scholars (such as Kelsen and Gidel) who concluded that submarine areas were *terra nullius.* A fair inference to be drawn from these views was that there was no principle of international law to prevent the driving of a tunnel or a mine through submarine areas, and that jurisdiction thereover would be vested exclusively in the excavating State. Those publicists did not seem to have considered the principle of occupation or control of submarine areas in general, and it is open to doubt whether their description of submarine areas as *terra nullius* ever really reflected the true state of affairs. In any case, explanation of the *use* of submarine areas in terms of occupation of *terra nullius* appears both superfluous and misleading. The doctrine of occupation in international law had generally been invoked solely for the exercise of State jurisdiction, quite independently of simple *use* of the area. The fact that submarine areas could be utilized for transportation by means of tunnels and explored for exploitation by means of mines should not have led to the conclusion that the entire submarine area could be possessed by a State in terms of the occupation of *terra nullius.* If the areas were indeed *terra nullius,* it might have been maintained that submarine areas in general would be possessed by any State, by virtue of contiguity or geographical identity, whenever a tunnel or a coal mine was constructed. But, so far as we know, few scholars considered the territoriality of submarine areas in general. Hence it can be concluded that submarine areas were never viewed as an area, like a landmass, that could be acquired by a State. These scholars who presupposed that the submarine areas were *terra nullius* seemed to adopt an incorrect approach to the problem.

33. The claim to the continental shelf initiated by the United States in 1945 was different from certain of the precedents mentioned above, and was quite unique under international law in the way that not the *use* of the specific part of the submarine regions, but the exercise of exclusive jurisdiction over vast areas of the high seas, was claimed by the coastal State for the purpose of exploiting the mineral resources in the areas beneath them.

34. Realizing that the doctrine of the continental shelf required theoretical underpinning in order to enable the coastal State to reserve to itself exclusive jurisdiction over the exploitation of submarine mineral resources, some scholars maintained that the continental shelf belonged *ipso jure* to the coastal State. This idea of the continental shelf as being *ipso jure* subject to the jurisdiction of the coastal State had its roots in the geological unity or geographical contiguity of the continental shelf in relation to the coast. Those specialists who favoured this idea, however, were not always consistent, since they had to attach some legal significance to unilateral declaratory claims to the continental shelf.

First, according to one view, the submarine shelves were appropriated by a unilateral proclamation. But, if effective control was required for the acquisition of a *terra nullius,* the continental shelf could not have been possessed by any State, given the then state of development of technology. Accordingly the concept of notional occupation was introduced. A different view was also suggested, to the effect that, while the continental shelf was not appropriated by an individual proclamation, customary law had evolved from the great number of proclamations concerning the shelf. This doctrine emphasized that, since no objection had been lodged by other States to dispute such claims, they had been tacitly accepted, effective control being dispensed with as a pre-requisite to effective appropriation. Some scholars were of the opinion that the doctrine of the continental shelf, while not yet expressive of a norm of general customary law, could be considered as embodying a norm of general customary international law *in fieri, in statu nascendi.* Without reference to customary international law, a similar conclusion was reached by some who maintained that the competence of the coastal State to regulate the exploitation of natural resources in the offshore submerged lands was now one of the general principles of law recognized by civilized nations, and therefore a rule of existing international law. These doctrines presupposed a theory of continental shelf rights based on the contiguity or continuity of the area with the coast, which was, in fact, obviously something new to international law. Secondly, there was also a group of scholars who were reluctant to admit that the continental shelf had so far been subject to the control and regulation of the coastal State. While not denying the possibility that the continental shelf might be susceptible to occupation, they did not believe that current attempts at control were sufficient to meet international standards for the acquisition of the space. All of those who relied either upon the significance of proclamations or upon effective occupation seemed to depend, perhaps subconsciously, on a premise that the space contained within the continental shelf must be conceived of as *terra nullius* in the existing international legal order. The continental shelf was analogized to a dry landmass which could be the object of national possession. This premise, by removing the submarine areas from the sphere of law pertaining to the high seas, implied that there was a point in time at which the continental shelf ceased to be *terra nullius* and became national territory. A number of publicists had not the slightest doubt of the validity of their own assumption of the analogy of submarine areas to the landmass.

35. There was, further, a different scholarly view which maintained that the submarine areas had always been tacitly regarded as an international realm which could never be *possessed* by any State. According to it, the submarine areas, like the superjacent waters, were not *terra nullius,* and there was no reason for subjecting the two domains to radically different régimes. Theoretically, just as each State had been free to catch fish, so it had always been free to *utilize* the resources contained in the subsoil under the high seas, either by "driving out" from the coast under its jurisdiction,

or by installations embedded in the floor of the sea. But no State could incorporate submarine areas beneath the high seas into its national territory. It necessarily followed that any doctrine of acquisition or appropriation was a radical break with the traditional development of international law. It was thus suggested that by introducing the régime of the continental shelf in the post-war period the attempt was being made to effect a revolutionary change in the principle of the freedom of the high seas, which previously had prevented any State from exercising jurisdiction over that area.

36. I presume that one of the characteristics of the legal doctrine on the continental shelf advocated by a number of scholars after the Second World War was that the claim to exclusive control and jurisdiction of the coastal State over the submarine areas was substituted for the demand for use of the submarine resources. The doctrine of the continental shelf – that is, the claim to exclusive control – was restricted by some to the simple legalization of national exploitation of the shelf's mineral resources. While any doctrine which would make it impossible to utilize the natural resources would certainly be undesirable, it should be noted that the exploitation of submarine areas beneath the high seas had not been prohibited under international law. The scholars in question simply overlooked the fact that a régime of the continental shelf would not necessarily be required for the actual exploitation of submarine areas. Secondly, most scholars were not fully alert to the fact that exploitation of submarine resources being conducted in the high seas came under the head of *use* of the sea and, while failing to deal with such exploitation in connection with the régime of the high seas, they tended to discuss simply the status of the sea-bed or the subsoil for this exploitation. Yet if the resources beneath the high seas had created any difficulties in international law, this would have been simply for the reason that the mode of utilization might sometimes hinder other uses of the seas, such as navigation or fishing.

Section II. Basic Concept of the Continental Shelf in the 1958 Convention on the Continental Shelf

1. Draft prepared by the International Law Commission

37. While the régime of the continental shelf as *lex lata* had been discussed by many scholars, primarily from the theoretical point of view, the United Nations International Law Commission endeavoured to establish a *lex ferenda* for the monopolistic exploitation by coastal States of offshore submarine resources. Since 1950, the question of the continental shelf had been treated by the Commission as one of the most important parts of the régime of the high seas. The received concept underlying the régime of the continental shelf had gone largely unchallenged in the course of seven years' debate by the Commission. The Commission never ques-

tioned the advisability of endorsing it as a basis of positive *lex ferenda.* On the other hand, the views of the Commission on the outer limit of the continental shelf fluctuated continually throughout this seven-year period, and no firm decision could be taken on this point.

38. At its 1950 session, the International Law Commission took the view that a coastal State could exercise control and jurisdiction over the sea-bed and subsoil of the submarine area off its coast in order to explore and exploit the natural resources existing there. It held that the continental shelf was not to be considered as either *res nullius* or *res communis,* and that the right of a coastal State was independent of the concept of occupation.

39. The fundamental principle contained in the 1951 draft did not differ in nature from what had been discussed in 1950, and was stated as follows :

> *"Article 2*
>
> The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources." (*International Law Commission Yearbook,* 1951, Vol. II, p. 141.)

Thus the exercise of control and jurisdiction for the purpose of exploring the continental shelf and exploiting its natural resources was held to fall within the competence of each coastal State. The Commission, however, remained consistent in excluding the treatment of submarine areas as *res nullius,* hence in defining the right of the coastal State over the continental shelf without reference to the notion of occupation or any formal assertion by the sovereign State. It further rejected the proposition that any number of proclamations over the previous decade would have created new customary law. It took the position that

> "[i]t is sufficient to say that the principal of the continental shelf is based upon general principles of law which serve the present-day needs of the international community" (*ibid.,* p. 142).

In the 1951 draft the continental shelf was defined as covering submarine areas "where the depth of the superjacent waters admits of the exploitation of natural resources of the sea-bed and subsoil". The Commission considered that "technical developments in the near future might make it possible to exploit resources of the sea-bed at a depth of over 200 metres", and, moreover, that

> "the continental shelf might well include submarine areas lying at a depth of over 200 metres but capable of being exploited by means of

installations erected in neighbouring areas where the depth does not exceed this limit" (*International Law Commission Yearbook,* 1951, Vol. II, p. 141).

40. In its 1953 draft, however, the International Law Commission, mindful of the need for clear definition of the outer limit of the continental shelf, adopted a depth of 200 metres as the sole criterion, taking the view that "the text previously adopted does not satisfy the requirement of certainty and . . . is calculated to give rise to disputes" (*International Law Commission Yearbook,* 1953, p. 213). For the rest, the 1953 draft followed the basic idea adopted in 1951, except that the right of control and jurisdiction was replaced by "sovereign rights", and Article 2 was accordingly framed in the following terms :

> "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources." (*Ibid.,* Vol. II, p. 212.)

41. In its 1956 final draft the Commission reaffirmed this basic concept of sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources, and retained the last-mentioned position, in identical terms, as Article 68 (*International Law Commission Yearbook,* 1956, Vol. II, p. 264). It was understood that the rights conferred upon the coastal State covered all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf and that such rights included jurisdiction in connection with the prevention and punishment of violations of the law. The rights of the coastal State were to be exclusive in the sense that, if it did not exploit the continental shelf, it was only with its consent that anyone else might do so. The following views expressed by the Commission in 1956 are worth quoting in order properly to understand the fundamental concept of the continental shelf :

> "(7) The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
>
> (8) The Commission does not deem it necessary to expatiate on the question of the nature and legal basis of the sovereign rights attributed to the coastal State. The considerations relevant to this matter cannot be reduced to a single factor. In particular, it is not possible to base the sovereign rights of the coastal State exclusively on recent practice, for there is no question in the present case of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned. However, that practice itself is considered by the Commission to be supported by considerations of law and of fact. In particular, once the seabed and the subsoil have become an object of active interest to coastal States with a view to the exploration and exploitation of their resources, they cannot be considered as *res nul-*

lius, i.e., capable of being appropriated by the first occupier. It is natural that coastal States should resist any such solution. Moreover, in most cases the effective exploitation of natural resources must presuppose the existence of installations on the territory of the coastal State. Neither is it possible to disregard the geographical phenomenon whatever the term – propinquity, contiguity, geographical continuity, appurtenance or identity – used to define the relationship between the submarine areas in question and the adjacent non-submerged land. All these considerations of general utility provide a sufficient basis for the principle of the sovereign rights of the coastal State as now formulated by the Commission." (*International Law Commission Yearbook,* 1956, Vol. II, p. 298.)

With regard to the outer limit of the continental shelf, however, the Commission's draft was again revised in 1956 so as to cover not only areas within the 200-metre isobath but also areas outside it, provided that exploitation of the natural resources there remained feasible :

"*Article 67*

[T]he term 'continental shelf' is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms) or, beyond that limit, to where the depth of the superjacent waters admits of exploitation of the natural resources of the said areas." (*Ibid.,* p. 264.)

2. The régime of the continental shelf adopted in the 1958 Convention on the Continental Shelf

42. At the Geneva Conference on the Law of the Sea of 1958, most, but certainly not all, States entered upon the deliberations without questioning the global concept of the continental shelf, and any argument regarding the fundamental status of this submerged area was soon dropped. Whether the right to be vested in the coastal State should be sovereign or exclusive was strenuously debated. The most important question, however, related not to the formal description but to the substance of that right. The provision of the draft of the International Law Commission was taken as it stood in Article 2, paragraph 1, of the Convention on the Continental Shelf, so we again find :

"The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."

43. However, a few new paragraphs were added to this basic concept of the continental shelf during the deliberations of the Conference. Paragraph 3 as it now stands was introduced at the suggestion of Cuba and was adopted by 41-7-12 votes at the Fourth Committee ; it had, however, already been clearly stated in the 1956 commentary on the Commission's draft. Article 2, paragraph 3, thus now reads as follows :

> "The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."

Article 2, paragraph 2, states :

> "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."

This paragraph was based on an Argentine proposal already adumbrated in the commentary on the 1956 draft and adopted by a 36-6-25 vote, and to a certain extent on a Yugoslav suggestion, adopted by 37-5-24. It might well be said, however, that the Yugoslav intention was not properly reflected because its proposal had been to the effect that "if the coastal State does not *exercise the rights under paragraph 1*, . . . no one may claim to its continental shelf without its express agreement" (emphasis added). Only the latter part of the Yugoslav proposal was incorporated by the Drafting Committee into the text of the Convention. It appears that this error in drafting was due to the fact that in the minds of many delegates the concept of the right of each coastal State over the continental shelf had become limited to the sole notion of active exploration and exploitation of the shelf's resources. At any rate, it is submitted that paragraph 2 should be interpreted as meaning that anyone is prevented from exploiting the resources contained in the continental shelf off the coast of the State without the express consent of that State, and that any State is prevented from claiming title to this continental shelf in terms of prescription or occupation or for any other reason, even in the case where the coastal State has not undertaken any exploitation of these resources.

44. The 1958 Convention on the Continental Shelf paved the way to control of the continental shelf. There was some doubt whether this Convention had simply codified existing customary rules or promulgated a new legal norm. However, it had certainly disposed of various theoretical controversies concerning individual claims by many States to submarine areas off their shores.

45. With regard to the outer limit of the continental shelf, France, Greece, Italy and the United States of America at the 1958 Conference had hesitated to accept the provision that the limit of the continental shelf be

measured by such an uncertain criterion as "exploitability". They had favoured the depth of 200 metres, but a proposal by France to this effect (A/CONF.13/C.4/L.7) was rejected. Yugoslavia, the United Kingdom, India, Canada and the Netherlands had proposed that it might be preferable to specify a depth-line of 550 metres, as being nearer to the deepest edge of the continental shelf and more likely to result in an agreement which could remain unaltered for a considerable period (A/CONF.13/C.4/L.12 as amended, L.24/Rev.1, L.29/Rev.1, L.30 as amended, L.32); their proposals were, however, either withdrawn or rejected. On the other hand, the proposal of the Republic of Korea, simply suggesting the "exploitability" criterion (A/CONF.13/C.4/L.11), and that of Panama, suggesting inclusion of the continental slope within the definition of the continental shelf (A/CONF.13/C.4/L.4), were both also rejected. Finally, the original draft prepared by the International Law Commission, with an additional clause concerning an island (which will be explained later in para. 149), was adopted, 51-9-10. France, Germany, Italy, Japan and the Netherlands opposed the original draft. Again, at the plenary meeting, the French delegate tried to remove the concept of exploitability from the original text, but in vain. Thus the width of the continental shelf was provided for as follows :

"Article I

> . . . the term 'continental shelf' is used as referring *(a)* to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas ; *(b)* to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

46. It must be said that the reference to the "exploitability" concept had been so framed as to express the very opposite of the Conference's intention, which had clearly been to sanction extension of the limit of the (legal) shelf beyond the 200-metre isobath to where the depth of the superjacent waters *ceased to admit* of the exploitation of the natural resources. However, even on that reading, much ambiguity remained over the interpretation of the criterion of exploitability. There was insufficient realization of the consequences of the fact that each coastal State was free to grant to any foreign country or foreign nationals the right to explore its continental shelf or to exploit the natural resources therein contained. Hence coastal States without sufficiently advanced technology could always encourage foreign investment or technical assistance with a view to exploration and exploitation of the resources contained within the continental shelf, their claim to which, beyond the 200-metre isobath, would thus be *ipso facto* substantiated. Thus understood, the concept of exploitability had to be continuously reinterpreted in terms of the most advanced standards of

technology in the world. The logical outcome of this is, finally, that the exploitation of submarine resources beyond even the 200-metre depth must *always* be reserved to "the coastal State", which is empowered to claim any area where the depth of the superjacent waters admits of exploitation. Implicitly, therefore, all the submarine areas of the world were divided among the coastal States by this 1958 Convention on the Continental Shelf. Solely the problem of delimitation remained. It is unlikely that such an interpretation was what the delegates at the Conference actually thought they were approving. Generally speaking, most of them seem to have been under an erroneous impression that thanks to this exploitability test, exploration and exploitation beyond the 200-metre isobath would only gradually become *permissible* in parallal with the progress of marine technologies.

Section III. Development of Ideas concerning Delimitation of the Continental Shelf

1. Draft prepared by the International Law Commission

47. In order to understand the proper method for delimitation of the continental shelf in the case of adjacent or opposite States, as provided for in the Convention on the Continental Shelf, we have to return to the 1945 Truman Proclamation, which stated :

> "In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles."

"Equitable principles" in relation to delimitation of the continental shelf of opposite or adjacent States were mentioned in several of the unilateral declarations subsequently made by States.

48. At its second session, in 1950, the International Law Commission agreed that boundaries should be established where two or more neighbouring States were interested in the same continental shelf. The draft prepared in 1951 contained the following provision :

> *"Article 7*
>
> Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundaries fixed by arbitration." (*International Law Commission Yearbook,* 1951, Vol. II, p. 143.)

It was also proposed that, if agreement were not reached and a prompt solution was needed, the interested States should be under an obligation to

submit to arbitration *ex aequo et bono.* The term "arbitration" was used in the widest sense and included possible recourse to the International Court of Justice. Meeting objections raised by some governments, Professor J. P. A. François, Special Rapporteur on this subject in the International Law Commission, was inclined to replace arbitration *ex aequo et bono* by the procedure of conciliation, and thus suggested the following provision :

"Article 7

> Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to submit the dispute to conciliation procedure." (A/CN.4/60, p. 129.)

49. The Committee of Experts on Certain Technical Questions concerning the Territorial Sea met in April 1953 in response to the request by the Special Rapporteur. The question put by the Special Rapporteur was as follows :

> "How should the (lateral) boundary line be drawn through the adjoining territorial sea of two adjacent States ? Should this be done
>
> A. By continuing the land frontier ?
> B. By a perpendicular line on the coast at the intersection of the land frontier and the coastline ?
> C. By a line drawn vertically on the general direction of the coastline ?
> D. By a median line ? If so, how should this line be drawn ? To what extent should islands, shallow waters and navigation channels be accounted for ?" (A/CN.4/61/Add.1, English Annex, p. 6.)

The reply to this question by the Committee of Experts was as follows :

> "1. After thoroughly discussing different methods the Committee decided that the (lateral) boundary through the territorial sea – if not already fixed otherwise – should be drawn according to the principle of equidistance from the respective coastlines.
>
> 2. In a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation." (*Ibid.,* pp. 6 f.)

In this connection the Committee of Experts made the following observations :

> "The Committee considered it important to find a formula for drawing the international boundaries in the territorial waters of

States, which could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf." (*Ibid.*, p. 7.)

In parentheses, the narrative must here be interrupted in order to point out that the Court, in the present Judgment (see para. 119) seems to have overlooked the conclusions of this Committee by simply stressing the questions which that body had had put to it by the Special Rapporteur of the International Law Commission.

50. In 1953, the International Law Commission, apparently on the basis of the recommendations of the Committee of Experts, proposed the formulation of a general rule based on the principle of equidistance, recognizing that, while that principle was to provide the general rule, it would be subject to modification in cases where another boundary line was justified by special circumstances. The text suggested by the Commission in 1953 for the case of adjacent States was as follows :

"*Article 7*

1. [The case of opposite States]
2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured." (*International Law Commission Yearbook,* 1953, Vol. II, p. 213.)

The commentary by the Commission on this provision reads as follows :

"[W]hile . . . the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances. As in the case of the boundaries of coastal waters, provision must be made for departures necessitated by any exceptional configuration of the coast as well as the presence of islands or of navigable channels. To that extent the rule adopted partakes of some elasticity." (*Ibid.*, p. 216.)

51. The International Law Commission further revised the text in 1956, as follows :

"*Article 72*

1. [The case of opposite States]
2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement,

> and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the baselines from which the breadth of the territorial sea of each of the two countries is measured." (*International Law Commission Yearbook,* 1956, Vol. II, p. 264.)

The commentary attached to the provision stated :

> "As in the case of the boundaries of the territorial sea, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. This case may arise fairly often, so that the rule adopted is fairly elastic." (*Ibid.,* p. 300.)

The International Law Commission also proposed, in Article 73 of the draft, that any dispute arising out of the interpretation or application of the régime of the continental shelf should, in principle, be submitted to the International Court of Justice.

2. Article 6 of the Convention on the Continental Shelf

52. At the Geneva Conference in 1958, Venezuela could not accept the idea that, if there were no agreement, the boundary line should, as a general rule, be the equidistance line, because the situations which existed in different parts of the world were too various to justify the adoption of any such general rule. Accordingly, Venezuela suggested that "the boundary of the continental shelf . . . shall be determined by agreement between them or by other means recognized in international law" (A/CONF.13/C.4/L.42). For different reasons, Yugoslavia proposed deletion of the words "and unless another boundary line is justified by special circumstances" from the 1956 draft (A/CONF.13/C.4/L.16) because, according to it, that criterion was vague and arbitrary and likely to give rise to misunderstanding and disagreement. The Yugoslav delegate asked whether, and how, such special circumstances were enumerated in international law, and who should be charged with interpreting their application. The proposals of both Venezuela and Yugoslavia were rejected by the Fourth Committee. The United Kingdom proposed the following provision :

> "In the case of adjacent States, the boundary of the submarine areas . . . shall, in the absence of agreement on any other boundary, be determined by the application of the principles of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each of the two States is measured." (A/CONF.13/C.4/L.28.)

According to the British delegation –

> "[T]he median line would always provide the basis for delimitation. If both the States involved were satisfied with the boundary provided by the median line, no further negotiation would be necessary ; if a

divergence from the median line appeared to be indicated by special circumstances, another boundary could be established by negotiation, but the median line would still serve as the starting point." (UNCLOS I, *Official Records,* Vol. VI, p. 92.)

After some queries had been raised by France and the Netherlands as to whether such agreements would be limited to cases where there were special circumstances, the United Kingdom proposal was withdrawn in favour of the Netherlands proposal, in which the United Kingdom joined as co-sponsor (A/CONF.13/C.4/L.23). This joint proposal was in fact substantially identical with the relevant provision of the 1956 draft of the International Law Commission and was finally adopted by the Fourth Committee by 29-16-9 votes. Thus Article 6 of the Continental Shelf Convention came into being.

"Article 6

1. Where the same continental shelf is adjacent to the territories of two or more 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.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured . . ."

53. Some suggestions were made during the 1958 Conference as to what "special circumstances" would mean in this context. The United Kingdom explained that –

"Among the special circumstances which might exist there was, for example, the presence of a small or large island in the area to be apportioned ; he suggested that, for the purposes of drawing a boundary, islands should be treated on their merits, very small islands or sand cays on a continuous continental shelf and outside the belts of territorial sea being neglected as base points for measurement and having only their own appropriate territorial sea. Other types of special circumstances were the possession by one of the two States concerned of special mineral exploitation rights or fishery rights, or the presence of a navigable channel ; in all such cases, a deviation

from the median line would be justified, but the median line would still provide the best starting point for negotiations." (UNCLOS I, *Official Records,* Vol. VI, p. 93.)

Although restricted to the case of opposite States, there was also a proposal by Italy, which read as follows :

"Where in the proximity of coasts which are opposite to each other there are islands belonging to the said continuous continental shelf, in the absence of agreement, the boundary is the median line every point of which is equidistant from the low-water line along the coast of the said States, unless some other method of drawing the said median line is justified by special circumstances." (A/CONF.13/C.4/L.25/Rev.1.)

This Italian proposal was rejected by 3-31-18 votes at the Fourth Committee. No other argument is to be found in the records of the Conference on what the "special circumstances" could be which might justify a line other than the equidistance line.

54. With regard to the compulsory settlement by the International Court of Justice of any dispute concerning the continental shelf, the Netherlands suggested that the following clause be added :

"In the case of judicial proceedings relating to the application of Article 72, the [International] Court [of Justice] shall have power to decide *ex aequo et bono* whether a boundary line other than that defined in that article is justified by special circumstances." (A/CONF.13/C.4/L.62.)

This provision was adopted by the Fourth Committee following a roll-call vote of 33-15-14. Both Tunisia and Libya abstained from voting. At the plenary meeting, this provision was put to a vote only after the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes had been adopted and, though obtaining 38-20-7 votes, it was rejected as it had failed to achieve the required majority of two-thirds of the Conference. Thus, contrary to the original intention of the International Law Commission, the settlement of disputes concerning the delimitation of the continental shelf did not become subject to compulsory settlement, either by the International Court of Justice or by any other means, under the Convention on the Continental Shelf, in that compulsory settlement was provided for only in a seperate instrument : the Optional Protocol. In fact, though the Convention on the Continental Shelf came into force on 10 June 1964, the Optional Protocol had not yet become effective.

55. Thus the Convention on the Continental Shelf suggests the determination of the boundary of the continental shelf between opposite or adjacent States by agreement, without providing for any compulsory settlement of disputes. In so doing, it confers on a principle of general law, concerning the settlement of disputes, priority over any principles or rules that may be applicable to the particular subject-matter, without saying what those may be. Thus there is no compelling principle of delimitation which must be respected by the terms of such agreement as may be reached. Hence the Convention refrains from mentioning any specific principle or rule until it comes to the event of failure to agree. But this, in my view, does not mean that the Conference intended deliberately to belittle the importance of such principles or rules *during* the process of reaching agreement. On the contrary, considering that it must have had some doctrinal basis for the second sentence of each paragraph of Article 6, I suggest that the Conference meant to provide guidance both before as well as after the ascertainment of any failure to agree (both being phases in which there is an "absence of agreement"). The implicit intention of Article 6 was therefore, I believe, most probably to the following effect : whether in the case of agreement or impartial third-party determination, the principles and rules of international law to be applied should be that, unless another boundary line is justified by special circumstances, the boundary in the case of adjacent States should be determined by application of the equidistance principle. In other words, the Convention may be interpreted to mean that it suggested the "equidistance/special-circumstances" method as a normal basis of agreement as well as of third-party determination. Certainly some difficulties still remain in determining whether another boundary line is justified by special circumstances or not, and this too should have been a matter for negotiation between the parties or for decision by a third party. This applies with particular force if there does not exist any established rule as to what is meant by "special circumstances".

Section IV. Significance of the 1969 Judgment of the Court

1. The continental shelf as a rule of customary international law

56. The argument as to whether the concept of the continental shelf was valid only as between States parties to the 1958 Convention on the Continental Shelf, which became effective on 10 June 1964, or had been generally accepted as customary international law, was ended by the Judgment of the Court in 1969, when the Court stated that :

> "19. . . . [T]he 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." (*I.C.J. Reports 1969,* p. 22.)

The concept of the continental shelf was thus given a firm place in the framework of customary international law. However, it is extremely important to note that the substance or content of the rights enjoyed by the coastal State were not newly fashioned by the 1969 Judgment. The Court qualified the rights of the coastal States, in the same way as provided in the Convention, stating as follows :

> "19. . . . 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 . . . but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent." *(Ibid.)*

57. The phrase *"ipso facto* and *ab initio"* should not be interpreted as meaning anything other than what is expressed in the 1958 Convention. In spite of this phrase, such a right of the coastal State, not being effective retroactively, did not exist *"ipso facto* and *ab initio"* prior to the time when the régime of the continental shelf found itself in the realm of customary international law. The Court did not give any additional interpretation to the concept of the continental shelf, but simply declared the right defined by the 1958 Convention to be one established under customary international law without necessarily depending upon the specific provisions of that Convention. The concepts of *"ipso facto* and *ab initio"* were employed by the Court in 1969 simply to strengthen the régime of the continental shelf, which had not yet achieved a firm status in international law. The Court observed :

> "100. . . . This régime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory, whose special features reflect that origin. It would therefore not be in harmony with this history to over-systematize a pragmatic construct the developments of which have occurred within a relatively short space of time." (*Ibid.,* p. 53.)

The Court stated, as quoted above, the concept that "the continental shelf . . . constitutes a natural prolongation of its land territory into and under the sea" and repeated that the "shelf area is the natural prolongation [of the land domain] into and under the sea" (para. 39). It also talked of "the more fundamental concept of the continental shelf as being the natural prolon-

gation of the land domain" (para. 40), and of "the natural prolongation of continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas via the bed . . ." (para. 43). In the context of the 1969 Judgment the outer limit of the continental shelf was not at issue, the North Sea being a shallow sea with the exception of the (irrelevant) Norwegian Trough, and thus the area beyond the 200-metre depth of water was not dealt with at that time. Just as the 1958 Convention on the Continental Shelf did not reveal any precise idea as to the outer limit of the continental shelf, so the 1969 Judgment did not attempt to define the outer limit, or the full expanse of the continental shelf, by use of the concept of "natural prolongation". No, that concept was used simply to justify the appurtenance to the coastal State of the continental shelf geographically adjacent to it.

58. In this connection I would further point out that the fact that the continental shelf was given a firm place in the framework of customary international law did not necessarily mean that the actual provisions of the Convention on the Continental Shelf reflected customary international law. In its 1969 Judgment, the Court, partly for the reason that reservation may not be allowed for Articles 1-3 of the Convention, held the view that –

> "63. . . . [T]hese three articles [Articles 1-3] [are] the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relevant to the continental shelf, amongst them the question of the seaward extent of the shelf ; the juridical character of the coastal State's entitlement ; the nature of the rights exercisable ; the kind of natural resources to which these relate ; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space." (*I.C.J. Reports 1969,* p. 39.)

I submit that this statement went too far in saying that "received or at least emergent rules of customary international law" had appeared not only with regard to the juridical character of the coastal State's entitlement and the nature of the rights exercisable, but also with regard to some other aspects. I shall have occasion below to refer to the problem regarding the kind of natural resources to which these rights relate.

2. Meaning of Article 6 of the Convention on the Continental Shelf

59. The Court stated in its 1969 Judgment that Article 6 of the Convention on the Continental Shelf, which provides for the application of the principle of equidistance in the case of another boundary not being justified by special circumstances, did not embody or crystallize any pre-existing emergent rule of customary law and could not be binding upon the States which were not parties to the Convention (*ibid.,* p. 41, para. 69). The Court stated as follows :

> "55. . . . [I]t is clear that at no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained. Quite a different outlook was indeed manifested from the start in current legal thinking." (*I.C.J. Reports 1969,* p. 35.)

It was further of the view that –

> "58. . . . But in fact, whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other." (*Ibid.,* p. 37.)

Minimizing the meaning of the principle of equidistance as provided for in Article 6 of the Convention, the Court seemed to find significance in the requirement of agreement between the parties and in equitable principles, both of which are also provided for in Article 6 of the Convention. The Court stated :

> "55. . . . 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 [International Law] 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 f.)
>
> "72. . . . In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of *jus cogens,* it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties, – but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule." (*Ibid.,* p. 42.)

> "85. . . . It emerges from the history of the development of the legal régime of the continental shelf, . . . that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, . . . have from the beginning reflected the *opinio juris* in the matter of delimitation ; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles." (*I.C.J. Reports 1969,* p. 46.)

60. According to my understanding, the ostensible solution of suggesting that, since there is no obligatory rule applicable in all cases, the delimitation is to be effected by agreement, is no solution at all. As I have pointed out above (para. 55) in my analysis of Article 6 of the Convention on the Continental Shelf, the rule calling for delimitation by agreement remains simply a rule concerning procedure and cannot constitute a principle or rule of delimitation. Neither is there anything specific to delimitation in the requirement to reach such agreement in accordance with equitable principles, while the declaration that use of the equidistance method must be denied the status of a rule of law on account of some *a priori* incompatibility with this requirement is a dictum that could only be justified if it had been proved that the line reflecting equitable principles could not be, or could only by coincidence be, an equidistance line. Suffice it to say that a rule may be a rule, even a paramount rule, and yet not have to be "compulsorily applied in all situations".

61. The Court in 1969 found that the equidistance principle could not be a rule of law, yet it could not suggest any alternative. It stated :

> "83. . . . [A]s between States faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied ; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties. Equally, it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule." (*Ibid.,* p. 46.)

It held in the operative paragraph of the Judgment that there was "no other single method of delimitation, the use of which is in all circumstances obligatory" (para. 101). In place of suggesting a method, it provided a definition whereby the appurtenance of a given sea-bed area to a particular State could be ascertained or recognized : the area in question had to be the "natural prolongation" of that State's land territory. Whatever method could be devised for applying that definition might thus be an aid to delimitation, but it could hardly be described as a method *of* delimitation. This idea of natural prolongation, which was to play a role in the development of the legal régime of the continental shelf, was embodied by the Court in the following requirement :

> "85 *(c)* . . . [T]he continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State." (*I.C.J. Reports 1969,* p. 47.)

In the operative paragraph of the Judgment the Court further stated :

> "101. . . . [D]elimitation is to be effected . . . in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other." (*Ibid.,* p. 53.)

I find, however, that the Court in 1969 did not make clear what it meant by "natural prolongation", despite the enumeration of factors in paragraph 101 of the Judgment. One senses that, once this concept had served the purpose of casting doubt on the proximity test (which might have pointed to the use of the equidistance method), the Court felt reluctant to be more explicit.

62. One may reasonably wonder whether the equidistance method would have been so decisively rejected in 1969 had it not been for the peculiar circumstances of the case under consideration. After all, in several places the Court then acknowledged that there were some advantages in the equidistance method, for instance when it said :

> "22. . . . It has never been doubted that the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases. It constitutes a method capable of being employed in almost all circumstances, however singular the results might sometimes be, and has the virtue that if necessary . . . any cartographer can *de facto* trace such a boundary on the appropriate maps and charts, and those traced by competent cartographers will for all practical purposes agree.
>
> 23. In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application." (*Ibid.,* p. 23.)

On the other hand, the Court suggested that certain inequities might result from the application of the equidistance method :

> "89. It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense :
>
> *(a)* The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the

> further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity." (*I.C.J. Reports 1969,* p. 49.)

63. Even the Federal Republic of Germany, which was opposed to the application of Article 6 of the Convention as embodying customary rules of international law, was not necessarily against the "equidistance/special circumstances" method. At the time, I argued on behalf of that Party as follows :

> "The use of a median line is a method of demarcation which, if used in proper geographical context, and if no unsound subsequent conclusions are drawn from its existence, can lead to commonsense results and just and equitable solutions." (*I.C.J. Pleadings, North Sea Continental Shelf,* Vol. II, p. 54.)

I then referred to :

> "Article 6, paragraph (2), of the Geneva Convention on the Continental Shelf which, even though not binding on the Federal Republic of Germany as treaty law does represent a facet of international law by virtue of the high sentiment which it embodies." (*Ibid.,* p. 62.)

It has already been pointed out that, even in 1953, the Committee of Experts on certain technical matters regarding the territorial sea held the view that the principle of equidistance might not lead, in certain cases, to an equitable solution even for the delimitation of the territorial sea, and the necessity for departure from the general rule of equidistance had repeatedly been stressed since the report of the International Law Commission in 1953. In 1969, submitting that the formalistic application of equidistance lines could quite easily lead to an odd result, I expressed my view on behalf of the Federal Republic of Germany as follows :

> "The use of this method for apportioning the continental shelf was mentioned as a mere possibility, and could not even remotely imply a mandate for the use of this method in all situations. The fact that the equidistance method was designed primarily to delimit territorial water boundaries is all the more important when we consider that in such a case relatively short distances from the coastal front are involved, and the extreme, and even sometimes bizarre, results reached by strictly applying the equidistance method to apportion the continental shelf at greater distances from the coastline cannot come into play." (*Ibid.,* p. 57.)

64. I certainly share the view of the Court when it stated :

> "24. . . . The plea that, however this may be, the results can never be inequitable, because the equidistance principle is by definition an equitable principle of delimitation, involves a postulate that clearly begs the whole question at issue." (*I.C.J. Reports 1969,* p. 24.)

Yet it is not proper to say that because there are some exceptions there should not be any rule, unless the exceptions are so numerous as to negate the utility or existence of the rule. The problem was that in certain cases the application of the equidistance method might bring about some effect of distortion contrary to the notion of equity. Thus the Convention on the Continental Shelf suggested the concept of special circumstances, although what was meant by this was not clearly indicated. The Federal Republic of Germany suggested the notion of the coastal front or façade, by the application of which distortion due to application of the equidistance method could have been avoided. The intrinsic merit of an equidistance line was not as such rejected in the 1969 Judgment. However, the Court then seems to have fallen short of a proper appreciation of the equidistance method and, in particular to have ignored the full potential of the formula contained in Article 6 of the Convention. In pointing this out, I wish to make it clear that I am concerned solely with the understanding of the Convention, and not with the status of its provisions in 1969.

CHAPTER III. SEDENTARY FISHERIES AND HISTORIC RIGHTS

65. In its Submissions in the Memorial, Tunisia stated as follows :

> "2. The delimitation must not, at any point, encroach upon the area within which Tunisia possesses well-established historic rights, which is defined laterally on the side towards Libya at line ZV 45°, and in the direction of the open sea at the 50-metre isobath."

Libya, on the other hand, stated in its submission in the Counter-Memorial :

> "4. The 'fishing rights' claimed by Tunisia as 'historic rights', even if and where ascertained, are in any event irrelevant to shelf delimitation in the present case."

As the Judgment properly states, the historic rights remain to be considered in themselves (para. 104), and whether these historic rights claimed by Tunisia should be upheld irrespective of the delimitation of the continental shelf is not a point with which the Court has to deal in the present case. However, also as properly indicated in the Judgment (para. 103), Tunisia has argued that the longstanding practice of sedentary fisheries serves to demonstrate that the areas in question belong to the

Tunisian landmass as its extension under the sea. Tunisia further argued in the oral proceedings that there is a striking coincidence between the status of ". . . Tunisia's sedentary fisheries and the way they fit into the theory of the continental shelf [CR 81/9, p. 47]" and claims that this should have an impact on the delimitation of the continental shelf. Tunisia had also attempted to prove that

> "The delimitation of the continental shelf must logically take account of the objective situation created from time immemorial by Tunisia's historic rights in the Gulf of Gabes, which . . . constitutes one of the oldest and most natural manifestations of natural prolongation [CR 81/13, p. 31]."

In view of these arguments put forward by Tunisia, I feel that I have to expatiate somewhat on the doctrine concerning sedentary fisheries in relation to the claim to the continental shelf.

Section I. Past Practice and Doctrines

1. Exploitation of sedentary species

66. In some regions of the world, such as the offshore areas of Tunisia, Sri Lanka and Australia, the exploitation of resources attached to the sea-bed, such as pearl shell, sponge, bêche-de-mer and oysters, has been conducted for many years in areas more than three miles from the coast. No complaint has ever been reported that such sedentary fishing in itself has contravened any articulated rule of international law. Mostly these activities have been carried on by inhabitants of the coast, and the coastal authorities have often exercised certain controls over such activities, but this fact is of little significance, since these controls were exercised over their own nationals. Only where coastal authorities attempt to appropriate these fisheries does a real issue arise – and some such attempts have been made.

67. The pearl fisheries on the banks of Ceylon, extending to a distance of 6 to 21 miles from the coast, were subject to the 1911 Colonial Act of Great Britain, which authorized the seizure and condemnation of any boat found within the limits of the pearl banks, or hovering about them. These pearl fisheries, however, had been regulated since time immemorial by the successive rulers of the island, and this practice had met with the acquiescence of other nations. Vattel's statement "Qui doutera que les pêcheries de perles de Bahreïn et de Ceylan ne puissent légitimement tomber en propriété ?" (*Le droit des gens ou principes de la loi naturelle,* 1758, Carnegie's ed., p. 247) has been quoted with approval by many scholars. While maintaining the freedom of the seas, Vattel recognized a special interest of the coastal State regarding the area around the coast. He attempted to assign coastal fishing areas to the exclusive control of the coastal State, but he did not differentiate between regular and sedentary fishing. It should be noted that Vattel's remarks may serve as justification for the institution of

jurisdictional areas, but his concern was *not* particularly sedentary fishing *under the high seas.* Furthermore, he was *not* interested in the *bed of the high seas.* In Vattel's day, no consistent doctrine of the extent of the high seas had found wide acceptance, and no breadth of the territorial seas had definitely been fixed. While recognizing that waters adjacent to the coast and stretching for a commonly-agreed-on distance should be considered as part of the national territory, he did not attempt to justify the claim to pearl fisheries on the basis of the special character of sedentary fishing itself in terms of the occupation of the sea-bed.

68. In 1871, Sir Travers Twiss responded to an enquiry by the British Government about dues levied by the Bey of Tunis upon the British subjects engaged in fishing sponge and other marine products off the coast of Tunis :

> "There is no objection on principle to the Bey of Tunis asserting an exclusive right to the *fructus* of the banks off the Coast of Tunis to which Sponges and Polypi attach themselves, although the banks in question are at a greater distance than three miles from the Coast-line, provided the Bey can shew a prescriptive enjoyment of such *fructus.*" (Smith, *Great Britain and the Law of Nations,* Vol. II, 1935, p. 122.)

At the time Twiss wrote, the concept of a three-mile territorial belt was gaining general approval. Despite this, Twiss did not believe that sedentary fisheries should be treated in the same way as the sea-bed. He considered sedentary fisheries beyond three miles to form a problem distinct from that of occupation of the sea-bed.

69. The practice of control by Ceylon and Tunis, as well as its justification as advanced by Vattel and Twiss, related solely to the right of the coastal State vis-à-vis certain specific marine products, and this right had been recognized even before the modern concepts of the high seas and the territorial seas had evolved. This point cannot be too strongly stressed. From these special circumstances scholars gratuitously derived the idea of possession of the sea-bed. Discussing the occupation of the sea-bed by sedentary fisheries, Sir Cecil Hurst, when, in 1923-1924, he wrote his influential article "Whose Is the Bed of the Sea ?" (*British Year Book of International Law,* Vol. 4), began with the premise that the exclusive right to pearl shell, a product of the subsoil of the sea-bed, is derived from ownership of the sea-bed where the shell bank lies. He felt, conversely, that ownership had been acquired through the exploitation of pearl shell, sponge and bêche-de-mer. We cannot but note the circular reasoning in his argument, even though, until recently, it was widely accepted in Britain. Oppenheim-Lauterpacht, one of the outstanding British treatises on international law, states that –

> "[I]t is not inconsistent with principle, and is more in accord with practice, to recognise that, as a matter of law, a State may acquire, for sedentary fisheries and for other purposes, sovereignty and property in the surface of the sea-bed." (*International Law,* Vol. I, 8th ed., 1955, p. 628.)

This opinion seems to imply that sovereignty over the sea-bed, and hence, the right of exclusive use, is obtained through positive acts of exploitation. But if the acts of exploitation are not in themselves exclusive, it is difficult to see how a right of sovereignty can be derived from them. If, on the other hand, the use *is* exclusive, but based upon an assertion of sovereignty, the argument seems to collapse because of a glaring *petitio principii.* Smith mistakenly interpreted the Twiss statement as "recognising the principle that the bed of the sea can be acquired by prescriptive occupation" (Smith, *Great Britain and the Law of Nations,* Vol. II, 1935, p. 121). On another occasion, he stated his belief that this practice had established that "particular States may acquire by usage and undisturbed possession an exclusive title to the small portions of the seabed in which these products are to be found" (Smith, *The Law and Custom of the Sea,* 3rd ed., 1959, p. 81). Colombos indicated, in his very worthwhile work on the law of the sea, that the surface of the sea-bed was of a piece with the waters of the open sea above it. He allowed, however, that, with reference to the pearl-shelling off the coast of Ceylon, a limited portion of the bed of the open sea was susceptible of occupation, "[e]xceptionally, on grounds based on historical and prescriptive considerations" (*The International Law of the Sea,* 4th ed., 1959, p. 61). In my view, the concept of possession or occupation of the sea-bed need not have been drawn into a situation where the only issue was control by the coastal State over certain exceptional fishing activities, conducted beyond the territorial limit.

70. I do not find any compelling logical necessity for considering the exploitation of resources attached to the sea-bed in terms of the legal status of the submerged lands. There is no need to talk about the occupation of the sea-bed, when the activities involved in acquiring the resources occur in the waters above it. The only time "occupation" may come into play is with reference to the waters above the resources being exploited while harvesting is being carried on. The question should not be whether resources are swimming in the ocean or attached to the sea-bed but, rather, what human activities are required for their exploitation. The so-called sedentary fisheries pertained rather to the high seas than to the sea-bed. I defend the view that, since both types of fishing are carried on in the high seas, the exploitation of resources attached to the sea-bed is not different from regular fishing, and that there was no reason why the same legal rules should not have applied to both. Such few reasons as have ever been put forward to justify either the exclusion of sedentary fisheries from the general régime of the high seas fisheries, or their inclusion in a régime of the sea-bed are, in the last analysis, unconvincing. In fact, although their views

on occupation of the sea-bed were perhaps somewhat wide of the mark, the ultimate goal of Hurst and like-minded scholars was surely to protect historic rights ; and their primary argument seems to be based on prescription of fishing, with only secondary importance being attached to occupation of the seabed. Only a rationale similar to that used for excluding historic bays from the régime of the high seas might have been invoked to create an exception for certain coastal States.

2. Fishing by means of embedded equipment

71. Fishing carried on with permanent equipment has been seldom discussed, and then only on a rather theoretical basis. Gidel is one of the few who have considered this problem. He was well aware of an inadequate understanding of sedentary fisheries, in the sense of occupation of the sea-bed, but he felt that sedentary fishing, comprising, as it did, an exception to the general rule, was to be permitted only under strict conditions, while ordinary fishing was an incident of the freedom of the seas. Gidel's views are clearly shown in this statement :

[Translation]

> "To endeavour to reconcile the lawfulness of sedentary fisheries outside the limit of the territorial waters with the concept of freedom of the high seas is . . . to persist in the attempt to square the circle. Sedentary fisheries and freedom of the high seas are not compatible as concepts of like rank and value." (*Le Droit international public de la mer,* Vol. 1, 1922, p. 500.)

Gidel did not completely deny the legality of such usage when the part of the sea in question had been utilized for the purpose of sedentary fishing for many years past and such usage had not been protested by other nations. It should be noted that Gidel was not concerned with any jurisdictional issue, but solely with the utilization of the seas for the purpose of exploiting the resources. The reason for this seems to be that Gidel's approach to the law of sedentary fishing was coloured by a preoccupation with the problems posed by permanent installations or equipment (*ibid.,* p. 488). At any rate, the two-fold use of the term "sedentary fishing" can be traced back to Gidel and has since been a source of confusion. The assertion of this great jurist that sedentary fishing conducted from a permanent installation or with permanent equipment is, in the absence of long usage, incompatible with freedom of the high seas, has found too-ready acceptance.

72. For, even when discussing sedentary fishing carried on through permanent installations or equipment, it was excessive, hence inappropriate, to speak in terms of occupation of the sea-bed or of freedom of the seas. Admittedly, the use of such techniques might interfere to some degree with navigation and regular fishing, but the difference between "perma-

nent" equipment and fishing vessels which are stationary for any length of time was not of great significance. Since exploitation of resources was the important factor, and since such exploitation had been clearly established as consistent with the freedom of the seas, there was no reason to attach different legal rules to equally inoffensive methods. The *construction* of permanent installations or equipment might have been subject to technical rules provided by international law. Even so, the prohibition of exploitation of marine resources from special equipment would not have been justified. Being legally permissible, such activities may well be claimed by coastal States as creative of historic fishing rights in suitable cases.

* *

73. To sum up two types of fishing are included in the category of "sedentary fishing", but, contrary to the doctrines of scholars in this field, I do not believe that "sedentary fishing", in either sense, should have been treated independently from regular fishing and in terms of the occupation of the sea-bed. Of course, the peculiar problems arising from different methods would have required appropriate solutions within the régime of the high seas. It should have been remembered that sedentary fishing was a type of human activity long protected by international law. In the age prior to the Truman Proclamation in 1945, there was no ground for suggesting that sedentary fishing, and means of occupation of the sea-bed, could have justified the exclusive claims of the coastal State to wider areas to the offshore submarine regions. If there was any legal doctrine prior to the 1958 Conference on the Law of the Sea it may have been derived from the long usage of sedentary fisheries, which could have given rise only to a claim to historic rights to those specific fisheries. It might have been claimed that, because of the long-term practice of sedentary fishing, historic rights to such fishing – but not to any submarine areas – were justified.

Section II. Sedentary Fisheries in the 1958 Conventions on the Law of the Sea

1. Draft prepared by the International Law Commission

74. Few problems seem to have been discussed by the International Law Commission involving more complicated concepts and depending on less reliable data than the problem of sedentary fisheries. In his first report on the high seas, submitted to the Commission, Professor J. P. A. François, the Special Rapporteur, stated :

> "Fisheries may be described as sedentary either by reason of the species with which they are concerned, that is to say species attached

> to the soil or irregular surfaces of the sea bed, or by reason of the equipment employed, for example stakes driven into the sea bed." (A/CN.4/17, p. 31.)

Without a doubt François had borrowed this concept from Gidel. He explained that sedentary fishing, as such, was allowable, although it might be not in conformity with the principle of freedom of the seas.

75. In his 1951 report, François recognized the existence of two questions :

> "(1) May a State regulate sedentary fisheries unilaterally ?
>
> (2) May a State reserve sedentary fisheries for its own subjects ?" (A/CN.4/42, p. 51.)

He submitted for approval the following theory :

> "Sedentary fisheries characterized by the effective and continued use of a part of the high seas without any formal and repeated protests against such use having been made by other States, and particularly by such States as, by reason of their geographical situation, could have put forward objections of particular weight, shall be recognized to be lawful, provided that the rules governing them allow their use by fishing craft irrespective of nationality and are limited to maintaining order and conserving the beds in the best interests of the fisheries by means of duties fairly assessed and collected." (*Ibid.,* p. 62.)

The first part of this proposal, reading "les pêcheries sédentaires . . . sont reconnues comme licites" appears irrelevant to either of the two questions concerning the State's control which François himself had raised, for it is concerned solely with the legality of fishing activities. At its 1951 session, while freely admitting its ignorance on the subject of sedentary fisheries, the International Law Commission adopted the following text :

> "The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial waters, where such fisheries have long been maintained and conducted by nationals of that State, provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals. Such regulation will, however, not affect the general status of the areas as high seas." (*International Law Commission Yearbook,* 1951, Vol. II, p. 143.)

The discussion on the subject indicates that the majority of the Commission thought that sedentary fisheries should be regulated independently of the problems of the continental shelf. The Commission took the view that the special position of sedentary fisheries justified recognition of special rights attaching to coastal States whose nationals had been carrying on fishing there over a long period. The Commission did not discuss the *general* problem of sedentary fisheries, considering only the specific case where coastal States had carried on sedentary fishing off their coasts for a long period of time. It was somewhat uncertain of its conclusions and awaited comments by member States before proceeding further. Among the countries that sent comments on the 1951 draft, Norway stood out from the rest in that it held the view that so-called sedentary fisheries should not be treated in a different way from other fisheries. On the basis of comments by several governments on the provision in the 1951 draft, François, in his 1953 report, prepared a provision on sedentary fisheries that was not far in substance from the concept in the 1951 draft, which that body had adopted (*International Law Commission Yearbook,* 1953, Vol. II, p. 49).

76. Only at the 1953 session of the Commission, held almost contemporaneously with the outbreak of a dispute between Australia and Japan concerning pearl-shelling off the former's coast, Mr. (later Sir Hersch) Lauterpacht and others were of the opinion that the problem of sedentary fisheries should be treated together with that of the continental shelf, where the coastal State is permitted to exercise its sovereign rights to explore and exploit resources. As a result of these views, the separate article on sedentary fisheries as proposed in the François report was dropped, and the topic was included in the 1953 draft of the régime of the continental shelf. The Commission was of the opinion that, except for cases in which nationals of other States have existing rights in them, sedentary fisheries are subject to the sovereign rights of the coastal State over its continental shelf (*ibid.,* p. 214). In 1951 exploitation of resources of the sea fell into three categories : regular fisheries, sedentary fisheries and the continental shelf. By 1953 there were two classifications : regular fisheries on the one hand, and the continental shelf, including sedentary fisheries, on the other. "Products of sedentary fisheries" as understood in 1953 meant only natural resources attached to the bed of the sea. In respect of such sedentary fisheries as pearl-shelling, the International Law Commission in 1956 maintained its earlier position. In the commentary to the 1956 draft, it was stated that :

> "the products of 'sedentary' fisheries, in particular, to the extent that they were natural resources permanently attached to the bed of the sea should not be left outside the scope of the régime adopted [for the continental shelf]" (*International Law Commission Yearbook,* 1956, Vol. II, p. 297).

It was indicated that the existing rights of nationals of other States should be respected. However, apart from the case of acquired rights, the sovereign rights of the coastal State over its continental shelf were also to cover sedentary fisheries.

77. On the other hand, fishing by means of equipment embedded in the floor of the sea-bed, which had been also categorized as sedentary fisheries, became subject to specific treatment differentiated from the fishing of resources sedentary at the sea-bed. In his report to the 1956 session, the Special Rapporteur pointed out that there was one aspect of the question which the Commission had overlooked, namely fisheries regarded as sedentary because of the equipment used, e.g., stakes embedded in the sea-floor. In his opinion, this class of fisheries was not covered by the Commission's draft of 1953. He suggested that the original article in the 1951 draft be reintroduced for these fisheries. In 1956 the Commission accepted the Rapporteur's view and decided that it was still necessary to have an article regulating fisheries involving equipment embedded in the floor of the sea. The 1956 draft provided under the section on fishing, as follows :

> "The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State, may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals." (*Ibid.,* p. 293.)

This provision was not essentially different from the wording of the 1951 draft, although the latter was concerned primarily with sedentary fisheries in the sense first alluded to above : fishing for objects attached to the sea-bed. The Commission considered in 1956 that :

> "Banks where there are fisheries conducted by means of equipment embedded in the bed of the sea have been regarded by some coastal States as under their occupation and as forming part of their territory. Without wishing to describe these areas as 'occupied' or as constituting 'property' of the coastal State, the Commission considers that the special position of these areas justifies special rights being recognized as pertaining to coastal States whose nationals have been carrying on fishing there over a long period.
>
> The existing rule of customary law by which nationals of other States are at liberty to engage in such fishing on the same footing as the nationals of the coastal State should continue to apply. The exercise of other kinds of fishing in such areas must not be hindered except to the extent strictly necessary for the protection of the fisheries contemplated by the present article.
>
> The special rights which the coastal State may exercise in such areas must be strictly limited to such rights as are essential to achieve the

ends for which they are recognized. The waters covering the seabed where the fishing grounds are located remain subject to the régime of the high seas." *(Ibid.)*

78. Thus the final draft of 1956 on the law of the sea dealt in completely different ways with two types of fisheries, both of which may properly be classified as sedentary fisheries. Article 68 related to the régime of the continental shelf and Article 60 was a separate provision for fisheries conducted by means of equipment embedded in the floor of the sea.

2. Provisions of the 1958 Conventions on the Law of the Sea

79. Paralleling the different treatment accorded the two types of sedentary fisheries by the International Law Commission, the Geneva Conference in 1958 took up the problem of these fisheries separately. The fishing of sedentary resources attached to the sea-bed was examined as part of the problem of the continental shelf in the Fourth Committee, and fishing carried on with equipment embedded in the sea-floor was dealt with in the Third Committee in charge of high sea fisheries.

80. In the Fourth Committee the delegates differed on the kind of resources to be included in the provision which defined the fundamental concept of the continental shelf. Many European coastal States insisted that the list should be limited to mineral resources. The Japanese delegate warned that the inclusion of sedentary fisheries in the concept of continental shelf would lead to a restriction of the freedom of the seas, and he explained that resources living in the sea should be covered by the general régime of fishing. A radically opposite view, supported by the delegates from Burma and the Republic of Korea, maintained that even "bottom-fish" should be included in the resources of the continental shelf. Proposals were submitted respectively by Sweden, Greece and the Federal Republic of Germany to replace the words "natural resources" in the draft of the International Law Commission with the expression "mineral resources" (A/CONF.13/C.4/L.9, 39, 43). This would have had the effect of excluding sedentary fisheries from the régime of the continental shelf.

In contrast, the Burmese proposal stated that :

"[t]he term 'natural resources' includes so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there" (A/CONF.13/C.4/L.3).

As a compromise between the two opposing views, a new proposal was jointly submitted by Australia, Ceylon, India, Malaya, Norway and the United Kingdom :

> "The natural resources referred to in these articles consist of mineral and other non-living resources of the seabed and the subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil; but crustacea and swimming species are not included." (A/CONF.13/C.4/L.36.)

The sponsoring States intended to draw a line between the mineral and sedentary resources on the one hand, and fish resources, including crustacea and bottom-fish on the other. Introducing this proposal, the Australian delegate explained that it was in his view senseless to give the coastal State sovereign rights over such mineral resources as the sands of the sea-bed, but not over the coral, sponges and the living organisms which never moved more than a few inches or a few feet on the floor of the sea. He emphasized that that did not apply to crabs and other crustacea, which could move a considerable distance. The proposals of Sweden *et al* and the proposal of Burma were all heavily defeated, while the joint proposal of the six States was eventually adopted by the Committee. At the plenary meeting, that portion of the joint proposal preceding the semi-colon was separately voted on and approved by the vote of 62-4-2, and became Article 2, paragraph 4, of the Convention. However, the exclusion relating to crustacea (of which Mexico had almost secured the deletion in the Committee) was disapproved by a vote of 14-43-9.

81. In point of fact, all the provisions except Article 2, paragraph 4, of the Convention on the Continental Shelf were drafted to be applicable mainly to the exploitation of the mineral resources of submerged lands, and not to the exploitation of sedentary species. Although I do not now hesitate to admit, in view of the lack of protest against this particular provision and of some repeated practices over the past two decades, that sedentary species will be treated as continental shelf resources, the unnecessary nature of the consolidation of the exploitation of sedentary species with the régime of the continental shelf was quite clear at the time of the adoption of the 1958 Convention on the Continental Shelf.

82. The original provision concerning fishing by means of embedded equipment in the 1956 draft of the International Law Commission, which had nothing to do with the concept of conserving marine resources, was nevertheless referred to the Third Committee together with the problem of the conservation of living resources of the high seas. Despite the view of the Norwegian delegate that it did not deal with an urgent issue of interna-

tional law such as should concern the Conference, the following provision, promoted in large measure by Ghana, was finally adopted by the Third Committee :

"*Article 13*

1. The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals except in areas where such fisheries have by long usage been exclusively enjoyed by such nationals. Such regulations will not, however, affect the general status of the areas as high seas.

2. In this article, the expression 'fisheries conducted by means of equipment embedded in the floor of the sea' means those fisheries using gear with supporting members embedded in the sea floor, constructed on a site and left there to operate permanently or, if removed, restored each season on the same site."

83. Article 13 as thus drafted does not present a general régime of fishing by means of equipment embedded in the floor of the sea. The coastal State may regulate such fishing only "where such fisheries have long been maintained and conducted by its nationals". The coastal State is allowed, on this specific condition, to apply its own national legislation to foreign fishermen who are engaged in this type of fishing in the areas concerned. This undoubtedly would not have been in conformity with the traditional principle of freedom of the seas, despite the provision in the Convention to the effect that "such regulation will not, however, affect the general status of the areas as high seas". The only basis I can see for such derogation is the presence of a historic right. This construction is surely justified by the fact that participation on an equal footing by foreign nationals in this type of fishing is prevented "where such fisheries have by long usage been exclusively enjoyed by . . . nationals [of the coastal State]". This clause may be interpreted to mean that exclusive fishing is allowable to the coastal State in areas where it has long kept out foreign fishermen who would otherwise have fished there. However, I believe that no case exists to which this provision, as thus analysed, would be applicable.

84. After having explained the way in which the two types of sedentary fisheries had long been interpreted from a legal point of view, particularly since the last century, I have thus attempted to show that the relevant provisions of the Geneva Conventions were not necessarily drafted upon the basis of a correct interpretation of the past practice of such fisheries.

Leaving aside the problems involved in the provisions relevant to sedentary fisheries in the Geneva Conventions, namely Article 2, paragraph 4, of the Continental Shelf Convention and Article 13 of the High Seas Fisheries Convention, the thought was never expressed in any of the 1958 Conventions on the Law of the Sea that these sedentary fisheries ought properly to have been made a ground for claiming such areas of the sea-bed as continental shelf.

Section III. Sedentary Fisheries at the Third United Nations Conference on the Law of the Sea

85. The subject of sedentary fisheries is one of those left almost untouched by delegates in the Sea-bed Committee and UNCLOS III. In the ISNT of 1975, the treatment of sedentary fisheries as a resource of the continental shelf was taken for granted in terms of Article 2, paragraph 4, of the Geneva Convention on the Continental Shelf. This provision was not touched at all throughout the ISNT, the RSNT and the ICNT and its revisions, and it now stands as Article 77, paragraph 4, of the 1981 draft convention on the Law of the Sea. Irrespective of whether this provision is workable or not, no doubt remains that it cannot constitute a basis for justifying a title to the continental shelf by reason of sedentary fisheries, as suggested by Tunisia. A provision concerning fishing carried out from embedded installations, as in Article 13 of the High Seas Fisheries Convention, completely disappeared in the ISNT. No reason for this disappearance is to be found in the *Official Records* of UNCLOS III. Practically no attention was paid to this problem throughout UNCLOS III, but it may well be that, because of the 200-mile exclusive economic zone, sedentary fisheries in terms of fishing from permanently fixed installations, as a part of high seas fishing, would not have made any sense under the new régime.

Section IV. Historic Rights

86. In connection with the Submissions of Tunisia, as referred to in paragraph 65 above, I would briefly like to touch upon the question as to whether the areas west of the ZV 45° line within the 50-metre isobath, as claimed by Tunisia, would have constituted a part of its historic waters because of its longstanding practice of fisheries, whether sedentary or not. With regard to historic waters, including historic bays, sufficient explanation is given in paragraph 104 of the Judgment. Inheriting almost word for word the provisions of the 1958 Convention on the Territorial Sea and the Contiguous Zone, the draft convention on the Law of the Sea provides :

"*Article 10. Bays*

. . . . . .

6. The foregoing provisions do not apply to so-called 'historic' bays, or in any case where the system of straight baselines . . . is applied."

As stated in paragraph 104 of the Judgment, no effort to elaborate on historic waters, including historic bays, has been made since 1958, yet in my view the question whether or not the Gulf of Gabes may be claimed by Tunisia as historic waters or historic bays because of its longstanding sedentary fisheries is not relevant to the present case. It also seems necessary to point out that the concept of historic waters may be claimed only where strict adherence to the geographical conditions required for internal waters (such as bays, straight baselines) might lead to a somewhat inequitable result because of the longstanding exercise of powers by the coastal State concerned. The area claimed by Tunisia, extending to offshore areas west of the ZV 45° line not framed by any part of the Tunisian coast, apart from the Gulf of Gabes, does not meet the geographical conditions for internal waters.

87. What, however, the Court fails to recognize is the fact that at the 1958 Conference the question of historic title was taken up in connection with the delimitation of the territorial sea. In the draft prepared by the International Law Commission in 1956, at least in the provision concerning the delimitation of the territorial waters between two adjacent States, there was no reference to historic titles. In the course of the 1958 Conference, Norway suggested a provision concerning the median line for the delimitation of the territorial shelf between adjacent States :

"shall not apply, however, where one of the States concerned through prescriptive usage has acquired the right to delimit its territorial sea in a way which is at variance with the provision" (A/CONF.13/C.1/L.97).

The words "through prescriptive usage" were replaced by the words "by reason of historic title". The Norwegian proposal was adopted by the First Committee, and thus Article 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone provides as follows :

"1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or

other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision."

This has also been inherited, almost word for word, as a provision of the 1981 draft convention on the Law of the Sea :

"Article 15. Delimitation of the Territorial Sea Between States with Opposite or Adjacent Coasts

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

88. It is, however, very important to note that even at the 1958 Conference there was no suggestion that this exception to the median line method of territorial-sea delimitation should be applied to the case of delimitation of the continental shelf, and no argument in favour of such an idea was ever put forward at UNCLOS III. Thus it may be assumed that historic title by reason of longstanding practice of sedentary fisheries might justify some deviation in the line of the delimitation of the territorial sea, but otherwise historic title would not have any impact on delimitation of the continental shelf. This is not incompatible with the principle that any historic fishing right based on longstanding practice should be respected whatever the status of the submerged areas under the new régime. The Court states in paragraph 104 that "it may be that Tunisia's historic rights and titles are more nearly related to the concept of the exclusive economic zone". I regret to say that I totally disagree with this contention. I shall explain the concept of the exclusive economic zone at a later stage, but it has nothing to do with historic titles, as the Court suggests.

CHAPTER IV. NEW TRENDS IN THE CONCEPT OF THE CONTINENTAL SHELF

Section I. The Halting of the Expansion of the Outer Limit of the Continental Shelf

89. While the basic legal concept of the continental shelf was strongly confirmed by the 1958 Convention on the Continental Shelf, and was further endorsed by the 1969 Judgment of the Court as being established under customary international law, the actual extent of the legal continental shelf had been left indeterminate, because of the introduction of the equivocal notion of exploitability which suggested that the area could

eventually expand under virtually the whole of the high seas. This trend was halted by the rise of the new concept of the international sea-bed area late in the 1960s. The realization that the concept of exploitability could be interpreted to mean that all sea-bed areas of the world would eventually be divided among separate States led Malta to take the initiative by introducing the concept of the common heritage of mankind, to be applied in the area beyond a redefined continental shelf.

90. Ambassador Pardo of Malta made an historic speech on 1 November 1967, which reads in part as follows :

> "67. The . . . interpretation of the 1958 Geneva Convention [enabling the areas beyond the continental shelf to be placed under certain international régimes] has, however, not gone unchallenged since it is in direct contradiction to the explicit wording of Article 1 *(a),* which states that the continental shelf extends '. . . to . . . the submarine areas adjacent to the coast . . . to a depth of 200 metres and beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas'. Thus an influential school of thought denies the possibility of any legal problem whatsoever. Professor Shigeru Oda of Tohoku University, for instance, points out that : 'there is no room to discuss the outer limits of the continental shelf or any area beyond the continental shelf under the Geneva Convention since . . . all the submerged lands of the world are necessarily part of the continental shelf by the very definition of the Convention'. Under this concept a coastal State, as its technical capability develops, may extend its jurisdiction across the deep-sea floor up to the midway point between it and the coastal State opposite, in accordance with the rules contained in Article 6 of the Convention. Such an interpretation gives the governing Powers of islands such as Clipperton, Guam, the Azores, St. Helen or Easter, sovereign rights over millions of square miles of invaluable ocean floor.
>
> 68. More important than the opinion of jurists, however, and however distinguished they may be, is the action taken by governments ; and such action appears to be increasingly based on an interpretation of the 1958 Geneva Convention even more far-reaching than that of Professor Oda. For instance, the United States has already leased tracts of land situated under water several hundred fathoms deep and well beyond its territorial waters, basing itself on a Department of Interior legal memorandum which holds that the leasing authority of the United States under the Outer Continental Shelf Lands Act 'extends as far seaward as technological ability can cope with the water depth, this is in accord with the Convention of the Sea adopted at Geneva'. This practice is spreading." (*GAOR,* 22nd Sess., 1st Comm., 1515th Meeting, p. 9.)

Owing to the initiative taken by Malta, the United Nations General Assembly adopted on 18 December 1967 resolution 2340 (XXII) called "Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the uses of their resources in the interests of mankind", by which an *ad hoc* committee was established to study the scope and various aspects of this subject. It was thus tacitly understood that there would have to be an international sea-bed area beyond the limits of national jurisdiction.

91. In parallel with the initiative of Malta, a movement had been emerging among non-governmental organizations in the United States to place the deep ocean floor under a certain kind of international control, and in the late 1960s a number of Bills were introduced in the United States Congress for a new régime to that effect. On the other hand, the oil industry in the United States seemed to be more willing to place the safety of its investments off the coasts of some developing nations under some kind of international control, in order to minimize the risks of eventual nationalization. Encouraged by this, President Nixon announced his country's policy on the ocean in his report to Congress on 18 February 1970 :

> "We also believe it important to make parallel progress toward establishing an internationally agreed boundary between the Continental Shelf and the deep seabeds and on a régime for exploitation of deep seabed resources." (*USDS,* Vol. 62, p. 314.)

In a subsequent statement on 23 May 1970 he proposed that :

> "All nations [should] adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the [200-metre isobath] and would agree to regard these resources as the common heritage of mankind."

It was clear, however, in view of his further proposal for an international trusteeship zone for the continental margins beyond the 200-metre isobath that, unlike some developing nations seeking the benefits derived from the exploitation of the "areas beyond" as the common heritage of mankind, the United States, which wanted certain international controls imposed upon other coastal States for the security of its own invested capital, yet attempted to reserve access to the continental margin for its interests.

92. The United Nations Sea-bed Committee, established pursuant to General Assembly resolution 2340 (XXII), started its work in 1968. For three years it deliberated, and during all that time no nation cast doubt on the principle that the unrestricted expansion of the continental shelf in terms of exploitability should be abandoned so as to leave some part of the sea-bed free for the benefit of the international community. Nevertheless, the Committee failed to adopt any declaration. Despite this, the United Nations General Assembly, at its twenty-fifth session in 1970, adopted by 108-0-14 votes a Declaration of Principles governing the international sea-bed area (resolution 2749 (XXV)), which affirmed that :

> "[t]here is an area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined".

It also adopted by 108-7-6 votes General Assembly resolution 2750 C (XXV), whereby it :

> "*Noting* that the political and economic realities, scientific development and rapid technological advances of the last decade have accentuated the need for early and progressive development of the law of the sea, in a framework of close international co-operation . . .
>
> 2. *Decide[d]* to convene in 1973 . . . a conference on the law of the sea which would deal with . . . a precise definition of the area, and a broad range of related issues including those concerning the régimes of . . . the continental shelf."

By the same resolution, the Sea-bed Committee was broadened, both in membership and functions.

93. Thus it was already clear that in the sea-bed areas of the vast oceans of the world, where the concept of the continental shelf had been the only applicable régime, the new concept of the common heritage of mankind had arisen to call a halt to the indefinite expansion of the continental shelf, in order to preserve the international sea-bed beyond it.

Section II. Fluctuation of the Criteria for the Outer Limit of the Continental Shelf

1. Suggested criteria

94. The outer limit of the continental shelf was the subject of extensive argument throughout the duration of the enlarged Sea-bed Committee and UNCLOS III. The notion of distance from the coast was proposed in addition to, or in place of, the existing criterion of the 200-metre depth, and the distance criterion or a combination of the distance and the depth criteria were gaining in importance, while the somewhat ambiguous con-

cept of exploitability had become interpreted in such a way as to allow each coastal State to claim as far as the foot of the continental margin as a potential reservoir of petroleum resources, leaving the hard mineral resources of the deep ocean floor as the common heritage of mankind to be administered by an international authority.

95. In 1970 the United States, implementing the proposals made by President Nixon a few months before, introduced a draft convention proposing an international sea-bed area which would lie beyond the continental shelf as defined in terms of the 200-metre isobath. However, it also suggested the institution of an international trusteeship area to comprise the continental margin beyond the continental shelf and constitute a part of the international sea-bed area in which each coastal State would be responsible for licensing, supervision and exercise of jurisdiction. In this area each coastal State would also be entitled to a portion of the royalties or profits derived from the exploitation of the resources (A/AC.138/25). The real intention of the United States seems to have been for the continental margin, though given the status of an international sea-bed area, to be placed under the control of the coastal State, while nevertheless featuring international protection of the relevant investments from any arbitrary nationalization or confiscation by such State.

96. In 1972 many landlocked and shelf-locked countries, acting as a group, took a position opposing the idea of wider continental shelf and/or narrower international sea-bed areas, while France, on the other hand, advocated the 200-mile distance criterion for the continental shelf, and the Netherlands suggested establishing an intermediate zone between the continental shelf and the international sea-bed areas. In the Kenyan proposal, presented in that year, the control of the coastal State in terms of a 200-mile Exclusive Economic Zone would definitely be extended not only to living resources but also to minerals. However, States which had even broader continental shelves in the geological sense, such as the United States, Canada, Brazil, the Soviet Union and India, contended that that zone would not be sufficient and accordingly claimed sea-bed areas farther than 200 miles from the coast as being still part of the continental shelf. These extensive sea-bed areas could have been defined in terms of the 200-metre depth, as at the Geneva Conference of 1958. However, since petroleum resources exist not only in the continental shelf itself but also in the continental slope and margin beyond, the demand of those coastal States could not simply stop at the 200-metre depth-line, even though this might lie more than 200 miles from the coast. Thus the continental shelf in legal terms needed to be interpreted in its widest sense in order to incorporate the outermost fringe of the continental margin.

97. In 1973 and 1974 numerous coastal States put forward concrete proposals, of which that from the Soviet Union was distinguished by a

combination of the 500-metre depth and the 100-mile distance from the coast as a criterion for the outer limit of the continental shelf ; and Greece likewise suggested a combination of distance and depth of water. The other proposals tended to abandon the depth criterion in favour of distance and/or geomorphological criteria, but all militated towards the diminution of the potential international sea-bed. The concept of natural prolongation returned at Caracas in a nine-State proposal (Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway) which read, in part :

"Article 19

. . . . . .

2. The continental shelf of a coastal State extends beyond its territorial sea to a distance of 200 miles from the applicable baselines and throughout the natural prolongation of its land territory where such natural prolongation extends beyond 200 miles." (A/CONF.62/L.4.)

98. The United States, in 1973, totally revised its position and suggested the concept of a coastal sea-bed economic area, which would cover the expanse from the outer limit of the 12-mile territorial sea to the lower edge of the continental slope (A/AC.138/SC.II/L.35). The real intention of the United States was to ensure, on the one hand, that the exploitation of this sea-bed area should not be impeded by any coastal State except for a public purpose, on a non-discriminatory basis, and with payment of just compensation, and, on the other hand, to suggest that the coastal State could bring such an activity under its own jurisdiction on condition that a portion of the revenues gained from exploiting this area might be dedicated to the international community. It might be said that although this new draft ostensibly makes a striking contrast to the United States' draft convention of 1970, the aims of both proposals were in fact not so different. However, in 1974 the United States abandoned its 1973 proposal and switched back to the subject of the outer limit of the continental shelf with a composite definition involving the economic zone, natural prolongation and geomorphology :

"Article 22

. . . . . .

2. The continental shelf is the sea-bed and subsoil of the submarine areas adjacent to and beyond the territorial sea to the limit of the economic zone or, beyond that limit, throughout the submerged natural prolongation of the land territory of the coastal State to the outer limit of its continental margin, as precisely defined and delimited in accordance with Article 23 [on limits]." (A/CONF.62/C.2/L.47.)

2. Negotiating texts

99. At the third session of UNCLOS III in 1975, the ISNT was prepared as a compilation of the work done by the chairmen of the main committees in their respective personal capacities. Although they may have had consultations with some groups or delegations and may even have taken into account the various proposals and ideas presented previously, the end result was nothing more than the personal work of each chairman. Apparently basing himself on two proposals, one by the nine countries (Canada and others) and the other by the United States, both of which are quoted above, the Chairman of the Second Committee drafted the following provision :

> *"Article 62. Definition of the Continental Shelf*
>
> The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

The provision in the ISNT remained, without any change, as Article 64 in the RSNT and Article 76 in the ICNT.

100. In this connection I must refer to a provision of Article 69 of the ISNT on payments and contributions with respect to the exploitation of the continental shelf beyond 200 miles. Its background is the fact of geography that the formation of the continental shelf can be extremely inequitable for some coastal States. If the legal continental shelf is to incorporate not only the 200-mile distance from the coast but also the outer edge of the continental margin – which could lie beyond that distance – thus embodying sea-bed areas where petroleum deposits can be found, the geographical inequality of States will be further exaggerated. But the landlocked or shelf-locked States not having any continental shelf would not allow the excessive claims made by a handful of States to go unchallenged. The provision thus seems to have been drafted by some geographically advantaged States simply to appease the dissatisfied States. In point of fact it originated mainly in Formula A of Provision 80 of the Main Trends of 1974, referred to above, and partly in Formula B taken from the United States proposal of 1974 (A/CONF.62/C.2/L.47) ; in any case, to understand this novel régime, it seems essential to analyse how the United States position fluctuated from President Nixon's statement of 23 May 1970 to its proposals in 1974 in "Draft articles for a chapter on the economic zone and the continental shelf" (A/CONF.62/C.2/L.47), and through its proposal in 1970 in "Draft United Nations Convention on the International Sea-bed Area" (A/AC.138/25) to its proposal in 1973 in

"Draft articles for a chapter on the rights and duties of States in the *coastal sea-bed economic area*" (A/AC.138/SC.II/L.35) (emphasis added). The provision of the ISNT was to the effect that, unlike the proceeds of the coastal State's exclusive interests within its 200-mile distance, the revenues derived from exploitation beyond that limit would be dedicated to the international community through the authority to be established for the purpose of exploitation of the deep ocean floor, which would in turn "distribute them ... taking into account" (ISNT, Art. 69, para. 4) the interests and needs of developing States, particularly the least developed and the landlocked among them.

101. Thus the continental shelf would be divided into two areas, the first being the area within 200 miles from the coast, where the exclusive interests of the coastal State would be established, and the other, the area beyond that, where a portion of the profits would be dedicated to the international community, in particular the developing nations. This parallelism is retained, with some modifications, in the draft convention as Article 82. It cannot be over-emphasized that this formula never founded part of the traditional concept of the continental shelf.

102. In 1978, several negotiating groups were established to negotiate on certain hardcore issues. The sixth negotiating group was entrusted with, among other things, the definition of the outer limit of the continental shelf. The discussions of the group were not disclosed, but, following them, a compromise suggestion by the chairman of the group was presented, at the eighth session, held in 1979, to the plenary meeting on 27 April 1979 (A/CONF.62/L.37). This text, containing nine paragraphs, was totally different from ICNT Article 76, a one-paragraph article, particularly in the way that the continental margin beyond the 200-mile distance would receive particular treatment in the régime of the continental shelf. At the close of the eighth session (1979), the ICNT/Revision 1 was prepared, which modified Article 76 to some extent along the lines suggested by the chairman of the sixth negotiating group (A/CONF.63/L.37). According to the explanatory memorandum by the President of the Conference :

> "On one major issue, that of the compromise proposal advanced by the Chairman of the Second Committee in document A/CONF.62/L.37 relative to certain aspects of the continental shelf, the situation was rendered more complex by the fact that a number of delegations had expressed opposition to, or reservations on, the inclusion of these proposals in a revision at this stage. The team was, therefore, obliged to examine with the utmost care the question whether those proposals could be judged as meeting the criterion of enjoying 'widespread and

substantial support prevailing in Plenary and to offer a substantially improved prospect of a consensus'. It noted that support for the inclusion of these proposals had been expressed by countries from all regional groups, among which were a number of land-locked or otherwise geographically disadvantaged States. On the other hand, opposition to their inclusion had been based chiefly on the ground that there had been insufficient negotiation or discussion and that the proposals did not take adequate account of other proposals or positions. However, as those proposals represented a clear movement away from the ICNT text which was in the light of the plenary debate manifestly less acceptable as a continuing basis of negotiation, the conclusion seemed inescapable that compared with the corresponding provisions of the ICNT, the new proposals appeared to the team to merit inclusion in the revision as offering the basis for a substantially improved prospect of a consensus.

This important conclusion was reached unanimously by the members of the team. The discussions in the team on all points were characterized by a remarkable degree of agreement and understanding which enabled it to arrive at unanimous decisions on all the other texts and revisions presented to the Plenary by the Chairmen concerned." (A/CONF.62/WP.10/Rev.1, pp. 18 f.)

Article 76, thus redrafted in the ICNT/Revision 1, read as follows :

"1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. . . .

3. The Continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor or the subsoil thereof [1].

[1] General understanding has been reached to the effect that on the question of underwater oceanic ridges there will be additional discussion and a mutually acceptable formulation to be included in Article 76 will be drawn up."

103. At the ninth session, in 1980, the sixth negotiating group continued deliberations on the subject of the outer limit of the continental shelf, and those discussions were included in the report of the Chairman of the Second Committee to the Plenary Meetings (A/CONF.62/L.51,

UNCLOS III, *Official Records,* Vol. XIII, p. 82). Certain arguments relevant to these issues were spelled out as follows :

> "6. . . .
>
> (a) *Submarine ridges*
>
> This point, referred to in a foot-note to paragraph 3 of Article 76 was the subject of particularly intense consultations and negotiations. In conjunction with these efforts, I submitted for the consideration of the group at its informal meeting on 28 March 1980 a compromise formula worded as follows. Amend the last sentence in paragraph 3 of Article 76 to read as follows :
>
> 'It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.' "

In the ICNT/Revision 2, prepared at the close of the ninth session, some amendments were made to Article 76 along the lines suggested by the sixth negotiating group, so that paragraph 3 now reads as follows :

> "The continental margin comprises the submerged prolongation of the landmass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor *with its oceanic ridges* or the subsoil thereof." (The part italicized was newly added.)

The text suggested in the ICNT/Revision 2 remained unchanged in the draft convention (Informal Text) in the summer of 1980 and the draft convention on the Law of the Sea prepared in August 1981.

104. The above account should suffice to show that there is no comparison between the degree to which the actual régime of the continental shelf has found acceptance, not to mention its endorsement by the Court in 1969 as customary law, and the status of the latest definition of the shelf's expanse, as it has hitherto emerged from UNCLOS III. It should be crystal clear that Article 76 of the draft convention is essentially a product of compromise – not consensus – between the conflicting positions of various groups which have different, and sometimes opposite, interests in the use of sea-bed areas. Well may the draft convention be expected eventually to become binding upon many nations, once it has become widely accepted and received a sufficient number of ratifications. Until that time, there is no doubt that Article 76 is not a provision of any worldwide multilateral convention, and can hardly be considered as enshrining established rules of international law.

105. With respect to Article 76, both Tunisia and Libya had occasion to express their own views, as follows. Tunisia stated :

"The Tunisian Government considers that Article 76, paragraph 1, represents one of the recent trends admitted at the Third Conference on the Law of the Sea. The whole of the text of Article 76 is the result of long and arduous negotiations, which concerned each paragraph and each sentence of the various paragraphs of which it is composed."

Libya's view, on the other hand, was as follows :

"The Libyan Jamahiriya regard the first part of this paragraph [Art. 76, para. 1] as representing existing, customary law. This is for the reason that, on the basis of the Court's own Judgment, in 1969, it is clear that a coastal State is already entitled, *de jure,* to its natural prolongation, in accordance with customary international law. So far as the extension to the edge of the continental margin is concerned, it is arguable that a coastal State's *de jure* entitlement to its natural prolongation extends to the edge of the continental margin.

The same would not be true for an area which lies beyond the edge of a continental margin, but within 200 miles from the baseline. Therefore the second part is not customary law so far as it defines the outer limit of the continental shelf."

Thus even in the eyes of the Parties to the case, the Court could not (early in 1982) have relied on Article 76 of the draft convention on the Law of the Sea in determining the principles and rules governing the geographical extent, or the outer limit, of the continental shelf.

Section III. Changing Concept of the Continental Shelf

106. Both in the United Nations Sea-bed Committee and in UNCLOS III, hardly any proposal or suggestion dealing with the basic concept of the continental shelf came to the fore. The ISNT of 1975 had a provision under Article 63, paragraphs 1-3, which was the same as Article 2, paragraphs 1-3, of the 1958 Continental Shelf Convention, except for the welcome deletion, from paragraph 2, of the virtually senseless phrase italicized below (which had surely been included in mistaken response to the Yugoslav proposal mentioned above – see para. 43) :

"The rights . . . 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 may make a claim to the continental shelf,* without the express consent of the coastal State."

Article 63, paragraphs 1-3, of the ISNT eventually entered the draft con-

vention on the Law of the Sea without any change, and reads as follows :

"*Article 77. Rights of the Coastal State Over the Continental Shelf*

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 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 without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."

107. Thus in the upshot the actual régime of the continental shelf is represented as remaining in 1981 exactly the same as in 1958. Yet it cannot be over-emphasized that, in parallel with the change in the outer limit of the continental shelf, the notion of natural prolongation by which the concept of the continental shelf was embellished in the 1969 Judgment has greatly lost its significance, particularly with the introduction of the criterion of the 200-mile distance under the strong influence of the concept of the exclusive economic zone (with which I shall deal in the next chapter), not to mention the parallelism between that zone and a possible inner-continental shelf of 200 miles, coupled with the possibility of a different régime applying to the continental margin beyond that distance. In spite of the provision of Article 77 relevant to the rights of the coastal State (which is essentially identical to that of the 1958 Convention), as mentioned above, the concept of the continental shelf cannot have escaped change as a result of the fading-away of the geomorphological notion of natural prolongation. This notion may be said to have remained in the case where the (geomorphological) continental shelf or slope extends farther than 200 miles, yet it must be said that the concept of the continental shelf, which had been sustained by scholarly views and the imperious necessities of the 1950s, has, early in the 1980s, changed.

CHAPTER V. IMPACT OF THE CONCEPT OF THE EXCLUSIVE ECONOMIC ZONE ON THE CONCEPT OF THE CONTINENTAL SHELF

108. The present case has been presented both in the Special Agreement and throughout the pleadings and arguments of the Parties as a case concerning the principles and methods applicable to delimitation of the continental shelf. However, in view of the fact that the concept of the exclusive economic zone has rapidly been accepted in the realm of international law, one cannot avoid the question whether this case should not also have been regarded as involving the lateral delimitation of the Exclu-

sive Economic Zone appertaining to Tunisia and the Exclusive Economic Zone appertaining to Libya. The question as to whether the sea-bed, at least within 200 miles of the coast, has been incorporated in the régime of the Exclusive Economic Zone or whether it should still come under the separate régime of the Continental Shelf in parallel with the Exclusive Economic Zone was far more essential than generally thought for making any judgment on the issues presented for the Court's consideration. I must add that the Exclusive Economic Zone cannot be a concept to which historic rights and titles claimed on the basis of longstanding fisheries are nearly related, as suggested in the Judgment (para. 100).

Section I. The New Concept of the Exclusive Economic Zone

1. Emergence of the concept

109. No provision concerning an idea similar to that of the Exclusive Economic Zone is found in any of the 1958 Conventions on the Law of the Sea, although the idea of the epicontinental sea had been promoted, mainly by some Latin American countries, in the post-war period. During the First and Second United Nations Conferences on the Law of the Sea, in 1958 and 1960 respectively, the United States was ready to forsake the fishery interests if the free navigation of warships in offshore areas of other coastal States could be guaranteed. Thus a package-deal was suggested by the United States whereby the 12-mile fishery zone would be traded for a narrower territorial sea. This idea did not bear fruit in those conferences. But the determination of the United States to maintain a narrower territorial sea limit for security and military considerations remained unchanged, and the question was pursued in order to discover some way of forestalling the general movement towards a 12-mile territorial sea. However, it became apparent in the latter half of the 1960s that it was already impossible to reverse the trend towards the extension of the territorial sea and persuade the developing nations to withdraw their unilateral legislation establishing a 12-mile territorial limit. Finding it imperative to preserve free navigation and overflight in certain critical areas, the United States had to seek some compromise solutions.

110. In announcing its maritime policy, the United States made it clear in 1970 that, while recognizing the 12-mile territorial sea, it wished to secure free navigation for warships and overflight for military aircraft in certain places. In order to achieve this objective, some compensation would have to be offered to the developing nations. Ten years before, when the six-mile territorial sea had been at issue, the set-off had been the recognition of a 12-mile fishery zone, and in 1970 it had to be something more. Thus the United States offered to some increasingly disgruntled developing nations the concept of preferential fishing rights beyond the 12-mile territorial sea. In other words, preferential fishing rights of coastal States were offered at the expense of existing fishing rights of major distant-water fishing nations, in order to gain freedom of passage for

warships and military aircraft through and above certain straits. At the 1971 session, the United States presented its idea to the United Nations Sea-bed Committee in the form of a three-articled draft convention (A/AC.138/SC.II/L.4) which, after accepting the 12-mile territorial sea as a *fait accompli,* attempted to retrieve the strategic situation with the scheme outlined above. Yet to some developing nations the United States attempts appeared to be designed to lure the largest catch with the smallest bait.

111. For the developing countries the 12-mile territorial sea had been a premise, not something to be granted as a compensation. Hence the United States claim to free passage through straits as if they were high seas appeared to them a violation of their sovereignty. Furthermore, exclusive fishing beyond the territorial sea had been considered by the developing nations to be an acquired right. They simply wished to institutionalize the régime of a fishery zone which would extend as far from the coast as possible, and they were confident that their wishes would eventually be realized. They were accordingly not willing to wait for the materialization of the somewhat ambiguous preferential fishing rights promised by the United States draft. From their point of view, the recognition of the 12-mile territorial sea was but the endorsement of a customary rule of law, so that its recognition should be unconditional. Moreover, they considered the fishing resources to be found in their adjacent seas as belonging to them inherently and not as something that could be bargained for. It is against this background that the concept of the economic zone came into being.

112. The Exclusive Economic Zone concept was introduced by Kenya at the forum of the Asian-African Legal Consultative Committee (AALCC) held at Lagos in January 1972. A 200-mile limit was suggested, where "fishery and pollution control would be within the exclusive jurisdiction of the coastal State" (*AALCC Report,* 1972, p. 157). In fact this was but the start of the concept of the exclusive economic zone, for at that stage the question of the exploitation of the mineral resources of the sea-bed seemed to play no role in the thinking of Kenya. On the other hand, two conferences which were held only some months after, in the Carribbean region and Africa respectively, played a decisive role in setting up a more comprehensive concept. The specialized conference of the Caribbean countries on problems of the sea, held at Santo Domingo, the Dominican Republic, in June 1972, adopted the Santo Domingo Declaration, which put forward the concept of the 200-mile patrimonial sea where the coastal State would have sovereign rights over the renewable and non-renewable resources in the waters, the sea-bed and the subsoil. This Declaration also suggested a concept of the continental shelf which was more or less similar to that adopted in the 1958 Convention on the subject but it added that in the part of the continental shelf covered by the patrimonial sea the legal régime of the latter should apply. The African States Regional Seminar on

the Law of the Sea, held at Yaoundé, Cameroon, also in June 1972, adopted a general report in which it was suggested that the African States should have, in an economic zone, exclusive jurisdiction for control, regulation and national exploitation of the living resources. With regard to fishery resources, such economic zone was understood as including "at least" the continental shelf and, with regard to the continental shelf and the sea-bed, the economic zone was to embody all economic resources comprising both living and non-living resources, the latter including oil, natural gas and other mineral riches.

113. Although both documents adopted by the Santo Domingo Conference or the Yaoundé Seminar referred not only to living resources but also to mineral resources as being covered by the régime of the patrimonial sea of the economic zone, it is not easy to determine the real intention behind these documents regarding the status of the continental shelf or of the mineral resources of the sea-bed in that connection, yet there was apparently no positive intention in either Conference to amalgamate the concept of the continental shelf with that of either of the two new institutions proposed. It was not at all clear how the régimes of the continental shelf on the one hand, and the patrimonial sea or economic zone on the other, would co-exist. But, however that may be, the discussions in the Sea-bed Committee in 1972 and 1973 were dominated by the concepts advanced at these two regional meetings. Kenya proceeded formally to submit the 200-mile economic zone proposal to the Sea-bed Committee in the summer of 1972. While freedom of navigation was still to be guaranteed, coastal States were to

> "have exclusive jurisdiction for the purpose of control, regulation and exploitation of both living and non-living resources of the Zone and their preservation, and for the purpose of prevention and control of pollution" (A/AC.138/SC.II/L.10, Art. II).

This proposal continues to state :

> "The exercise of jurisdiction over the Zone shall encompass all the resources of the area, living and non-living, either on the water surface or within the water column, or on the soil or subsoil of the sea-bed and ocean floor below." (*Ibid.*, Art. IV.)

Within two years Kenya's proposal had attracted many co-sponsors, particularly in Africa and Asia.

114. In parallel, some developed States, while conceding that the coastal States should have some jurisdiction with respect to the utilization, conservation and management of the living resources of the sea in areas adjacent to their coasts, were more interested in having the utilization of

fishery resources in such areas maximized for the benefit of the international community, or at least in the interest of geographically disadvantaged States. It is important to note that these developed States then took the concept of the continental shelf as undisturbed, and understood *grosso modo* that the areas it was proposed to draw into the Exclusive Economic Zone would be affected solely in respect of fishing. Thus Canada spoke of delegating powers to conserve and manage fishery resources within the proposed zone to coastal States as custodians of the international community, while Australia and New Zealand had in 1972 submitted a working paper recognizing the exclusive jurisdiction of the coastal State over the living resources of the superjacent waters of the continental shelf (A/AC.138/SC.II/L.11). The responsibility of the coastal State to ensure proper management and utilization of the living resources was here spelled out for the first time.

115. It was for the coastal State under this proposal to determine the allowable catch of any particular species and to allocate to itself that portion of the allowable catch, up to 100 per cent, that it could harvest. However, where the coastal State was unable to take 100 per cent of the allowable catch of a species, it had to allow the entry of foreign fishing vessels with a view to maintaining the maximum possible food supply. The Kenyan proposal was re-drafted in 1973 as "Draft Articles on the Exclusive Economic Zone", sponsored by 14 African States (Algeria, Cameroon, Ghana, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tunisia and United Republic of Tanzania) (A/AC.138/SC.II/L.40). In parallel, Kenya, jointly with Canada, India and Sri Lanka, also presented a proposal on fisheries in which the concept of the exclusive fishery zone was suggested (A/AC.138/SC.II/L.38). In these two proposals it was specifically provided that jurisdiction and control over all fishing activities within the exclusive economic zone would lie with the coastal State, which would also decide any disagreement over its limits or the terms and conditions for fishing. However, the imposition on the coastal State of responsibilities for conservation and management would distinguish the exclusive economic zone from the territorial sea.

116. Alongside the principally African proposals for an exclusive economic zone, various Latin American States continued in 1973, pursuant to the year-old Santo Domingo Declaration, to promote their concepts of the patrimonial, epicontinental or expanded territorial sea. However, in the course of the deliberations of the Sea-bed Committee in 1973 and UNCLOS III in 1974, these concepts of the patrimonial sea or the epicontinental sea gradually merged into or were supplanted by the concept of the exclusive economic zone initiated by Kenya.

2. Concept of the exclusive economic zone as suggested in the negotiating texts of UNCLOS III

117. During the preparation of the negotiating text in UNCLOS III from 1975 to 1980, the suggested 200-mile limit for the Exclusive Economic Zone remained constant. The relevant provision in the ISNT (Art. 46) did not undergo any change throughout the RSNT (Art. 45), and the ISNT (Art. 57) or its revisions. The draft convention on the Law of the Sea of 1981 has the same provision, except for a very minor drafting change. It reads :

> *"Article 57. Breadth of the Exclusive Economic Zone*
>
> The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

It is to be noted that the 200-mile limit for this zone had never been openly challenged since Kenya suggested the concept early in 1972. No other suggestion for the seaward extent of this zone has ever been presented to the Sea-bed Committee or to UNCLOS III. Unlike the case of the continental shelf, there is no trace of the criteria of contiguity or natural prolongation in the concept of the exclusive economic zone. Just like the territorial sea or the contiguous zone, the extent of the exclusive economic zone is to be measured simply by distance from the baseline off the coast. It is very important to note that this differs greatly from the original concept of the continental shelf.

118. On the other hand, while the basic concept of the continental shelf had been firmly established without leaving any room for doubt, the basic concept of the exclusive economic zone is not quite unequivocal. In order to avoid any controversies over the basic character of that zone, the ICNT introduced a novel provision to indicate that its régime would be *sui generis* as established by the convention itself. This provision is retained in the draft convention, rendering meaningless the argument as to whether the exclusive economic zone still remains part of the high seas :

> *"Article 55. Specific Legal Régime of the Exclusive Economic Zone*
>
> The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal régime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

119. The provisions relevant to the basic character of the Exclusive Economic Zone, especially the cardinal provisions on the competence of the coastal State, had been recast wholesale before the following text emerged in the ICNT :

> *"Article 56. Rights, Jurisdiction and Duties of the Coastal State in the Exclusive Economic Zone*
>
> 1. In the exclusive economic zone, the coastal State has :
>
> *(a)* sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds ;
>
> *(b)* jurisdiction as provided for in the relevant provisions of the present Convention with regard to :
>
> (i) the establishment and use of artificial islands, installations and structures ;
> (ii) marine scientific research ;
> (iii) the preservation of the marine environment ;
>
> *(c)* other rights and duties provided for in the present Convention . . ."

The difference of substance involved in the recasting did not, however, appear to be crucial, and in fact these provisions had not undergone any fundamental discussion during their preparation. This text remains in the draft convention (Art. 56). It is important to note that, while provision is made for the competence of the coastal State in the exploitation of non-living as well as living resources, it is control of the latter which receives the more concrete treatment in the specific provisions. Indeed, it seems evident that, in line with Kenya's original proposals, the conservation and proper utilization of living resources is to be regarded as one of the most essential features of the régime. The accent was further placed on the coastal State's rights and responsibilities in this respect to accommodate the interests of both landlocked and geographically disadvantaged coastal States to the Exclusive Economic Zone.

120. It is widely recognized that the concept of the exclusive economic zone has become irresistible, and the way seems paved towards the institution of a régime for it under international law, incorporating a uniform limit of 200 miles. Throughout the history of international law, scarcely any other major concept has ever stood on the threshold of acceptance within such a short period. Even apart from the provisions of the 1981 draft convention, the Court need have few qualms in acknowledging the general

concept of the exclusive economic zone as having entered the realm of customary international law. Yet I cannot but point out two problems in this respect : first, quite apart from the treaty-making process, the *sui generis* régime of the exclusive economic zone is going to require much more careful examination before the *rules* so far adumbrated may be viewed as susceptible of adoption into existing international law ; secondly, the relation of the zone to the continental shelf remains profoundly ambiguous, particularly where such "interface" issues as the exploitation of ocean-floor minerals are concerned. These ambiguities will be discussed in the next two sections of this opinion.

Section II. Some Ambiguities in the Concept of the Exclusive Economic Zone

1. Unclear concept of conservation management

121. This is not the place to make any exhaustive analysis of the concept of the exclusive economic zone but, in order to understand its status in existing international law, it will be necessary to touch upon the difficulties with which it is faced. As suggested before, the coastal State will be placed under certain obligations for the conservation and optimum utilization of fishery resources in the Exclusive Economic Zone. This markedly differentiates the régime of the zone from the territorial sea and from the concept of a fisheries zone which had become institutionalized in the 1960s ; and it seems apparent from the draft convention on the Law of the Sea that the obligations for the conservation and promotion of optimum utilization of the fishery resources to be imposed upon the coastal State in this connection may confront it with some acute difficulties.

122. First, there is no clarity as to the extent to which responsibility for conservation entitles, or compels, the coastal State not only to monitor the allowable catch but also to impose restrictions on seasonal fishing, areas fished and gear used, not to mention whether it may confine the imposition of such measures to foreign vessels (Art. 61). Secondly, there is a profound ambiguity about the importation of foreign capital and equipment for the purpose of increasing the fishing capacity of the coastal State, as also in regard to the granting of concessions to foreign enterprises. By such means, even the least-developed country may take steps towards acquiring the capacity to harvest the whole of its allowable catch. On this reading, the notion of the coastal State that "does not have the capacity to harvest", assuming that "capacity" implies "potential" – which is normally the case –, seems pointless (Art. 62, para. 2). Yet its very presence in the text suggests that some other connotation was implied. Hence uncertainty prevails.

123. Similar obscurity enshrouds the problem of access to any surplus of the allowable catch by other States, including especially the landlocked,

which are given little clue as to which exclusive economic zone they may seek entry to, what percentage they may expect, and the extent to which the recognition of traditional fishing and the special needs of developing countries might affect the result (Art. 62, paras. 2 and 3). Indeed, such is the complexity and elasticity of the criteria embodied in the draft convention that it is difficult to see how any coastal State, let alone a "least-developed" one, can be expected to arrive at equitable and technically correct solutions. Disputes may well occur if other States object to the coastal State's determination of the allowable catch and its allocation of the resources in the Exclusive Economic Zone. It would be extremely difficult to implement the whole scheme of this process in view of the fact that the ideas themselves are not all well defined in the draft convention. What is more, under the text these disputes are exempted from compulsory settlement.

2. Somewhat unbalanced concept of the enforcement of the laws and regulations of the coastal State

124. The provision of the draft convention on the Law of the Sea concerning the exercise of jurisdiction in the case of violation of coastal regulations also leaves many ambiguities (Art. 73). As presented, the mode of exercise of jurisdiction is no different from that exercised by the coastal State within its territorial sea and, so far as the development of the natural resources of the sea is concerned, its competence in the Exclusive Economic Zone is equivalent to that it enjoys in the territorial sea. Moreover, disputes concerning law-enforcement activities in the exercise of sovereign rights of jurisdiction in the Exclusive Economic Zone are proposed for exemption from compulsory settlement (Art. 298, para. 1 *(b)*). Thus an incident arising out of the enforcement of the fishery regulations of the coastal State, such as the boarding, inspection and arrest of foreign vessels, may not be unilaterally submitted by the flag-State of the arrested vessel to any procedure of compulsory settlement. That the only penalties the coastal State will be allowed to impose are financial ones does little to counterbalance this exemption. The same is true of the written-in safeguards against undue detention, which remain at the mercy of unilateral construction of the word "reasonable", despite the at-first-sight impressive provisions for judicial remedy.

* *

125. In sum, though the idea of the exclusive economic zone undoubtedly seems to have been accepted in international law, the competence of the coastal State and the mechanism for the functioning of the new régime do not yet appear to have undergone thorough examination. Until the draft convention becomes treaty law, it is premature and equivocal to

speak of the Exclusive Economic Zone as if it had given rise to principles and rules of international law. It should be pointed out that the pros and cons of the continental shelf concept, prior to its formulation through the extensive work of the International Law Commission and the Geneva Conference of 1958, had been examined by scholars throughout the world, which greatly contributed to the adoption of the concept in that Conference, whereas the concept of the exclusive economic zone went through hardly any scholarly discussion early in the 1970s and required only one or two years to be formulated at the United Nations Sea-bed Committee. Yet nobody today doubts the trend towards the Exclusive Economic Zone, and in this situation the Court was faced with an extremely difficult problem.

Section III. Relation Between the Continental Shelf and the Exclusive Economic Zone

1. Parallel régimes of the continental shelf and the exclusive economic zone

126. The two parallel régimes of the Continental Shelf and the Exclusive Economic Zone arose from completely different circumstances, and the histories which the respective régimes have followed are different. If the régime of the continental shelf, as seen above, was mainly designed for the exploitation of mineral resources in the subsoil of submarine areas, the real issue should not necessarily have been related to the status of the bottom of the sea, but rather to the exercise of the coastal State's jurisdiction on the high seas for the purpose of exploring and exploiting those resources. The exclusive economic zone has essentially been designed to reserve for the coastal State the right to exercise jurisdiction for the purpose of exploitation of fishery resources. Both these jurisdictions are intended to be exercised far beyond the traditionally recognized extent of the territorial seas, in areas where the régime of the high seas used undoubtedly to hold sway. In this sense, both of these régimes should be considered as derogation from traditional international law. Certainly such derogations can be justified *pari passu* with the development of international law. However, even if the jurisdiction of the coastal State is exercised separately for the purpose of exploitation of resources – mineral resources on or under the continental shelf, on the one hand, and living resources within the exclusive economic zone, on the other – is it feasible to assume that the area in which such jurisdiction is exercised can or should be different, depending on what resources are exploited ? Either of the régimes – the Continental Shelf or the Exclusive Economic Zone – could be claimed to exist in parallel with the high seas régime, to which the exercise of jurisdiction under either – which at any rate is restrictive – might be regarded as an exception. Yet if the régimes of the Continental Shelf and Exclusive Economic Zone co-exist without covering coincident areas, a question may

arise as to how the jurisdiction of the coastal State can be unambiguously exercised in the fringes where they fail to overlap. Is it congruous or conceivable that the same marine/submarine column should be placed under different national jurisdictions for the same purpose of resource exploitation, however different the resources may be, and that the same area of the ocean be consequently policed by two different States ? One is entitled to enquire whether superimposition of two different boundaries is tolerable as a matter of international *ordre public.*

127. In replying to a question I put to both Parties, at the hearing on 9 October 1981, Tunisia and Libya expressed the following views. Tunisia stated :

> "Given that the coastal State, under Article 56 of the draft convention, possesses, in the Exclusive Economic Zone, sovereign rights for the purpose of exploring and exploiting the natural resources of the sea-bed and its subsoil, it is difficult to conceive how the limits of the Exclusive Economic Zone could differ from those of the continental shelf inside the 200 miles."

Libya, on the other hand, stated :

> "Libya considers that, as between States with opposite or adjacent coasts, the delimitation of their respective continental shelf areas and of their economic zones ought not, in the majority of cases, to be different. Nevertheless, there may be factors relevant to fishing, such as established fishing practices, which have no relevance to shelf resources ; and, conversely, there may be factors relevant to shelf resources – such as geological features controlling the extent of a natural prolongation – of no relevance to fishing. It therefore follows that the two boundaries need not necessarily coincide."

The Parties were thus in apparent disagreement on this point.

2. Exploitation of submarine mineral resources under the different régimes of the Continental Shelf and Exclusive Economic Zone

128. A further difficulty will arise if the same resources may be exploited under the two different régimes and each régime is held to apply to a different area. As previously pointed out, the concept of the exclusive economic zone had originated in the idea of the fishery zone in the early 1970s. However, by 1973, its expansion to cover the exploitation of mineral resources had already begun. But in that and the following year, little heed was paid to the fact that, with regard to mineral resources, the concept of the Continental Shelf had already been firmly established, and this oversight marred the proposals concerning the new zone. The necessity of

harmonizing the concepts of the Exclusive Economic Zone and the Continental Shelf, or of clarifying the difference between these two régimes, virtually went by the board – doubtless because no proposal was made which focussed a spotlight on the practical consequences of subsuming mineral resources under the Exclusive Economic Zone.

129. At all events, the sovereign rights to be exercised by the coastal State for the purpose of exploring and exploiting the mineral resources of submerged submarine areas have been expressly subsumed under both the régime of the Continental Shelf and the régime of the Exclusive Economic Zone. Any concrete issue that may arise concerning the exploitation of mineral resources within the 200-mile limit will thus, for the time being, be cloaked in legal ambiguity, for it will not arise bearing the label "Continental Shelf" or "made in the Exclusive Economic Zone". The only realistic attitude to adopt in the circumstances is to await, and meanwhile to promote, the harmonization of the two régimes. And it is common sense that, to that end, what is still malleable in one should be aligned on what has taken firm shape in the other, rather than the reverse. Now the nature and régime of the Continental Shelf were solidly established in 1958 and were confirmed by the 1969 Judgment of the Court, and no doubt can remain as to the competence to be exercised by the coastal State ; moreover although the outer limit of the area has as yet hardly been established, even with the abandonment of the depth/exploitability test, it can at least be said that a 200-mile distance test has found wide acceptance. On the other hand, the nature of the Exclusive Economic Zone, and its régime, particularly in regard to the rights and duties of the coastal State, is still comparatively unclear, but the 200-mile limit has been firmly established.

130. It has therefore fittingly been suggested that the régime of the Exclusive Economic Zone should be aligned as far as possible on that of the Continental Shelf. But surely, it will be said, this has been done, for Article 56 of the draft convention on the Law of the Sea reads, in paragraph 3 :

> "The rights set out in this article [the exclusive economic zone], with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI [the Continental Shelf]."

The concrete meaning of this provision is hard to seek, as Part VI of the text, the chapter on the continental shelf, likewise simply provides for sovereign rights for the purpose of exploring the submerged areas and exploiting their resources, but does not specify how the rights set out in Article 56, i.e., "sovereign rights for the purpose of exploring and exploiting, conserving and managing [non-living] resources of the sea-bed and subsoil", are to be exercised. Was it not, however, the intention of the authors of the draft convention that Article 56, paragraph 3, should be interpreted to mean that the régime of the exclusive economic zone will

incorporate, in principle, the whole régime of the continental shelf ? If that is indeed the case, and I can see no other interpretation which would not result in anomaly, then there should be no impediment to aligning what is still indecisive about the continental shelf concept, namely the question of the extent of the area involved, upon what is clearly established in the concept of the exclusive economic zone, namely the extent of the zone. I draw further consequences from this reasoning below. Suffice it for the present to say that in my view the question facing the Court could equally well have concerned the Exclusive Economic Zone as the Continental Shelf.

CHAPTER VI. TRENDS IN THE DELIMITATION OF THE CONTINENTAL SHELF/EXCLUSIVE ECONOMIC ZONE AT THE UNITED NATIONS THIRD CONFERENCE ON THE LAW OF THE SEA

Section I. Various Proposals for Delimitation

131. As delimitation was the subject of the present case, the Court should in my opinion have devoted considerably more attention to the way the views of States on this specific topic have been evolving – a topic strangely neglected by the Parties themselves. The main point in this connection is that, in most of the relevant proposals presented at the Sea-bed Committee and UNCLOS III, the delimitation of the Exclusive Economic Zone and the Continental Shelf were dealt with together or in virtually identical terms. This may be demonstrated with the aid of some quotations :

Australia and Norway (A/AC.138/SC.II/L.36 – 16 July 1973) :

> "A. Adjacent or opposite States shall use their best endeavours to reach agreement on the delimitation between them of their (economic zones – patrimonial seas) and their sea-bed areas in accordance with equitable principles.
>
> . . . . . .
>
> D. Subject to principle[s] A . . . above, and unless the drawing up of another boundary is justified by special circumstances, the boundary shall be an equidistant line in the case of adjacent coasts and a median line in the case of opposite coasts."

Japan (A/CONF.62/C.2/L.31/Rev.1 – 16 August 1974 ; Revision of previous proposal : A/AC.138/SC.II/L.56 – 15 August 1973) :

> "3. *(a)* Where the coasts of two or more States are adjacent or opposite to each other, the delimitation of the boundary of the con-

tinental shelf (the coastal sea-bed area) appertaining to such States shall be determined by agreement between them, taking into account the principle of equidistance."

China (A/AC.138/SC.II/L.34 – 16 July 1973):

"*II. Exclusive Economic Zone or Exclusive Fishery Zone*

(8) The delimitation of boundaries between the economic zones of coastal States adjacent or opposite to each other shall be jointly determined through consultations on an equal footing. Coastal States adjacent or opposite to each other shall, on the basis of safeguarding and respecting the sovereignty of each other, conduct necessary consultations to work out reasonable solutions for the exploitation, regulation and other matters relating to the natural resources in the contiguous parts of their economic zones.

III. Continental Shelf

(5) States adjacent or opposite to each other, the continental shelves of each connected together, shall jointly determine the delimitation of the limits of jurisdiction of the continental shelves through consultations on an equal footing.

(6) States adjacent or opposite each other, the continental shelves of which connect together, shall, on the basis of safeguarding and respecting the sovereignty of each other, conduct necessary consultations to work out reasonable solutions for the exploitation, regulation and other matters relating to the natural resources in their contiguous parts of their continental shelves."

Turkey (A/CONF.62/C.2/L.23 – 26 July 1974):

"1. Where the coasts of two or more States are adjacent and/or opposite, the continental shelf areas appertaining to each State shall be determined by agreement among them, in accordance with equitable principles.

2. In the course of negotiations, the States shall take into account all the relevant factors, including, *inter alia,* the geomorphological and geological structure of the shelf up to the outer limit of the continental margin, and special circumstances such as the general configuration of the respective coasts, the existence of islands, islets or rocks of one State on the continental shelf of the other."

Turkey (A/CONF.62/C.2/L.34 – 1 August 1974):

"1. Where the coasts of two or more States are adjacent or opposite to each other, the delimitation of the respective economic zones shall be determined by agreement among them in accordance with equi-

table principles, taking into account all the relevant factors including, *inter alia,* the geomorphological and geological structure of the seabed area involved and special circumstances such as the general configuration of the respective coasts and the existence of islands, islets or rocks within the area."

132. Some other proposals, such as those submitted by the Netherlands, Romania, Kenya and Tunisia jointly and France, suggested a uniform formula for the delimitation of both the continental shelf and the exclusive economic zone :

The Netherlands (A/CONF.62/C.2/L.14 – 19 July 1974) :

"1. Where the determination of sea areas under Articles ... (territorial sea, continental shelf, economic zone) by adjacent or opposite States up to the maximum limit would result in overlapping areas, the marine boundaries between those States shall be determined by agreement between them, in accordance with equitable principles, taking into account all relevant circumstances."

Romania (A/CONF.62/C.2/L.18 – 23 July 1974) :

"*Article 1.* The delimitation of all the marine or ocean space between two neighbouring States shall be effected by agreement between them in accordance with equitable principles, taking into account all the circumstances affecting the marine or ocean area concerned and all relevant geographical, geological or other factors.

Article 2. 1. The delimitation of any marine or ocean space shall, in principle, be effected between the coasts proper of the neighbouring States, using as a basis the relevant points on the coasts or on the applicable baselines, so that the areas situated off the sea frontage of each State are attributed thereto.

2. Islands which are situated in the maritime zones to be delimited shall be taken into consideration in the light of their size, their population or the absence thereof, their situation and their geographical configuration, as well as other relevant factors.

. . . . . .

Article 3. The delimitation of space between two neighbouring States, whether they be adjacent or opposite, or whether they have both of these two geographical characteristics simultaneously, shall be governed by the method or combination of methods which provides the most equitable solution. For example, neighbouring States may use, exclusively or jointly, the geographical parallel or the perpendicular line from the terminal point of the land or river frontier, equidistance, or the median line of the points closest to the coasts or their baselines. The terminal point of a river frontier shall be con-

sidered as the immediate confluence of the river and the sea, irrespective of whether the river flows into the sea in the form of an estuary."

Kenya and Tunisia (A/CONF.62/C.2/L.28 – 30 July 1974) :

"1. The delimitation of the continental shelf or the exclusive economic zone between adjacent and/or opposite States must be done by agreement between them, in accordance with an equitable dividing line, the median or equidistance line not being necessarily the only method of delimitation.

2. For this purpose, special account should be taken of geological and geomorphological criteria, as well as of all the special circumstances, including the existence of islands or islets in the area to be delimited."

France (A/CONF.62/C.2/L.74 – 22 August 1974) :

"The delimitation of the continental shelf or of the economic zone between adjacent and/or opposite States shall be effected by agreement between them in accordance with an equitable dividing line, the median or equidistance line not being the only method of delimitation.

2. For this purpose, account shall be taken, *inter alia,* of the special nature of certain circumstances, including the existence of islands or islets situated in the area to be delimited or of such a kind that they might affect the delimitation to be carried out."

133. No matter whether the equidistance line was suggested or not, reference to equitable principles was found indispensable in these proposals and "special circumstances", "relevant circumstances" or "all the circumstances" were almost always in point. This was well borne out in the ensuing discussions.

Section II. Negotiating Texts

1. Existence of two schools of thought

134. During the preparation of the ISNT in 1975, the following provision for the delimitation of the Exclusive Economic Zone/Continental Shelf was suggested by the Chairman of the Second Committee :

"Articles 61/70

1. The delimitation of the exclusive economic zone/the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances." (UNCLOS III, *Official Records,* Vol. IV, pp. 162 f.)

It is to be noted that this text omitted all reference to factors to be taken into account as relevant circumstances, as suggested in proposals submitted by various delegates in 1973 and 1974. It was nonetheless taken as it stood for inclusion in the ISNT and RSNT and eventually became Articles 74/83, paragraph 1, of the ICNT.

135. During the seventh session in 1978, as already noted, seven negotiating groups were set up, the seventh of which was charged with, in addition to the definition of the outer limit of the continental shelf and other matters, the problem of the "delimitation of maritime boundaries between adjacent and opposite States and settlement of disputes". The seventh group considered the following two main proposals, based on different schools of thought :

(i) Informal suggestions by Bahamas, Barbados, Canada, Colombia, Cyprus, Democratic Yemen, Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, United Arab Emirates, United Kingdom and Yugoslavia (joined later by Cape Verde, Chile, Denmark, Guinea-Bissau, and Portugal) :

"1. 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." (NG 7/2.)

(ii) Informal suggestions by Algeria, Bangladesh, Benin, Burundi, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libyan Arab Jamahiriya, Madagascar, Maldives, Mali, Mauritania, Morocco, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syrian Arab Republic, Somalian Democratic Republic, Turkey, Venezuela and Viet Nam :

"1. The delimitation of the Exclusive Economic Zone (or Continental Shelf) 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." (NG 7/10.)

136. Mr. E. J. Manner, the chairman of the group, suggested the following formula by way of "informal suggestions" :

"Articles 74/83

1. The delimitation of the Exclusive Economic Zone/Continental Shelf between opposite or adjacent States shall be effected by agreement with a view of reaching a solution based upon equitable principles, taking account of all the relevant circumstances, and employ-

ing, where local conditions do not make it unjustified, the principle of equidistance." (NG 7/11.)

In his report of 17 May 1978 on the work of the group, he stated as follows :

"Like before, the positions of the delegations differed markedly between those in support of the equidistance solution and those favouring delimitation in accordance with equitable principles . . . No compromise on this point did materialize during the discussions held, although one may note, that there appears to be general agreement as regards two of the various elements of delimitation : first, consensus seems to prevail to the effect that any measure of delimitation should be effected by agreement, and second, all the proposals presented refer to relevant or special circumstances as factors to be taken into account in the process of delimitation. As a whole, however, no approach or formulation received such widespread and substantial support that would offer a substantially improved prospect of a consensus in the Plenary. On the other hand, the discussions clearly indicated that consensus could not, either, be reached upon the present formulation in the ICNT." (NG 7/21.)

137. Negotiations were continued in the resumed seventh session. Without coming to any positive conclusion, the chairman of the group stated on 6 September 1978 :

"Similarly, reference might be made to the fact that, in essence, we have been considering the same set of criteria to be applied both to the economic zone and the continental shelf. One could, perhaps, also examine whether some kind of distinction in this respect, as related to the applicable criteria of delimitation, offered elements conducive to our search for a comparison.

It may also be worthwhile to notice that if no specific criteria are agreed upon, a more simple approach might be explored. As we all may recall, there appeared to be, in Geneva, general agreement in respect of two of the various elements of delimitation : first, consensus seemed to prevail to the effect that any measure of delimitation should be effected by agreement and second, all the proposals presented referred to relevant or special circumstances to be taken into account in the process of delimitation.

To transform this into treaty language would amount to a provision simply providing that the delimitation of the exclusive economic zone and the continental shelf between opposite or adjacent States shall be effected by agreement taking account of all the relevant circum-

stances. If desired, a general reference to the rules of international law might also be included without, however, elaborating their contents in any further measure." (NG 7/22.)

His report, issued on 14 September 1978 (NG 7/24), contained a passage on the delimitation problem which was repeated and enlarged upon in his opening statement at the group's meeting of the eighth session, made on 26 March 1979. I quote from the latter :

"Delimitation Criteria

The basic positions relating to the criteria of delimitation are still maintained by the supporters of the equidistance line on the one hand and the advocates of equitable principles, on the other. None of the proposals presented by the members of these two groups, seems to offer a basis for a consensus. The same would also seem to apply to any other formula which may be considered to give preference to one or another of the proposed delimitation criteria.

On the other hand, there seems to prevail general understanding, that the four main elements reflected in the various proposals should be included in the definition, namely (1) that any measure of delimitation should be effected by agreement ; (2) that all relevant or special circumstances should be taken into account ; that there should be (3) a reference to equitable principles ; as well as (4) a reference to the equidistance line.

As to the re-drafting of paragraph 1 of Articles 74/83, it has been pointed out that the crucial problem is, how to avoid any classification or hierarchy of the elements concerned which could make the definition unacceptable to some delegations. In this regard the following points of view would seem to have relevance.

The provision that the delimitation should be effected by agreement, is as such, a procedural rule, but it also speaks out the principle that every (new) delimitation must be an agreed delimitation, and consequently, that neither the equidistance line, nor any other line not effected by agreement (or by other settlement), can be substituted for an agreed (or otherwise settled) delimitation. Because of its 'leading role' the provision concerning agreement might be mentioned first in the definition, but this does not mean that the other elements were of less importance.

The three other elements emerge as material criteria which are to form the basis for the agreement. The special or relevant circumstances are, of course, of various kind and importance. It goes without saying that local conditions and circumstances are usually relevant to the conclusion of delimitation as well as other territorial agreements. Mentioned as one of the three 'material' delimitation criteria, special

circumstances should, however, be considered in relation to the two others, partly as an independent criterion and partly as an element having an effect upon the application of the other criteria. In certain cases, special geographic or historical circumstances may be given preference over the employment of the equidistance line. In some others, again, special circumstances may serve as a basis for the estimation of equitable principles. For these reasons special or relevant circumstances should be included in the definition together with the two other criteria, but without priority over them.

One of the most difficult problems the Negotiating Group has to solve refers to the relation between equitable principles and the equidistance line (some prefer to speak of a method, others of a principle of equidistance) as elements of the definition of delimitation criteria. Although it is generally admitted that delimitation agreements should be concluded with a view of reaching an equitable solution, and often the employment of the median or equidistance line appears in accordance with equitable principles, the question of 'preference' has so far, proved too hard to be solved." (NG 7/26.)

138. In the course of the meeting of the negotiating group, at the eighth session, Mexico and Peru submitted an informal proposal, the revised form of which read as follows :

"*Articles 74 and 83*

1. The delimitation of the exclusive economic zone (or of the continental shelf) between States with opposite or adjacent coasts shall be effected by agreement between the parties concerned, taking into account [concurrently] all relevant criteria and circumstances, and applying either the equidistance or such other means as are appropriate in each specific case, in order to arrive at a solution [that is satisfactory to the parties] in accordance with equitable principles." (NG 7/36/Rev.1.)

On 24 April 1979 the chairman of the seventh negotiating group reported on the work of the group to the Second Committee. Summing up a total of 41 meetings with 39 working papers distributed in the course of the group's discussions, he said :

"*Articles 74/83 (1)*

From the outset the negotiations were characterized by the opposing positions of delegations supporting the equidistance rule and those specifically emphasizing delimitation in accordance with equitable principles . . . [A]t the beginning of the present session . . . I . . . expressed the view that the necessary compromise might be within reach if the Group could agree upon a 'neutral' formula avoiding any classification or hierarchy of the elements concerned.

> During the present session a number of compromise proposals were made . . . [However] the Group did not succeed in reaching agreement on any of the texts before it . . . [P]ersonally I doubt, whether, in view of our lengthy deliberations and taking into account the controversies still prevailing, the Conference may ever be in a position to produce a provision which would offer a precise and definite answer to the question of delimitation criteria." (NG 7/39.)

In the light of the various suggestions presented, the group chairman then offered his own compromise text :

> "The delimitation of the exclusive economic zone (or of the continental shelf) between States with opposite or adjacent coasts shall be effected by agreement between the parties concerned, taking into account all relevant criteria and special circumstances in order to arrive at a solution in accordance with equitable principles, applying the equidistance rule or such other means as are appropriate in each specific case." *(Ibid.)*

He concluded, however, by pointing out that none of the proposed amendments to the ICNT relating to the delimitation of the Exclusive Economic Zone or the continental shelf had either secured a consensus within the group or seemed to offer any substantially improved prospects of a consensus in the Plenary. Thus he did not find himself in a position to suggest any modification or revision of the relevant provisions of the ICNT, and the ICNT/Revision 1 retained the same provisions as the ICNT.

139. On 20 August 1979, at the resumed eighth session, the group chairman replaced his personal proposal, as quoted above, with the following, said to reflect the state of the negotiations :

> "The delimitation of the exclusive economic zone (the continental shelf) between States with opposite or adjacent coasts shall be effected by agreement in accordance with equitable principles, taking into account the equality of States in their geographical relation to the areas to be delimited, and employing, consistent with the above criteria and subject to the special circumstances in any particular case, the rule of equidistance." (NG 7/44.)

The chairman of the seventh negotiating group submitted to the Plenary on 24 August 1979 the group report, which read in part :

> *"Articles 74/83 (1)*
>
> As before, the discussion on delimitation criteria were characterized by the opposing position of, on the one hand, delegations advocating the equidistance rule and, on the other hand, those specifically emphasizing delimitation in accordance with equitable principles. In

the main, also the arguments of the two sides remained as before, referring to the concepts and expressions to be used in the provisions concerned. At the Chairman's meetings with the supporters of the two differing opinions, it became apparent, that a consensus may not be based upon a 'non-hierarchical' formulation only listing the basic elements of delimitation ; an alternative, which earlier had seemed to have some support. Similarly, a concise formulation providing merely that the delimitation would be 'effected by agreement in accordance with international law' did not receive any particular sympathy from either side . . . [C]ertain new elements of delimitation, notably that of the equality of States, were introduced in private consultations."

140. The negotiating group met only twice during the ninth session in 1980, but the chairman then made the following suggestion :

"Articles 74/83

1. The delimitation of the exclusive economic zone/the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the areas concerned." (UNCLOS III, *Official Records,* Vol. XIII, pp. 77 f.)

In suggesting this text, the chairman summed up the group's discussions, as follows :

"Delimitation Criteria

3. . . . At the outset of the consultations with the Chairman, the members of both interest groups were asked to indicate whether they would be prepared to use as a basis of further discussions the Chair's informal proposal on delimitation criteria issued at the end of the eighth session in document NG7/44 and containing as a new element of delimitation a reference to the equality of States in their geographical relation to the areas to be delimited. However, such a reference was found rather ambiguous by several delegations on both sides and even otherwise it proved apparent that the text in NG7/44 did not enjoy support broad enough to offer improved prospects of a consensus . . .

7. . . . [T]he following is offered as the Chairman's final conclusions and suggestions relating to the work of negotiating group 7.

(a) During the negotiations no agreement could be reached on any

proposed text concerning the criteria to be applied in the delimitation of the exclusive economic zone or the continental shelf. This conclusion also applies to the respective formulation of Articles 74 and 83 in the revised informal composite negotiating text. While the provision in the negotiating text has been supported by, or at least indicated to prove satisfactory to, a number of States, it has been described as quite unacceptable by the members of the group supporting the median line approach. Because of this firm refusal by a notable part of the members of the group to adopt the present formulation of paragraph 1 of Articles 74 and 83 it is clear that it cannot be considered a text which could provide consensus on the issue.

(b) Owing to the obvious difficulties in agreeing upon a more detailed definition, it has been indicated by some delegations that the final solution might be found in a concise formulation merely identifying the two most fundamental elements of delimitation, that is, that it shall be effected by an agreement and based on international law. Such a provision might read as follows : 'The delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts shall be effected by agreement in accordance with international law.' Other delegations, however, have considered that such a short formula would not provide adequate guidance for the process of delimitation . . .

(c) . . .

. . . [The Chairman] felt it to be his duty to make one further effort to open the way towards an acceptable solution. Accordingly, the Chairman prepared a revised text, as contained in the annex to this report. Even if the revised text did not as a whole meet the position of several delegations it might, however, prove useful to be taken into account in the completion of the final consensus package of the Conference." *(Ibid.)*

The collegium agreed that this text suggested by the chairman of the seventh negotiating group should be incorporated in the second revision, thus becoming a provision of the ICNT/Revision 2.

141. At the plenary meeting on 28 July 1980, during the resumed ninth session, the delegate of Ireland introduced a letter dated 30 May 1980 addressed to the President of UNCLOS III by the countries sponsoring NG 7/10, in which it was stated that they could not accept the formulation of Articles 74/83 (1) of the ICNT/Revision 2 because –

"The new formulations as they appear in Articles 74 (1) and 83 (1) of the Informal Composite Negotiating Text/Revision 2 'did not emerge from negotiations themselves' nor did those formulations receive 'the widespread and substantial support' required in plenary

> to offer a substantially improved prospect of consensus." (A/CONF.62/SR.130, p. 18.)

The countries who signed this letter considered that "the new formulations will not be helpful for future negotiation". It is reported that the seventh negotiating group has not met since the resumed ninth session of UNCLOS III in the summer of 1980 and that no action has been taken by the chairman of the group. At the general committee meeting on 28 August 1980, on the question of delimitation of maritime zones, the President of UNCLOS III stated that –

> "A satisfactory solution . . . had not been found but it was gratifying to note that the two main interest groups had shown a genuine willingness to arrive at a mutually acceptable compromised text." (A/CONF.62/Bur/SR.57, p. 2.)

The provisions included in the ICNT/Revision 2 remain unchanged in the draft convention (Informal Text) that is, the ICNT/Revision 3 of 22 September 1980.

142. Articles 74/83, paragraph 1, in the wording quoted above, remained part of the text until August 1981. On 28 August 1981, the very last day of the resumed tenth session, the President of UNCLOS III (President T. B. Koh, who had succeeded the late Mr. Amerasinghe in the previous session) introduced a document entitled "Proposal on Delimitation" :

> "During his consultations, he had gained the impression that the proposal enjoyed widespread and substantial support in the two most interested groups of delegations, and in the Conference as a whole." (A/CONF.62/SR.154, p. 2.)

According to the introductory note to the draft convention :

> "The members of the collegium concluded, on the basis of consideration of A/CONF.62/WP.11 in the Plenary at the 154th meeting on 28 August 1981, that the criterion in A/CONF.62/62 had been satisfied." (A/CONF.62/L.78.)

The groups of sponsors of documents NG 7/2 and NG 7/10 both stated through their respective representatives that the suggestion of the President would be agreeable to them, but understood that the United States, China, United Arab Emirates, Libya, Portugal, Venezuela, Qatar, Iran, Oman, Kuwait, Egypt, Bahrein and Israel had expressed the view that time should be given for examination of the President's proposal. However, as a

result of the meeting of the collegium, the text proposed by the President was included in the draft convention, again on the very same day, and reads as follows :

> *"Articles 74/83. Delimitation of the Exclusive Economic Zone/Continental Shelf Between States with Opposite or Adjacent Coasts*
>
> 1. The delimitation of the exclusive economic zone/the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

2. Significance of Articles 74/83 of the draft convention

143. Setting aside the question of the standing of a text suggested by the President of UNCLOS III only one day before the close and incorporated on the very last day of the tenth session, it is difficult to foresee the potential nature and limits of its effects. What is clear from a survey of the drafting history of this specific provision is that the efforts of the negotiating group centred on an attempt to discover a formula that would be satisfactory to delegates with not only different but sometimes contradictory views on the delimitation of the continental shelf and of the exclusive economic zone. Even in 1978 there was already a clear opposition between the "equidistance" and the "equitable principles" schools of thought. It could be pointed out that Articles 74/83 of the draft convention on the Law of the Sea form a catchall provision that ought to satisfy both, and that is indeed its merit. Given, however, the difficulty of deriving any positive meaning from these provisions, it would seem that the satisfaction must be essentially of a negative kind, i.e., pleasure that the opposing school has not been expressly vindicated.

144. Firstly, the suggestion that the delimitation of the continental shelf should be effected by agreement simply represents the procedural aspect of the problem, and indicates that any unilateral claim for the delimitation of the continental shelf would not be regarded as valid under international law. This idea is not unlike Article 6 of the 1958 Convention, and had already received the support of the two opposing schools of thought in 1978. However, its effect is merely to confirm that a general rule for the conduct of inter-State relations is applicable to the subject of delimitation. Secondly, the simple reference to "the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice" does not furnish any practical assistance towards a solution, in the absence of any more specific designation of which principles and rules from out the entire panoply of customary, general, positive and conventional law are of particular significance. Thirdly, the idea of an equitable solution, although not specifically mentioned in Article 6 of the 1958 Convention, lay at the basis of that provision, but the draft convention does not supply any

answer to the question of what the equitable solution is, and no method for reaching such an equitable solution is specified.

145. Despite the resultant vagueness, there is one firm conclusion which has already been hinted at above, but which now stands fully confirmed by the identity of Articles 74 and 83, an identity which even the more complex earlier formulae strove always to maintain. This conclusion is that the principles and rules of international law applicable to the delimitation of the continental shelf will not be different from those applicable to the delimitation of the exclusive economic zone. This of course works both ways, in that one must examine whether principles said previously to apply to delimitation of the continental shelf are adaptable to delimitation of the Exclusive Economic Zone, and also see what features of the Exclusive Economic Zone concept are instructive in relation to delimitation of the shelf.

CHAPTER VII. PRINCIPLES AND RULES FOR THE DELIMITATION OF THE CONTINENTAL SHELF/EXCLUSIVE ECONOMIC ZONE

Section I. Introduction

146. To recapitulate, what I hope to have made clear in the foregoing chapters is as follows :

First, for the purpose of indicating the principles and rules of international law applicable to the delimitation of the continental shelf between Tunisia and Libya, the Court should not have taken the relevant provisions of the 1981 draft convention on the Law of the Sea at their face value, on the sole ground that they had been formulated as a result of the consensus formula, special procedures and "package deal" of UNCLOS III, even though the Special Agreement had requested it to take account of the "tendances récentes admises" or "new accepted trends" at that Conference. The Court should have examined more thoroughly the progress of the discussions underlying those provisions and considered the trends in the law of the sea for the past few decades in a much wider perspective.

Secondly, the régime under which the coastal State enjoys sovereign rights for exploring the continental shelf and exploiting its natural resources had become firmly established by the late 1960s on account of the 1958 Convention on the Continental Shelf, but the outer limit of that area was still left ambiguous. For the *delimitation* of the continental shelf between adjacent or opposite States the Court in 1969 indicated the law applicable in the late 1960s. Since then, while the right of the coastal State exercisable over the continental shelf has remained constant, the suggested outer limit has fluctuated. The application to the deep ocean floor of the concept of the common heritage of mankind, which had been emerging in

the late 1960s, has had a great impact on views about that limit. Despite the possibility opened up by the exploitability criterion in the 1958 Convention that the continental shelf might have been expanded indefinitely, this new concept has been successful in calling a halt to this process. The precise line at which the halt has been called remains, however, a matter of controversy. While some landlocked or geographically disadvantaged States have wished to keep the "common heritage of mankind" area as wide as possible, some coastal States have pressed for incorporation of the continental margin and rise, where petroleum resources could be discovered, into the régime of the continental shelf, thus, essentially, leaving the exploitation of hard mineral resources to the common heritage of mankind. The suggested provision concerning the outer limit of the continental shelf which has emerged at the latest stage of UNCLOS III seems to have been simply a political compromise, and can hardly be regarded as reflecting customary international law. The matter will require further elaboration or negotiation among States, as well as some repeated practice. Yet noteworthy as of great importance is the change in the concept of the continental shelf arising out of the universal introduction of the 200-mile distance, which may certainly override the traditional concept of "continuity" or "contiguity" that has been supplemented, in particular through the 1969 Judgment, by the notion of natural prolongation.

Thirdly, the longstanding practice of sedentary fisheries was frequently relied on during the proceedings for the purpose of confirming the appurtenance of certain areas to the continental shelf. Apart from the question whether sedentary fisheries as such relate to resources of the continental shelf, not only scholarly views and past practice but also the drafting of the 1958 Geneva Convention on the Law of the Sea afford no grounds for any assertion that the past practice of sedentary fisheries could found a legal claim to the continental shelf, the object of the rights to which has been defined from the outset in terms of the exploitation of mineral resources. Admittedly, the longstanding practice of sedentary fisheries can form a basis for a title to historic waters. Such title, which may override a claim to the continental shelf or exclusive economic zone, should not, however, cover vast maritime areas which, on account of such geographical situations as the absence of embracing coastlines, do not qualify for classification as waters of that kind.

Fourthly, the significance of the emergence of the new concept of the exclusive economic zone cannot be over-emphasized. While the régime of the continental shelf, as regards both its concept and the geographical area concerned, was gradually established to meet a specific need, that of the exclusive economic zone is one which, without any particular reason for the extent of 200 miles involved, suddenly gained universal support in the early 1970s. But, in the nature of things, the cost of such support has been a certain blurring of the issues. While in the case of the continental shelf

many exchanges of scholarly views preceded the adoption of the régime of the 1958 Conference on the Law of the Sea, the concept of the exclusive economic zone required only one or two years to reach the point of no return, without being subjected to any sustained scholarly discussion from the theoretical point of view. Although no delegate seems to be recorded as ever having challenged the concept of the exclusive economic zone or cast doubt on its 200-mile limit, the very concept and the operation of its régime are still not clear-cut, and a more scrupulous scrutiny will be required before it can be regarded as part of the established principles and rules of international law. The Exclusive Economic Zone, which began as a fisheries zone, is now designed to cover the sovereign rights of the coastal State for the exploitation not only of living resources but also of mineral resources. The incorporation of mineral resources into the régime of the Exclusive Economic Zone appears strange in that most of the provisions dealing with that zone in the draft convention are entirely irrelevant to the exploitation of mineral resources, and above all because the draft convention retains the régime of the Continental Shelf, concerned with the exploitation of such resources, in parallel with that of the Exclusive Economic Zone. As I have endeavoured to show in detail, this trend towards the absorption of the continental shelf régime into that of the Exclusive Economic Zone is too pronounced to be ignored. Hence the Court would have shown realism in paying more serious attention to the question whether a case submitted as one of Continental Shelf delimitation was not also a case implying the delimitation of the Exclusive Economic Zone.

Fifthly, throughout the negotiations in UNCLOS III the delimitation of the Exclusive Economic Zone and the delimitation of the Continental Shelf, despite separate discussion of the question of outer limits, were dealt with together, and no doubt was expressed that the same principles and rules should be applicable in each case. It can be argued, of course, that, although the principles applicable to delimitation of the Continental Shelf and delimitation of the Exclusive Economic Zone may be the same, the practical application of those principles in each case might be different as a result of applying the same principles in different frameworks. If not, what ought to have been considered by the Court was whether criteria of *distance,* being intrinsic to the Exclusive Economic Zone and also favoured by the latest concept of the continental shelf (which sounds the knell of both the depth and the exploitability tests), ought not to play a role in the common delimitation of the area.

Section II. The Status of the Third State in the Case of Delimitation of the Continental Shelf

1. In general

147. Although the solution which I personally favour has at least the merit, as will be seen, of largely obviating the need to define the area concerned in the delimitation, I believe that it is appropriate for me to

address certain aspects of this problem which may affect the task of delimitation. Among these is the situation of third States in relation to the geographical claims of Parties to the dispute. For it is in any event difficult to define in advance the disputed areas in a case concerned with the delimitation of the continental shelf of adjacent States, but this difficulty is all the greater when, as in the present case, the sea area which both Parties face is also surrounded by other States. A map of the central Mediterranean clearly indicates that any area of the sea related to the present case falls within the 200-mile distance from the coast, and, looking at the places where the respective interests of Tunisia and Libya can be seen, one can readily recognize that a few other States may be similarly interested in the area concerned in the case.

148. In this connection I feel bound to reiterate a passage from the opinion I appended to the Court's Judgment of 14 July 1981 on Malta's application for permission to intervene :

> "22. If the 'area' as to which the relevant circumstances to be taken into account by the Court is to be simply an aggregate of the 'area' appertaining to Libya and the 'area' appertaining to Tunisia, so that it does not affect any third State but only concerns these two States, how can one identify that whole 'area' without possessing any precise definition of that aggregate ? Is it not logical to suggest that when these two States mention 'the relevant circumstances which characterize the area', this 'area' must necessarily have a different connotation from what is implied by the mere aggregate of the 'area' appertaining to Libya and the 'area' appertaining to Tunisia to be delimited as a result of the Court's Judgment ? This is borne out by the use of the words 'propres à la région' (not 'zone') in Tunisia's certified French translation of the Special Agreement, where the English had 'which characterize the area'. Certainly the delimitation of the two 'areas' is essentially a bilateral matter to be settled by agreement between Tunisia and Libya. That delimitation ought not to intrude upon the area-to-be of the continental shelf of any third State. Yet is it possible to assume that when account is taken of the characteristics of the *area as a whole,* an area in which a third State may have some legal title to a portion of continental shelf, there will be no legal interest of such a State which may be affected by the decision of the Court aimed at the principles and rules of international law applicable in that area ? Furthermore, is it proper to state that no conclusions or inferences may legitimately be drawn from the findings or the reasoning with respect to rights or claims of other States not Parties to this *Tunisia/Libya* case (Judgment, para. 35) ? If any consideration is given by the Court to the effect which, for example, the existence of an island or islands in this 'area' may have in the delimitation of the continental shelf between Tunisia and Libya, how can Malta remain unaffected by a decision of the Court indicating the principles and rules therein involved ?

23. Without scrutinizing the details of the case, the Court cannot now define the 'area' of which the relevant circumstances to be taken into account by the Court are characteristic. The Court cannot take a position in advance in this respect without dealing with the principal case. Since this 'area' actually is not limited to the expanses in which it is evident that no third State may have a claim, the possibility or probability of an adverse effect upon a third State is not excluded. Theoretically, a number of States may have a claim to the continental shelf in the 'area', invoking any justification which they may prefer for this purpose, because the criteria for delimitation of the continental shelf have not yet been firmly settled. Yet, in the light of developments in the law of the sea, it would not have been difficult for the Court to exercise its discretionary powers under Article 62, paragraph 2, and allow the intervention of the third State particularly concerned, depending on the Court's evaluation of the imminent and grave interests prima facie at stake and considering the relevant factors. In this case, I cannot agree that Malta, which prima facie belongs to the very 'area' in issue, will escape any legal effect of the judgment of the Court. This distinguishes Malta from all other countries (except perhaps a few neighbouring States) many of which may of course be interested *in abstracto* in the judgment of the Court concerning the interpretation of the applicable 'principles and rules of international law'."

2. Island States

149. For reasons which I shall subsequently make clear, it is pertinent at this stage to see whether, in the present state of the law of the sea, there is anything special in the status of island States where the continental shelf and exclusive economic zone are concerned. The status of island States has not been given much consideration throughout the development of the new law of the sea during the past three decades. The 1958 Convention on the Territorial Sea and the Contiguous Zone contained a provision on islands (Art. 10), and so did that on the Continental Shelf :

"*Article 1*

For the purpose of these articles, the term continental shelf is used as referring . . .

(b) to the sea-bed and subsoil of similar submarine areas adjacent to the coast of an island."

This specific provision was the one newly inserted at the 1958 Geneva Conference. In fact, Article 67 of the 1956 draft of the International Law Commission contained no reference to islands, but paragraph 10 of its commentary reads as follows :

> "The term 'continental shelf' does not imply that it refers exclusively to continents in the current connotation of that word. It also covers the submarine areas contiguous to islands."

It was the Philippines which introduced into the text of the convention the idea expressed in this commentary. The Philippines proposal (A/CONF.13/C.4/L.26) was adopted by the Fourth Committee by 31-10-25 votes. The Phillipines delegate did not have a chance to explain the reasoning behind this proposal, but it might have been asked whether this paragraph was not redundant, since the actual definition of the continental shelf did not imply, despite the adjective, that it must be the shelf adjacent not to an island but *only* to a continent.

Neither of the two provisions in the Geneva Conventions were drafted particularly to cover an island *State.* Yet there was no doubt under the Geneva Conventions on the Law of the Sea that an island, whatever its status, may have a territorial sea and a continental shelf.

150. The only provision specifically relevant to an island in the 1981 draft convention is Article 121, the previous provisions found in Article 10 of the Convention on the Territorial Sea and the Contiguous Zone and in Article 1 of the Convention on the Continental Shelf having been replaced by this article, which reads as follows :

> *"Article 121. Régime of Islands*
>
> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. Except as provided for in paragraph 3, 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.
>
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

No suggestion was ever made, and no idea ever presented, to imply that an island State should be distinguished from other coastal States or from any non-independent islands or groups of islands. Thus the "new accepted trends" contain no pointers on the subject and provide no ground for modification of my above-quoted opinion. It remained the Court's duty to avoid formulating any judgment affecting areas which might fall within the purview of Malta's interests.

Section III. Equitable Principles

1. Equitable apportioning

151. The present case was different in substance from most disputes concerning land boundaries, or the sovereignty over an island, in which what is required of the organ entrusted with deciding the matter is to ascertain whether this or that claim to a particular boundary or island is historically justified or not. In such cases, the decision to be made by that organ is oriented towards finding and ascertaining, but *not* determining *de novo,* the sovereignty of one party in areas of land or on an island. In contrast, the dispute in the present case concerned sea-bed areas which both Tunisia and Libya would have been entitled to claim under international law, for, despite the continuing uncertainty as to the outer limit of the continental shelf, the coastal State, under the new concept of the continental shelf, is certainly entitled to claim sea-bed areas as far as a distance of 200 miles from the coast. Furthermore, despite the continuing uncertainty as to the precise régime of the exclusive economic zone, the coastal State is entitled, within the universally agreed 200-mile limit, also to claim sea-bed areas for the purpose of exploitation of mineral resources. Thus in the case of two opposite States whose coasts are less than 400 miles apart, there will be an area where each will have an equally valid claim.

152. Furthermore, neither under the new concept of the continental shelf nor under that of the exclusive economic zone is the lateral extent of the sea-bed areas appertaining to the coastal State restricted *a priori,* so that both Tunisia and Libya were in principle entitled to claim any area within a 200-mile radius of any point on their coastlines as appertaining to their respective continental shelf or exclusive economic zone. In other words, given the adjacency of the two States, the areas which both were entitled to claim certainly overlapped. Hence no line which could have been suggested by the Court would have been an absolute line in the sense of being the only possible *legal* line, deviation from which would mean encroachment upon the rights possessed *ab initio* by one party or the other. Thus what the Court was requested to do was in effect not to establish the greater cogency of one claim over another, but only to indicate the principles and rules of international law for dividing the area which both parties might claim under the concepts of the continental shelf and the exclusive economic zone.

153. To pose the issue in these terms is inevitably to evoke the concept of "a just and equitable share", which was not acceptable to the Court in 1969. To be quite clear about the background to this rejection, it will be advisable to quote the relevant passages *in extenso* :

> "18. . . . It considers that . . . its task in the present proceedings relates essentially to the delimitation and not to the apportionment of the areas concerned, or their division into converging sectors. Delimitation is a process which involves establishing the boundaries of an

area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical. (*I.C.J. Reports 1969,* pp. 21 f.)

. . . . . .

20. It follows that . . . the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share) is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all, – for the fundamental concept involved does not admit of there being anything undivided to share out. (*Ibid.,* p. 22.)

. . . . . .

39. . . . From this notion of appurtenance is derived the view which . . . the Court accepts, that the coastal States' rights exist *ipso facto* and *ab initio* without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different States. This was one reason why the Court felt bound to reject the claim of the Federal Republic . . . to be awarded a 'just and equitable share' of the shelf areas involved in the present proceedings." (*I.C.J. Reports 1969,* p. 29.)

The Court did not accept the concept of apportioning "just and equitable shares", and I agree in the sense that the sea-bed area is not meant to be parcelled out like so may fiefs. However, the Court's rejection of this notion in 1969 seems to have been very heavily dependent on its development of the doctrine that "the rights of the coastal State in respect of the area of the continental shelf . . . exist *ipso facto* and *ab initio*". The Court seems to have found it an implicit consequence of this doctrine that the areas of continental shelf falling under the jurisdiction of each party were predetermined *ab initio,* each being mutally exclusive of the other, so that the function of the delimitation of the continental shelf consisted "merely" in discerning and bringing to light a line already in potential existence. The test of natural prolongation, and certain other features of the Judgment, were developed precisely as an aid to the performance of that very special and difficult task.

154. Now, whatever the necessity of the Court's logic in the 1969 context – and here it must be borne in mind that it was impelled to make some pronouncement on the "equitable share" contention by its presence among

the Submissions – I am fully persuaded, for reasons amply developed in earlier chapters, that it has now been overtaken by events. There was thus insufficient reason for the present Court, in 1982, to be inhibited from realizing that the present delimitation was simply a question of equitably dividing, or apportioning, between the Parties, by means of a justifiable line of demarcation, those submarine areas which either could potentially have claimed.

2. Geographical equity

155. The concept of "equity" is often suggested as applicable to any case of dividing or apportioning and the case of delimitation of the continental shelf or the exclusive economic zone is no exception. The Truman Proclamation of 1945, the first official document in this field, suggested, for the boundary of the continental shelf between neighbouring States, determination with the States concerned in accordance with equitable principles, and the eleventh-hour provision of the draft convention on the Law of the Sea provides in similar terms that "delimitation . . . shall be effected . . . in order to achieve an equitable solution". I am in agreement with the Judgment that an equitable solution has to be achieved. However, in saying that "delimitation is to be effected in accordance with equitable principles" (para. 38), the Court cannot be regarded as suggesting principles and rules of international law, for it is simply stating a truism. Even worse, it is simply telling the Parties what they already know and have explicitly incorporated as a rider to their questions. The problem is what principles and rules of international law should apply in order to achieve an equitable solution.

156. Although simple insistence on an equitable solution is not very helpful, since "equity" is a blanket concept susceptible of divers interpretations, yet "equity" still remains the prevailing principle in delimiting the continental shelf and the exclusive economic zone. How should it have been applied in the circumstances of the present case ? The Parties have asked the Court to take account of all the relevant circumstances which characterize the area. For the Court simply to have indicated that they should do the same would obviously have been no genuine answer.

157. Certainly various political, social and economic factors could have been suggested for this purpose, and indeed the Judgment has briefly referred to them : the size of the territories and their population, the distribution of natural resources, the degree of development of the economy and industry, etc., of the respective Parties. However, these factors could not lead to a solution agreeable to the Parties because ideas of the way in which they should be taken into account may well vary between them. It could be asked, for instance, if the advanced industry or economy of one State should justify its being given wider areas of the continental shelf or exclusive economic zone than the other State, or whether the latter should be given much wider areas to compensate for its poverty. It could

also be asked whether the ratio between the two States' areas of land territory should in equity ensure the same ratio between their sea-bed areas or whether, on the contrary, an inverse ratio of sea-bed areas would be more equitable. Such questions involve global resource policies, or basic problems of world politics which not only could not have been solved by the judicial organ of the world community but stray well beyond equity as a norm of law into the realm of social organization.

158. By the same token, the theory of the "hinterland" had also to be excluded. The relevance of natural features such as mountains or rivers appears prima facie more plausible, as they have often been determinative in the fixing of land boundaries. If that is so, however, it should not be forgotten that this circumstance is bound up with traditional problems of communication and defence to which submarine topography scarcely gives rise at all. Besides, such features seemed chiefly relevant when the test of natural prolongation held sway, and even then their relevance was subject to the overriding test of leading to an equitable solution. To seek in them assistance for the application of "equitable principles" – an expression which, by the way, is undoubtedly taken in Anglo-American law as synonymous with "principles of equity" – would surely have been to put the cart before the horse, the more so in that their relevance may often be interpreted in divergent ways. Furthermore, the direction of the land boundary, for similar reasons, also affords no sure guide to an equitable solution if the boundary follows a natural feature, and *a fortiori* if it does not – which is not to say that the prolongation of the land frontier may not in specific cases provide a solution *acceptable* to the States concerned.

159. In sum, the inequality of geography is a fact of the world, nature cannot be refashioned, and the Court has no competence to guess at or initiate any future policy of world social justice, going beyond the existing principles and rules of international law. More especially, it should be noted that, during the formulation of the concept of the exclusive economic zone at UNCLOS III, the idea of granting some benefits to land-locked and geographically disadvantaged countries with regard to the exploitation of fishery resources in the exclusive economic zone of neighbouring States was widely agreed ; but that such benefits have never, on the other hand, been offered such disadvantaged States for the exploitation of mineral resources. In its 1969 Judgment the Court properly pointed out the following :

> "91. Equity does not necessarily imply equality. 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 a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy ... It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.

92. It has however been maintained that no one method of delimitation can prevent such results and that all can lead to relative injustices. This argument has in effect already been dealt with. It can only strengthen the view that it is necessary to seek not one method of delimitation but one goal ... As the operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable ; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable." (*I.C.J. Reports 1969,* pp. 49 f.)

The Court was, however, quick to deny the merits of the equidistance principle in paragraph 101 (C), suggesting instead :

"(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other." (*Ibid.*, p. 53.)

160. In the drawing of maritime boundaries, the geography of the areas concerned has always played a very important role ever since the International Law Commission first started dealing with the law of the sea, and rarely has any other element been considered a factor affecting it. The 1958 Convention suggested the formula of application of the principle of equidistance from the coasts "unless another boundary line is justified" : and the successive negotiating texts of UNCLOS III, the RSNT, the ISNT and the ICNT, all spoke of "applying, where appropriate, the median or equidistance line and taking account of all the relevant circumstances". I find that these suggestions relate simply to the geography of the specific areas concerned. In addition, it cannot be over-emphasized that in the new concept of the continental shelf as well as in the exclusive economic zone the distance criterion now plays a decisively important role in defining the expanse of the respective areas, thus also qualifying their very nature.

Section IV. Proportionality as a Function of Geographical Equity

161. In seeking the correspondence between equity and geography in the division of a sea-bed area, it goes without saying that the expanse allocated to each State concerned does not necessarily have to be equal. If we seek "equity" and not "equality" in this respect, what has been thought of, even implicitly, as governing such equity ? The concept of equity must in this context imply certain criteria which are related to some geographical concept. To my mind, the lengths and relative positions of the coasts facing the sea-bed areas concerned have been implicit in the concept of equity in this respect. In this connection the Court, in its 1969 Judgment, properly stated :

> "98. A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines, – these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions." (*I.C.J. Reports 1969,* p. 52.)

The Court also mentioned in paragraph 101 (D), as a factor to be taken into account in the course of negotiations :

> "(3) the element of a reasonable degree of proportionality, which a delimitation . . . ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline . . ." (*Ibid.,* p. 54.)

When equity in the division of offshore areas has been the topic of discussion, the length of the coast of each State has never been disregarded, and it is further important to note that the length of coastline in this respect is not the length measured in accordance with the detailed configuration of the coast, but that measured in the general direction of the coast, as suggested in the 1969 Judgment. Whether the line of delimitation selected is equitable or not must always be verified by the test of proportionality, or, to put it the other way round, this concept is in principle useful in the verification of geographical equity.

162. The concept of proportionality as between the areas and the lengths of coast is not meant to determine any concrete line of demarcation for the delimitation of the area, for the number of lines capable of producing the same proportion is obviously limitless. No, it simply affords a certain basis for consideration of whether any suggested line would satisfy the requirement of equity. This seems to have been very properly pointed out by the Decision in the Arbitration of 1977 between the United Kingdom and France on the delimitation of the continental shelf, which stated:

> "100. . . . But particular configurations of the coast or individual geographical features may, under certain conditions, distort the course of the boundary, and thus affect the attribution of continental shelf to each State, which would otherwise be indicated by the general configuration of their coasts. The concept of 'proportionality' merely expresses the criterion or factor by which it may be determined whether such a distortion results in an inequitable delimitation of the continental shelf as between the coastal States concerned. The factor of proportionality may appear in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines, as in the *North Sea Continental Shelf* cases. But it may also appear, and more usually does, as a factor for determining the reasonable or unreasonable – the equitable or inequitable – effects of particular geographical features or configurations upon the course of an equidistance-line boundary." (HMSO, Cmnd. 7438, p. 60.)

The Decision went on to state, most acutely, that : "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor" (*ibid.*, p. 61, para. 101).

163. Furthermore, the concept of proportionality is an extremely general one, and the area concerned and the coastlines to be taken into account in this respect cannot be presupposed. The outer limit of the areas attributable to the respective countries can vary greatly according to, first, the existence of third parties, and, secondly, the geographical or geomorphological circumstances determining the outer limit of the continental shelf. In other words, the existence of a third party may adversely affect one party if ignored when a line is drawn to reflect proportionality as between the divided area and the lengths of coastline. In addition, in the case of neighbouring States which face the vast ocean, any differences in geomorphology which must (according to recent trends) be taken into account in determining the outer limit of the continental shelf (i.e., as between two such States of which one faces a continental margin extending beyond 200 miles while the other does not) may certainly result in an unbalanced division of the area in spite of a line having been drawn to reflect proportionality. Such results are unavoidable, unless we are to be concerned with the application of social justice or distributive justice to the resources of the sea. In conclusion, proportionality may have to be gauged simply by eyeing the area concerned as a whole, from a very broad macrogeographical standpoint, rather than with an eye to establishing any predetermined ratio in the apportionment of the area. In this respect it may be appropriate to quote, from the 1977 Decision of the Arbitration between the United Kingdom and France, the most appropriate evaluation of the concept of proportionality.

> "101. . . . [T]here can never be a question of completely refashioning nature, such as by rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coast-

line ; it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical fact. Proportionality, therefore, is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf." (*Ibid.*, p. 61.)

164. In my view, the Judgment is not correct in starting from a more or less precise calculation of the length of the coastlines and the expanse of the areas. It suggests in paragraph 131 that while the ratio of the coastlines of Libya and Tunisia in this area is 31 : 69, or, reckoned on a basis of straight-line coastal fronts, 34 : 66, the line proposed would result in dividing the area approximately in the ratio of 40 : 60 between Libya and Tunisia. First, how can the area concerned be defined in advance in terms of definite parallels and meridians, as attempted in paragraphs 75 and 130. If the present case were to be one where a confined area is to be shared out in conformity with the concept of proportionality, the case would be very simple. But actually this is not such a case. As I have suggested before, the concept of proportionality to be applied in delimitation of maritime areas is a very general one, since in most cases the areas concerned are not mathematically specific and the relevant lengths of coastline of the States concerned are not susceptible of very precise definition.

Section V. The Rule of Equidistance

1. General application

165. The equidistance method, a geometrical method which leaves no room for equivocal interpretation, has since the 1958 Convention often been suggested for the delimitation of the continental shelf. Throughout UNCLOS III the equidistance method was suggested for the delimitation of the continental shelf and Exclusive Economic Zone by one school of thought and opposed by another. No method other than that of equidistance has ever been submitted in UNCLOS III, as a simple suggestion of equitable principles could have been no substitute for the equidistance method. As the Court seems to admit in its 1969 Judgment, no other method of delimitation has the same combination of practical convenience and certainty of application. Is there any other method which may possibly represent equity as explained above ? Here I would like to quote, with great admiration, from the dissenting opinion of Judge Tanaka in the 1969 case, as follows :

> "The incorporation of the equidistance rule as a geometrical technique into a legal norm [Article 6 of the Convention on the Continental Shelf] exemplifies an extremely widespread phenomenon which can be observed in regard to several kinds of extra-legal, social and cultural norms and in such fields as usage, ethics and techniques . . . In the case of the equidistance principle, a technical norm of geometrical nature, after being submitted to juridical evaluation has become incorporated or naturalized in law as a legal norm vested with obligatory force." (*I.C.J. Reports 1969,* p. 183.)

166. As suggested in the 1969 Judgment, equidistance may not be the sole method for delimitation purposes, and no doubt has existed that in principle this method would be followed only in certain normal situations where it produces an equitable solution to the problem of the division of sea-bed areas. If this method is one which, in principle, should apply in normal situations, as suggested in the 1958 Convention and the 1969 Judgment of the Court, how can one say that this cannot be a rule of delimitation ? This does not of course mean that it is a compulsory rule in abnormal circumstances. As mentioned previously (para. 49), in 1953 the Committee of Experts on Certain Technical Questions concerning the Territorial Sea was already well aware of the necessity of allowing exceptions. In 1956 the International Law Commission pointed out, in its final draft, that "provision must be made for departures [from the equidistance method]" and that "this case may arise fairly often so that the rule adopted is fairly elastic" (para. 51). The 1958 Convention accordingly provided that a boundary other than the equidistance line might be justified by special circumstances. This was not, however, unequivocal, since no clue was given as to what might constitute such special circumstances, nor as to the effect to be ascribed to them, and the practical application of the text was therefore bound to give rise to many difficulties. I would further suggest that the reason why this provision of the Convention has often been found open to criticism, both within and outside UNCLOS III, lies in the way it was drafted, harnessing together the unequivocal geometrical method of "equidistance" and the equivocal notion of "special circumstances".

167. Moreover, if the equidistance method was not accepted by the 1969 Judgment, this was apparently not because the equidistance method itself would be inapplicable, but for the reasons implied in the Judgment (para. 89) that there existed convergent claims of several States and certain irregularities such as a concave or convex coastline in the North Sea area, and that the Court thought that simply employing the equidistance method would produce an unreasonable result. If the baselines had been adjusted to rectify the irregularity of the coastlines, the Court would surely have hesitated to refuse merit to the equidistance method. In any case, what the

Court was rejecting was equidistance as argued for by two of the three Parties in the peculiar circumstances of the dispute ; just as in the case of its rejection of the "equitable share" contention, there has in my view been too great a readiness to generalize from the Court's treatment in 1969 of specific submissions. Here I would like to borrow the following from the 1977 Decision of the Court of Arbitration :

> "97. . . . [T]he appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of the method or methods of delimitation in any given case . . . has therefore to be determined in the light of those circumstances and of the fundamental norm that the delimitation must be in accordance with equitable principles."

168. The conflict between the two schools of thought, which had manifested itself by 1978 in UNCLOS III, is illustrated by one proposal (NG 7/2), which suggested a formula "employing, as a general principle, the median or equidistance line, taking into account any special circumstance where this is justified", and another (NG 7/10), which spoke of a formula "in accordance with equitable principles, taking into account all relevant circumstances and employing any methods where appropriate" (para. 135). This conflict may not, as generally thought, be insurmountable, since the concept of equity seems to underlie the former formula, while the latter attempts to promote the quest for practical ways of implementing this same concept of equity. The main point, at any rate, is that since the time of the 1958 Conference on the Law of the Sea efforts have been made to reconcile equity with the geography surrounding the sea-bed areas concerned. Perhaps the true solution to the problem relating to the method of equidistance is that account should always be taken of various elements and factors when determining the baselines from which the equidistance line is to be plotted. Should the real configuration of the coast of each State be the sole baseline for measuring equidistance ? This is basically the principle applicable for determining the outer limit of the territorial sea. However, the inherent logic of the 1958 Convention might be so construed : while the sole use of the equidistance method can be expected to lead to an equitable result, this is on the understanding that the baseline to be employed for the purpose of the geometrical construction will vary from case to case, from the strict version used in measuring the limit of the territorial sea to certain modified baselines employed because of special circumstances in the geography of the region.

169. If I may put the conclusion first, "irregularities in coastlines" and the "existence of islands" have always, even if only implicitly, been regarded as circumstances to be taken into account. Certainly, not just any

existing geographical condition may be regarded as an anomaly, and it will not be easy to define what irregularities should be rectified in determining the baseline for application of the equidistance method. However, an irregular overall shape of the coastline, significant configurational irregularities and the existence of narrow promontories or peninsulae, or even of islands, might be agreed upon as constituting irregularities the effect of which is to be mitigated in settling the baselines. The degree of irregularity to be considered significant in each case may vary according to the overall expanse of the area concerned. If the area is comparatively large, the existence of some irregularity may well be ignored, but if it is small even some minor irregularity would probably have to be taken into account for the purpose of rectifying the baseline for delimitation of the continental shelf or Exclusive Economic Zone.

2. An island as an irregularity of the coastline

170. Although the status of islands in connection with the delimitation of the continental shelf was not provided for in either the 1958 Convention on the Continental Shelf or the 1981 draft convention on the Law of the Sea, views have often been expressed on whether all islands should have the status of a baseline for measuring the equidistance line when delimiting the continental shelf. In this connection, it is proper to reflect once more upon how islands were treated at the 1958 Conference and UNCLOS III. I have referred to Article 10 of the Convention on the Territorial Sea and the Contiguous Zone and Article 1 of the Convention on the Continental Shelf, the only provisions relevant to the status of islands in the Geneva Conventions on the Law of the Sea (para. 149). As was also stated above (para. 150), Article 121 is the only article in the draft convention that deals with islands. I again quote the most relevant provision therein :

> "2. . . . 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."

This text has not changed since it was drafted as Article 132 of the ISNT. The drafting style of this provision is similar to that of Article 10, paragraph 2, of the Territorial Sea Convention. The difference lies in the fact that, while under the 1958 Convention "the territorial sea of an island is measured in accordance with" the provisions of the Convention, under the 1981 draft convention not only the territorial sea but also 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".

171. The influence of islands on the delimitation of the continental shelf was not provided for in the 1958 Convention on the Continental Shelf, and was also not a point dealt with in the 1969 Judgment of the Court. I have briefly referred to this problem (para. 53). However, it will be as well to recapitulate how this problem was argued at the 1958 Geneva Conference. For the case of opposite States, Italy made the following proposal, which has been quoted previously :

> "Where in the proximity of coasts which are opposite to each other there are islands belonging to the said continuous continental shelf, in the absence of agreement, the boundary is the median line every point of which is equidistant from the low-water line along the coast of the said States, unless some other method of drawing the said median line is justified by special circumstances." (A/CONF.13/C.4/L.25.)

The Swedish delegate remarked that this proposal might be interpreted to mean that the median line should be drawn solely on the basis of coastlines, leaving islands entirely out of account. Iran also proposed :

> "Where an island or islands exist in a region which constitutes a continuous continental shelf, the boundary shall be the median line and shall be measured from the low-water mark along the coasts of the States concerned, provided, however, that where special circumstances so warrant, the median line shall be measured from the high-water mark along the coastline of such States." (A/CONF.13/C.4/L.60.)

The Iranian delegate stated that his proposal was substantially the same as the Italian amendment, except that his amendment recommended reference in special circumstances to the high-water mark. In the view of the Iranian delegate, it was clear that, if islands were to be taken into account, serious complications would arise and the benefit of having adopted the median line rule would be lost by the difficulty of applying it. The Iranian delegate suggested that the most convenient and most equitable solution was not to permit islands situated much farther out than the territorial sea to have any influence on the boundary. No opposition was explicitly expressed toward these views, and both the Italian and Iranian proposals were defeated almost outright at the Fourth Committee. It may not be correct to conclude from this fact that a principle was formulated to have the existence of islands taken into account in the drawing of the median line. The delegate of the United Kingdom considered that the existence of islands would fall in the category of special circumstances. He suggested that for the purpose of drawing a boundary, islands should be treated on their merits. The United States delegate agreed with the United Kingdom delegate that, in view of the great variety of size, grouping and position of islands, it would be impossible either to include or exclude all islands on

the continental shelf, and that each case should be considered on its merits. Hence taking into account the existence of all islands in drawing the equidistance line was not conceivable. The existence of islands was no more than one of the factors which might justify the invocation of special circumstances.

172. In the United Nations Sea-bed Committee and UNCLOS III some proposals concerning the status of islands also dealt with the question of the effect of islands on the delimitation of the continental shelf. Some proposals dealt simply with the existence of certain types of island as a special circumstance, but other proposals suggested that the same principles should apply to both continents and islands. The following proposals seem to be the most interesting in this respect. In their proposal on "Régime of Islands", submitted at the 1973 session of the Sea-bed Committee, Cameroon, Kenya, Madagascar, Tunisia and Turkey suggested :

> "1. Maritime spaces of islands shall be determined according to equitable principles taking into account all relevant factors and circumstances, including, *inter alia* :
>
> *(a)* the size of islands ;
> *(b)* the population or the absence thereof ;
> *(c)* their contiguity to the principal territory ;
> *(d)* whether or not they are situated on the continental shelf of another territory ;
> *(e)* their geological and geomorphological structure and configuration." (A/AC.138/SC.II/L.43.)

In the second session of UNCLOS III in 1974, 14 African States (Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta and Zambia) proposed more detailed "Draft Articles on the Régime of Islands" (A/CONF.62/C.2/L.62/Rev.1 – 27 August 1974) :

> *"Article 2*
>
> . . . . . .
>
> 2. The marine spaces of islands considered non-adjacent, in accordance with paragraphs 1 and 6, shall be delimited on the basis of relevant factors taking into account equitable criteria.
>
> 3. These equitable criteria should notably relate to :
>
> *(a)* the size of these naturally formed areas of land ;
> *(b)* their geographical configuration and their geological and geomorphological structure ;
> *(c)* the needs and interests of the population living thereon ;
> *(d)* the living conditions which prevent a permanent settlement of population ;

(e) whether these islands are situated within, or in the proximity of, the marine space of another State ;

(f) whether, due to their situation far from the coast, they may influence the equity of the delimitation . . ."

This latter set of proposals refers specifically to "non-adjacent" islands, thus alluding to a distinction made elsewhere, and is concerned mainly with the delimitation of the marine areas attributable to such islands as distinct entities. This is a matter of some relevance to a topic I have dealt with in an earlier chapter. The last subparagraph, *(f)*, however, appears to allude to delimitation between States, otherwise its meaning would be somewhat circular.

173. Indeed it is evident that the presence of an island may "influence the equity of a delimitation" according to its geographical position, and not only when the island is to be regarded as non-adjacent. However, when an island is within easy reach of the mainland, it is my conclusion that geographical and demographic criteria will normally be sufficient to determine whether it should be treated as a rectifiable irregularity. In other words, an island should be considered on its own merits when the baseline for the plotting of an equidistance line is being determined.

3. Low-tide elevations

174. After the above examination of the relevance of the shape of the coast and the presence of islands to determine baselines for the measurement of the equidistance line, it should be clear that the normal baseline for measuring the breadth of the territorial sea could not always be used for the equidistance method as applied to the delimitation of the continental shelf, despite the provisions of Article 6 of the 1958 Convention on the Continental Shelf. In this connection I should like to make some further observations on the status of low-tide elevations. It is suggested under the 1958 Territorial Sea Convention that, where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation be used as the baseline for measuring the breadth of the territorial sea (Art. 11, para. 1). While it may be reasonable to provide that, in the case of the delimitation of the territorial sea, a low-tide elevation should be taken fully into account for determining the equidistance/median line (Art. 12, para. 1), the situation might be quite different were this rule to be applied in the case of delimitations of the continental shelf. The extent of the territorial sea will in any case be limited to a narrow belt from the coast, and, whatever the line of delimitation adopted for demarcating their territorial seas between two States, its effect will probably not be very great.

175. However, this delimitation line, which may not produce any great effect within the narrow confines of the territorial sea, will bring about an enormous difference in the much more widely extended area of the continental shelf. If the baseline used for measurement is extended seaward owing to the existence of a low-tide elevation, the effect will also be great. It

is true that the 1958 Convention on the Continental Shelf provides that the equidistance line should be measured from the baselines from which the breadth of the territorial sea is measured, that is to say, taking into account the existence of a low-tide elevation. It should not be overlooked, however, that in the early days of the International Law Commission, which submitted the draft convention to the 1958 Conference on the Law of the Sea, the three-mile limit was still regarded as having the widest acceptance for the breadth of territorial seas. A low-tide elevation could have been taken into account for measuring the territorial sea, or even the continental shelf, if it were located within so narrow a limit as three miles from the coast. However, it may be asked whether the same is true now that the breadth of the territorial sea has been extended to 12 miles from the coast. Undoubtedly this difference between the 3-mile limit and the 12-mile limit greatly affects the evaluation of the significance of a low-tide elevation within the limit : the delimitation of the continental shelf would be greatly affected by taking into account low-tide elevations which, it is submitted, the International Law Commission in its early days had not contemplated. It is accordingly my conclusion that, despite the provisions of the Convention on the Continental Shelf, it would be proper to ignore the existence of low-tide elevations in the case of a delimitation of the continental shelf, now that the wider 12-mile limit of the territorial sea has become an established rule of international law.

* *

176. In conclusion, I would suggest that, considering geography as the sole factor to be employed for the division of the sea-bed area, a division of the area concerned in proportion to the length of the relevant coast of each State facing that area will, in principle, satisfy the requirement of equity, and the geometrical method of equidistance will, in principle, serve to achieve this purpose. As previously suggested, however, the concept of proportionality between the continental shelf area and the length of coastline must remain very vague in the absence of any precise knowledge of the extent of the area to be divided and the relevant coastline of each Party. No less difficult will be finding the baseline for drawing the equidistance line, whether one follows the real configuration of the coast and takes account of the existence of islands, or modifies it on account of certain irregularities of the coastline or the unusual location or character of the islands. It must be admitted that it would be difficult, if not impossible, to devise a general formula applicable to all cases in such a way as to indicate the precise shape of any coastline, or the nature (size, economy, distance from mainland, etc.) of any island, to be wholly or partially disregarded. The geographical circumstances will have to be evaluated in each case in the light of what is regarded as representing equity, to be verified by proportionality between the continental shelf areas assigned and the lengths of the relevant coasts.

CHAPTER VIII. PRACTICAL METHOD SUGGESTED

1. Suggested Method

177. I regret that I can neither share, nor even understand, the view which the majority of the Court, in describing the practical method to be employed for the delimitation between the Parties, has expressed to the effect that the delimitation line should be composed of two segments. The Court suggests, for its first segment, a straight line drawn from Ras Ajdir, at an angle corresponding to the western boundary of the Libyan concessions, to the point of intersection with a parallel passing through the most westerly point of the Tunisian coastline in the Gulf of Gabes. What justification can there be for prescribing a delimitation identified with a line already emplaced by one Party, even if the other Party subsequently granted some concessions in such a way as not to encroach upon it ? Is it not a fact that the present case was brought to the Court by the Parties because this line was not mutually satisfactory ?

178. What significance, moreover, from any objective viewpoint, has the point of intersection of this line with the parallel passing through the most westerly point of the Gulf of Gabes ? Why should that point be of any special importance in the delimitation of the area concerned ? I realize that a connection has been made between a change in the general direction of the Tunisian coastline and the alleged necessity of "veering" the line, but the translation of this connection into terms of a parallel of latitude can only result from an optical illusion in which a conventional lattice of cartography is treated as part of the natural configuration. This is the more disconcerting in that the Court has rightly resisted the Parties' efforts to persuade it to view the area as imprinted with a north-south or west-east orientation, as the case may be. I suggest that, if the configuration of the area is looked at from a position and angle different from the traditional north-south/west-east view, it will immediately be apparent that the suggested veering point has no special relationship with the most westerly point in the Gulf of Gabes. Unless there is specific agreement between the Parties to attach special significance to parallels or meridians, it is surely a serious error in delimitation to treat them as anything more than convenient lines of reference for descriptive purposes. A companion error is to attach special significance to the cardinal points of the compass, and here I am thinking of the possibility that the "most westerly" point of the Gulf of Gabes may not be the geometrically correct point from which to consider that a change of general direction occurs.

179. For the second segment of the line the Court suggests a bearing of 52°. Is it possible to find any principle or rule of international law which will provide a ground for this inclination ? Surely not. In paragraphs 128 and 129 of the Judgment it is suggested that this segment of the line derives from a parallel with the general direction of the coast of Tunisia north of the most westerly point of the Gulf of Gabes, as adjusted to allow a "half-effect" to the Kerkennah Islands. Why should this segment of the

line be parallel with the coast of Tunisia rather than the coast of Libya ? In any case, a line in parallel to the coastline can appropriately be used for the outer limit of maritime zones, but not for the lateral or common boundaries of the zones of adjacent or even opposite States. If a geometrical method of delimitation such as a parallel to the bisector of the angle made by one line drawn from the most westerly point of the Gulf of Gabes to Ras Kaboudia and another to the seaward coast of the Kerkennah Islands is to be used, why should not this idea of bisecting angles have been applied for drawing the first segment of the boundary ? In addition, in spite of recognizing that low-tide elevations have some significance, the Court not only seems to ignore them for no stated reason as a possible baseline for the shelf delimitation, but also disregards them in recommending an angle of 52° to the meridian as being the bisector of the angle between the (42°) line drawn from "the most westerly point of the Gulf of Gabes" to Ras Kaboudia, and the other (62°) line "from that point *along the seaward coast* of the Kerkennah Islands" (emphasis added), simply because "to cause the delimitation line to veer even as far as to 62°, to run parallel to the island coastline, would, in the circumstances of the case, amount to giving excessive weight to the Kerkennahs". The treatment here given by the Judgment to low-tide elevations (however correct in itself) cannot but give rise to a suspicion that the "bisector" is employed simply to justify the somewhat arbitrarily determined angle of the second segment. In fact, the angle of 52° seems to depend on the happy coincidence that the seaward coast of the Kerkennahs happens to lie in the path of the line extended from the most westerly point of the Gulf of Gabes. That being so, I am personally at a loss to see any reason why this particular parallelism adds to the persuasiveness of the inclination of 52° preferred for the second segment.

180. In fact, the Court fails to adduce any cogent ground for either segment of the line, or for the line as a whole, a line which does not exemplify any principle or rule of international law. It may represent an acceptable solution, but whether it is equitable can only be verified by comparing it with the outcome of applying a truly equitable method. But if a method can be applied for the purpose of verification, why should it not have been tried in the first place ?

181. As demonstrated above, equity requires that delimitation of the continental shelf (or of the exclusive economic zone) should be effected in accordance with the geography of the area concerned, i.e., so as to secure reasonable proportionality between lengths of coastline and the expanses allocated. I hold this to be generally true, but there will surely be wide agreement that it is at any rate true in cases, like the present one, where (as the Judgment indicates in para. 133 A (2)) the concept of natural prolongation provides no useful guide. It can be shown, both as a geometrical theorem and empirically, that the plotting of an equidistance line will normally satisfy this requirement of equity, provided certain preliminary

conditions, which I have described, are observed before the plotting is undertaken. The qualified equidistance method is thus the equitable method *par excellence,* and for this reason alone should be tried before all others.

182. In paragraph 109 the Judgment states that "equidistance may be applied if it leads to an equitable solution ; if not, other methods should be employed". Despite the proposition put forward in paragraph 110 of the Judgment, the fact that the Parties have (for reasons not unconnected with the extent of their respective claims) argued that the application of the equidistance method would not be an appropriate solution does not, in my view, conclusively deprive the Court of its right to suggest the qualified equidistance method that I have just suggested. Is there in the Judgment a trace of any effort to prove that equidistance in the present case will lead to an inequitable solution ? I feel bound to point out the inconsistencies in the Court's preference for bisected angles, compromise boundaries, half-effects, etc. Not only do these attempts to "split the difference" derive from an implicit purpose of apportionment, but they are all simply approximations to the consistent geometrical approach, based on a distance criterion, which the Court has rejected for no stated reason. And a distance criterion is precisely the one established feature of the exclusive economic zone régime which is destined to replace natural prolongation as a test in delimitation of the continental shelf.

183. In the present case the preliminaries involve taking into account the following geographical circumstances :

(1) On inspection of the map, the coastlines of Tunisia and Libya which face the area concerned, namely from Cap Bon in the north to Ras al-Hamamah in the east, no feature is revealed, apart perhaps from the presence of some islands, which calls for any departure from the coastal configuration in determining the baseline from which to plot the equidistance line for the delimitation of the continental shelf. The question of the islands is dealt with in the next subparagraph.
(2) I have earlier concluded that islands should be considered on their own merits for the purpose of delimitation of the continental shelf, and suggested that an island within easy reach of the coast should be viewed to that end from the viewpoint of demographic and geographic circumstances. I shall devote a few words to Jerba, whose size, configuration, contiguity to the coast and nearness to the frontier-point (see below) are, taken together, such as to preclude its being disregarded. From the viewpoint of demography and economics, it can be shown that the Kerkennahs are also of importance to Tunisia. However, this fact does not definitively exclude the possibility of disregarding them in plotting the equidistance line for the purpose of delimitation of the continental shelf. To see whether this possibility is plausible, one has to look closely at the geographical circumstances.

Now, although within easy reach of the mainland, the Kerkennahs are separated from it by approximately 11 miles and, being elongated and far from parallel to the coast, project far out to sea ; they have thus pushed the baseline for the territorial sea of Tunisia far to the east. While this effect is tolerable and necessary for the territorial sea, it would be so pronounced if applied to a vast and economically important zone like the continental shelf that I feel impelled to recommend the exclusion of the Kerkennahs from consideration in determining the baseline from which the equidistance line is to be plotted, despite their demographic importance. Here attention needs to be drawn to a peculiarity of the equidistance method, namely that the extent to which a geographical feature can be treated as an irregularity and disregarded may depend on its distance from the frontier point. It may be inequitable to disregard a feature near to that point, because to do so would bring the dividing line too close to it, and in any case a feature near to the frontier will not affect the course of the line for a very great distance. A similar feature far from the frontier-point may, on the contrary, have an altogether disproportionate effect, but that feature can be disregarded without bringing the dividing line in any sense close to it. Thus even if, for the sake of argument, the island of Jerba had not been contiguous to the mainland and had had a similar configuration to the Kerkennahs, it would have been very doubtful that it could be disregarded.

(3) Under the Geneva Conventions on the Law of the Sea, it was provided that any low-tide elevation should form part of the baseline for the measurement of the territorial sea, and also that this baseline should apply when an equidistance line is plotted for the purpose of delimitation of the continental shelf. However, as I have pointed out earlier, it is scarcely appropriate to take account of low-tide elevations in the delimitation of the continental shelf. This is particularly true in the present case, since it is only on the coast of Tunisia that a significant number of low-tide elevations exist, and their effect has been to place the baseline for measuring the territorial sea of that country at a far remove from the real coastline of the mainland. This simply reinforces my view that low-tide elevations should be discarded as an element of the baseline for the delimitation of the continental shelf.

184. Thus I would suggest that the line for the delimitation of the continental shelf between Tunisia and Libya should be drawn as a line equidistant from their respective coasts, disregarding all the low-tide elevations off the coast of either Party and the existence of the Kerkennah Islands.

185. The technical methods for drawing the equidistance-median line in the case of neighbouring States which are either adjacent or opposite are well illustrated in Shalowitz's *Shore and Sea Boundaries,* Volume I (1962),

particularly at pages 232-235. Reference can also be made to Hodgson and Cooper, "The Technical Delimitation of a Modern Equidistant Boundary", *Ocean Development and International Law,* Vol. 3, No. 4, 1976, pp. 361 ff. In this connection I must point out that the Court seems to misunderstand the practical application of the method of equidistance in suggesting "the equidistance method [takes] full account of almost all variations in the relevant coastlines" (para. 126). In fact, in drawing the equidistance line, it is scarcely possible to take full account of "almost all variations", as only salient points or convexities on the coastline can affect the drawing of this line. Provided only that the baseline excludes long, narrow spurs or promontories and similar features, this is wholly equitable, for the lengths of coastline between salient points or convexities will embrace areas commonly recognized as internal in status, such as mouths of rivers, coves and bays.

2. Suggested Line

186. Properly applied, from a baseline determined as I have explained, the method of equidistance results in a line which, subject to expert verification, includes the following points :

(i) 33° 50′ N and 11° 57′ E
(ii) 34° 25′ N and 12° 47′ E
(iii) 34° 35′ N and 13° 03′ E

The line should be extended in the direction of the line connecting points (ii) and (iii) above.

187. (1) Point (i) is roughly 40 miles from Ras Ajdir, and from it the closest points are Ras Ajdir itself, together with a point on the eastern coast of Jerba in Tunisia and Ras at-Talqa on the Libyan coast. It is technically impossible to single out *one* equidistance line within the area landwards from point (i), since Ras Ajdir, where the coastlines of both Parties meet, is located at an apex. In cases where the point from which the line is to start is so located, a plurality of equidistance lines is inevitable between the starting-point and a point P equidistant from the starting-point itself and two other points, one on each of the respective coasts. In the present case, P is point (i). Hence the single line of equidistance can only start from point (i). It then follows a course in which every point is equidistant from a point on the eastern coast of Jerba in Tunisia and Ras at-Talqa on the Libyan coast, until it reaches point (ii).

(2) Point (ii) is equidistant from Ras Kaboudia and the point on the eastern coast of Jerba on the Tunisian side and Ras at-Talqa and Tripoli on the Libyan side and it is the spot where the combined effect of the presence of Ras Kaboudia in Tunisia and Tripoli in Libya is to deflect the line

slightly eastwards. In other words, it is the turning-point of the equidistance line. The line then follows a course in which every point is equidistant from Ras Kaboudia in Tunisia and Tripoli in Libya.

(3) Point (iii) is the point on the last-mentioned line which is equidistant from Tunisia and Libya, as well as from Malta. Since Malta is not a party to the present case, this point is marked on the line simply to indicate the direction of the line to be drawn from point (ii). In fact, it so happens that at this point a feature located a few miles east of Tripoli, on the Libyan side, starts pushing the line westwards, but only to a negligible degree.

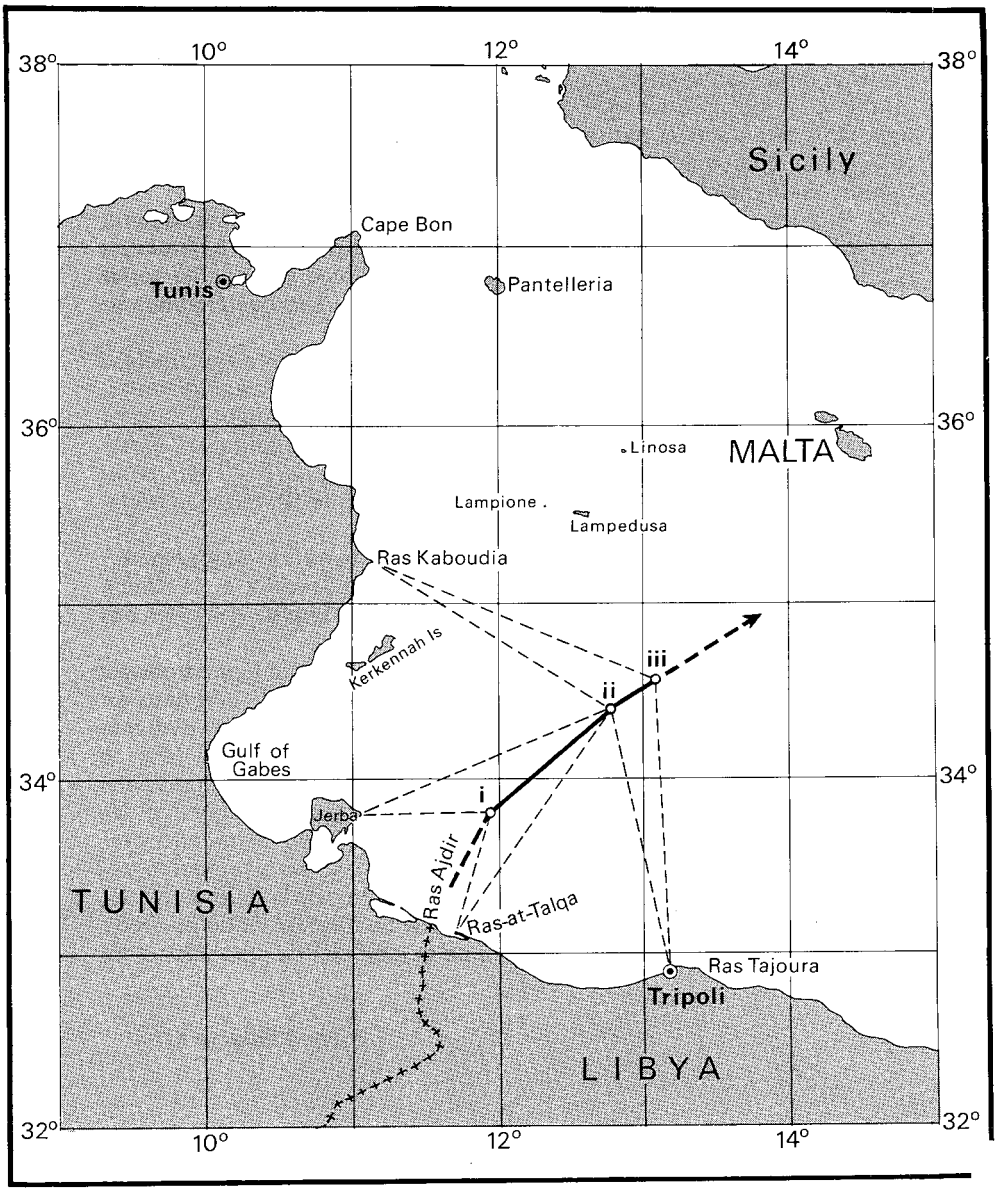
(4) Although only point (ii) is mentioned as a turning-point, there are, theoretically, more, but in each case the alteration in direction which would result from changing the points of reference on the coast would be practically negligible, as the new reference-point would be merely a few miles distant from the old.

(5) As stated previously, in the area landwards of point (i) any line within a certain rhomboid can be an equidistance line. It may not be inequitable to suggest the straight line connecting Ras Ajdir and point (i) as the equidistance line for the purpose of delimitation. This line represents a perpendicular to the coasts of both Parties measured over a distance which is relatively short in comparison with that of about 40 miles from Ras Ajdir to point (i).

(6) Attached hereto, purely by way of illustration, are two maps, one giving the proposed equidistance line in the area offering itself for delimitation, and the other giving the position of this line in the full background of the entire coastlines of both Parties.

188. It would be invidious to proceed farther and to demonstrate how the suggested line satisfies the requirement of a reasonable degree of proportionality (as defined in an earlier chapter), but I suggest that if this demonstration is carried out it will be seen that the line in question provides a useful yardstick against which to verify the equitable nature of the two-part line prescribed by the Court. Without going into detail, I would like before concluding to stress one very important advantage of the equidistance method, when employed with the precautions I have outlined. It lies in the fact that its inherent property of equity remains constant whatever the "area relevant to the delimitation", so that the imperious necessity of defining that area is removed – and with it the need to resort to the arbitrary and artificial use of parallels and meridians.

(Signed) Shigeru ODA.


38°
10°
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14°
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Sicily
Cape Bon
Tunis
Pantelleria
36°
Linosa
MALTA
Lampione
Lampedusa
Ras Kaboudia
Kerkennah Is
iii
ii
Gulf of Gabes
34°
i
Jerba
Ras Aidir
Ras-at-Talqa
TUNISIA
Ras Tajoura
Tripoli
LIBYA
32°
10°
12°
14°
32°

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