DISSENTING OPINION OF JUDGE EVENSEN

1. To my deep regret, I find myself unable to share the views of the Court on the practical method laid down in the Judgment for determining the line of delimitation for the area of the continental shelf appertaining to each of the two Parties, or the reasons provided therefor in the Judgment. My regrets are sincere because of the overwhelming respect I feel for the International Court of Justice and for its predecessor, the Permanent Court of International Justice, as international institutions whose very existence and whose patient work have given justified hopes to a turbulent world that justice can be found and peace be built, not upon arms and wanton sacrifice of human lives, but on the painstaking development of a new international order based on the Rule of Law. Likewise, my dissenting opinion in no way affects the deep and sincere respect I have for the Court, comprised as it is of illustrious internationalists who, through their untiring work, have enhanced the Court's role and impact as a conflict-solving international organ of the highest order. I also realize the importance of the present case and my inadequacies when presenting a dissenting opinion, acting as an *ad hoc* Judge in the present case.

2. The Court's jurisdiction in this case derives from the Special Agreement (Compromis) of 10 June 1977. (See Statute, Art. 36, para. 1.) The main provisions regarding the Court's jurisdiction are contained in Article 1 of the Special Agreement.

There are certain minor discrepancies between the Parties in the translations from the original Arabic. These discrepancies to some extent reflected the divergence of views between them as to the competence entrusted to the Court by the Special Agreement. But as appears from the Judgment, these discrepancies have not been of significance as to the Court's interpretation of its competence. I share this view.

I likewise share the view that in the present case, the task of the Court as defined in Article 1 of the Special Agreement of 10 June 1977 differs from that entrusted to the International Court of Justice in the *North Sea Continental Shelf* cases by Special Agreement of 2 February 1967 and that entrusted to the Court of Arbitration in the Delimitation of the Continental Shelf case by the Arbitration Agreement of 10 July 1975, between France and the United Kingdom.

Under Article 1 of the present Special Agreement the International Court of Justice is "requested to render its judgment" with regard to what principles and rules of international law may be applied for the delimitation of the respective continental shelf areas of the Parties. The starting point is of course that it is for the Court to decide what are the "principles

and rules of international law" applicable to the present case according to Article 38, paragraph 1, of the Statute of the Court, taking into consideration the provisions of the Special Agreement concluded between the Parties. In laying down the principles and rules of international law applicable to the delimitation of the areas concerned the Court is requested "to take its decision according to" :

(a) equitable principles ;
(b) the relevant circumstances which characterize the area ;
(c) the new accepted trends in the Third Conference on the Law of the Sea (Art. 1, para. 1).

I share the view of the Court that these provisions may have a bearing on the sources of law available to the Court in the present case ; and likewise the observation by the Court that the reference to these factors in Article 1 may affect the legal relations of the Parties in the present case only, but cannot affect the position in law of other States.

However, I beg to differ somewhat with the Court with regard to what specific elements may be relevant in this connection ; the relative weight to be given to these elements and the relative weight and importance thereof measuring the one vis-à-vis the other. I shall revert to these questions.

Paragraph 2 of Article 1 has likewise considerable bearing on the task entrusted to the Court. It provides that "Also the Court is further requested" :

(a) to clarify the practical method for the application of the above-mentioned principles and rules ;
(b) to do so in relation to the specific situation ;
(c) to do so, so as to enable the experts of the two countries to delimit these areas without any difficulties.

I share the view of the Court that clearly the Court's task is to render a binding and final

> "judgment in a contentious case in accordance with Articles 59 and 60 of the Statute and Article 94, paragraph 2, of the Rules of Court, a judgment which will have therefore the effect and the force attributed to it under Article 94 of the Charter of the United Nations and the said provisions of the Statute and the Rules of Court" (Judgment, para. 29).

Of course the Court has not been asked to render an advisory opinion, as it could not be asked to do so, in the present contentious case between two States. Nor could it agree in any other way solely to give "guidance" to the Parties to the present dispute which would lack the essential elements of a formal judgment (UN Charter, Art. 96).

I share the view that the Court in its Judgment should lay down the

practical method for the application of the principles and rules of international law with the degree of precision applied by the Court in the operative part thereof. I further share the view that in concluding a treaty according to Articles 2 and 3 of the Special Agreement for the purpose of implementing the Judgment the negotiations of the Parties will be of a limited and technical nature providing in treaty form for the concrete line of delimitation drawn up by the experts of the two Parties. This must be done in compliance with the practical method for the application of the principles and rules of international law laid down in the Judgment.

3. I now revert to the provisions of Article 1, paragraph 1, of the Special Agreement wherein the Court is called upon in rendering its decision based on principles and rules of international law to take account of :

(a) equitable principles ;
(b) the relevant circumstances which characterize the area ; and
(c) the recent trends admitted by the Third Conference on the Law of the Sea.

Obviously this enumeration does not convey authority to the Court to decide *ex aequo et bono* under Article 38, paragraph 2, of the Statute of the Court.

A further question is whether this enumeration in Article 1 changes, enlarges or restricts the sources of international law available to the Court in this case.

4. Re *(a)* : The reference to equitable principles follows from already established concepts of the applicable sources of international law. It is of importance that the Parties are in agreement on this point. However, they seem to disagree what these equitable principles are, and the concrete legal consequences to be drawn from this reference.

The express reference to equitable principles in the Agreement may to some extent have been inspired by the provisions contained in the Third Conference on the Law of the Sea : draft convention (Informal Text), document A/CONF.62/WP.10/Rev.3 of 27 August 1980. This draft text had identical provisions in Article 74 for Exclusive Economic Zones and Article 83 for the continental shelf with regard to delimitation of these zones between States with opposite or adjacent coasts. Paragraph 1 provided :

> "The delimitation of the continental shelf [the exclusive economic zone] 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 area concerned."

These formulations were amended during last year's session of the

Conference. The draft convention on the Law of the Sea of 28 August 1981 (doc. A/CONF.62/L.78), Articles 74 and 83, now provides :

> "The delimitation of the continental shelf [the exclusive economic zone] 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."

This new text was suggested as a compromise in order to satisfy two group factions in the Conference. It may have some merits in fulfilling this aim since it makes no reference either to the equidistance principle or to the equity principle. The new twist is the general reference to Article 38 of the Statute and the provisions to the effect that the delimitation must result in "an equitable solution". It has not been discussed in detail in the Conference.

5. Re *(b)* : The express reference in Article 1, paragraph 1, of the Special Agreement to the relevant circumstances which characterize the area is of course

> "in complete harmony with the jurisprudence of the Court, as appears from its Judgment in the *North Sea Continental Shelf* cases, in which it held that international law required delimitation to be effected 'in accordance with equitable principles and taking account of all the relevant circumstances' " (Judgment, para. 23).

It seems obvious that in drawing up lines of delimitation between the respective continental shelves (and 200-mile economic zones), of neighbouring countries, the relevant circumstances in the region concerned must play an important role.

But the express reference to "the relevant circumstances which characterize the area" in Article 1, paragraph 1, of the Special Agreement is not without significance. The Parties to the litigation have expressly agreed as to the relevancy of this element. This demonstrates the importance which the Parties attach to these regional circumstances, which again must give an added impetus to the Court to give them due consideration. The concern of the Parties in this respect is evident also from the repeated reference thereto in Article 1, paragraph 2, of the Special Agreement in connection with the request to the Court to clarify the practical method for the application of the international law principles "in this specific situation".

It seems futile to attempt to give an exhaustive analysis of all the relevant circumstances which characterize the area. It must obviously include the directions of the coasts concerned ; whether they are straight or curved or otherwise regular or irregular ; whether they are in opposite directions in the sense that prolongations of the shelves and exclusive economic zones seaward would lead to collisions between competing claims for such shelves or zones ; the presence of sinuosities, bays, islands, drying shoals or rocks, etc. The water depths of the areas concerned could play a role. The

geographical features of the coasts and marine extensions thereof, including bathymetry, geomorphology, etc., all these elements are by their nature relevant circumstances that characterize the area. The above-mentioned formulations are not confined to geographic aspects. Both Parties have relied heavily on the geology of the area, not only of the upper layers thereof but in great detail, deeper lying strata almost down and back to the creation.

As to the forebears of these provisions in the Special Agreement, mention may be made of the references to special circumstances which were included in Article 6, paragraphs 1 and 2, of the Geneva Convention on the Continental Shelf of 29 April 1958, although here the principle was closely connected with the equidistance/median line principle. In the operative paragraph (para. 101) of the Judgment of the Court in the *North Sea Continental Shelf* cases of 1969, the Court held that delimitation of the continental shelves concerned "is to be effected by agreement in accordance with equitable principles, and *taking account of all the relevant circumstances . . .*" (*I.C.J. Reports 1969,* p. 53) (emphasis added). Among the factors to be taken into account were, according to that Judgment, *inter alia,* the general configuration of the coasts of the Parties as well as the presence of any special or unusual feature.

As hereinbefore mentioned, Articles 83 and 74 of the draft convention on the Law of the Sea dated 29 August 1981 (doc. A/CONF.62/L.78) contain a broad reference to Article 38 of the Statute of the Court, but no longer any express reference to "all circumstances prevailing in the area concerned". But the purpose was not to weaken the importance of the circumstances prevailing in the area for the concrete delimitation.

6. Re *(c)* : The third group of elements expressly mentioned in Article 1, paragraph 1, of the Special Agreement is "the new accepted trends in the Third United Nations Law of the Sea Conference".

The draft convention has not yet been adopted as the final text by the Law of the Sea Conference. It is by virtue of the Special Agreement that the Court is authorized to take into account trends which – although having reached an advanced stage of the process of elaboration, even a stage where such trends to a considerable extent have been included in the practice of States – have not yet attained the force of general international law. Certain of the recent trends in the draft convention may have acquired such status. Owing to the express provisions in Article 1, paragraph 1, of the Special Agreement, it is neither necessary nor appropriate in the present case to make a distinction between accepted trends and recent developments of law due to the activities of the Third Law of the Sea Conference and the ensuing practice of States.

The reference in the Special Agreement to new accepted trends in the Third Law of the Sea Conference may obviously create certain difficulties with regard to its meaning and application to the present case. What

proposals in the draft convention should be considered as "trends" ? Are such trends "accepted" in the sense of the Special Agreement ; and what importance should be attached to such trends ? The question of the relative importance of different trends may also arise. As an example, mention may be made of the interrelationship between the provisions of Part V of the draft convention concerning Exclusive Economic Zones and Part VI concerning the Continental Shelf, both with regard to conceptual approaches and to basic substantive issues.

A number of the provisions of the four Geneva Conventions on the Law of the Sea of 29 April 1958 expressing the more traditional rules of the International Law of the Sea have been included in the draft convention of 1981. But even in these chapters of the draft convention new trends have frequently been included. Thus, Article 3 of the draft convention provides as to the breadth of the territorial sea that a coastal State has the right to establish a territorial sea "up to a limit not exceeding 12 nautical miles". This corresponds to the limit of the territorial sea claimed by the two Parties.

The added importance which the draft convention seems to give to islands – and even rocks– may be a trend of interest to the present case. In this connection, mention may be made of Article 121, paragraph 2, of the draft convention which provides :

> "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 entails that islands have an exclusive economic zone and a continental shelf proper. The same trend is noticeable even with regard to mere rocks. Article 121, paragraph 3, provides that only "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive zone or continental shelf".

Similar trends are apparent from the provisions concerning archipelagic States and archipelagic waters ; see, *inter alia,* the draft convention of 1981, Part IV and Article 2.

The bearing of the above-mentioned trend should in my respectful opinion not be underestimated or disregarded in the present case especially with regard to the importance of two main island formations, the island of Jerba and the Kerkennah archipelago, as well as their adjacent low-tide elevations.

7. Of great bearing are also other "new accepted trends" especially Part V, Exclusive Economic Zone, *inter alia,* Articles 55-62 and Articles 73-74. Likewise, Part VI, Continental Shelf, *inter alia,* Articles 76, 77, 80, 81 and 83.

The principle of Exclusive Economic Zones of 200 nautical miles is an innovation in international law. These Exclusive Economic Zones "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured" (Art. 57). The purposes of the Exclusive Economic Zones are threefold. They are :

(a) a continental shelf zone ;
(b) an exclusive fisheries zone with some interesting modern trends with regard to sovereign rights and conservation rights and obligations (Arts. 61 ff.) ;
(c) an exclusive economic exploration and exploitation zone also with regard to other natural resources such as the production of energy "from water, currents and winds" (Art. 56).

This triple zone approach has been defined in Article 56 as follows :

> "(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 ; . . ."

The coastal State exercises these rights in its 200-mile zone whether the sea-bed thereof is shallow or deep, even if the depths thereof exceed the 2,500-metre isobath mentioned in Article 76, paragraph 5 ; and regardless of whether the sea-bed or subsoil within the 200-mile zone can be considered a *natural prolongation* or not (see Art. 76, paras. 1, 4 *(a)* and 5). Of course, a full 200-mile economic zone is only possible where the expanses of the ocean concerned so permit. This is obviously not the case here where the coasts of Tunisia and Libya are angled in such a manner as to lead to a collision between their respective 200-mile economic zones including their sea-bed and subsoil (continental shelf areas), should they be extended maximally. It also follows from the provisions of Article 76 that inside the 200-mile distance from the coasts, the natural prolongation principle is not the overriding principle with regard to the sea-bed and subsoil of the economic zone.

In this context it should be noted that the economic zone principle up to 200 miles is *as valid and important a principle* as the continental shelf principle. The two principles are laid down in two separate parts ; Part V for the Exclusive Economic Zone, and Part VI for the Continental Shelf. In Part VI on the continental shelf, special consideration and privileged status is given to the 200-mile zone concept both with regard to the extent of the

continental shelf (see Art. 76 of the draft convention), and to payments and contributions (see Art. 82 of the draft convention).

In seems clear that the provisions of both Part V and Part VI contain "new accepted trends" as provided for in Article 1 of the Special Agreement. This includes also the provisions specifically dealing with the delimitation of those marine areas between States with opposite and adjacent coasts in Article 74 (Exclusive Economic Zones) and Article 83 (Continental Shelf). See also Article 76, paragraph 10.

The concept of exclusive economic zones of 200 miles has already won wide recognition in the practice of States. The latest development in this respect in the Mediterranean is the Moroccan Law (Dahir), No. 1-81 of 8 April 1981. It establishes a 200-mile Exclusive Economic Zone along the coasts of Morocco. The zone according to Article 1, paragraph 2 :

> "extends up to a distance of 200 nautical miles calculated from the straight baselines or the normal baselines from which the territorial sea is measured".

Article 11 concerning the delimitation of the 200-mile zone provides for the application of the equidistance principle as follows :

> "Without prejudice to the circumstances of a geographical or geomorphological order, and taking account of all pertinent factors, the delimitation shall be made in conformity with equitable principles prevailing under international law, by means of bilateral agreements. The outer limits of the exclusive economic zone shall not extend beyond the median line all the points of which are equidistant from the nearest points of the baselines of the Moroccan coasts and the coasts of foreign countries whether these coasts are situated opposite to or adjacent to the coasts of Morocco." (See Official Bulletin of Morocco – No. 3575 (6.5.81), pp. 232-233.)

But as early as 20 August 1971, that is to say before the emergence of the concept of economic zones, Tunisia concluded an agreement with Italy regarding the delimitation of the continental shelf between the two countries. The agreement was based on the principle of equidistance measured from the nearest points on the baselines for territorial seas and "taking into account islands, islets, and low-tide elevations" (Art. 1), special arrangements being made for the Italian islands of Pantelleria, Lampione, Lampedusa and Linosa (Art. 2) (Judgment, para. 20).

8. The concept of the continental shelf has also been subjected to new trends in Part VI, *inter alia,* in the proposed Article 76, trends which, to some extent at least, depart from the earlier established concepts, for

example as they are defined in Article 1 of the Fourth Geneva Convention on the Law of the Sea of 29 April 1958.

Article 76 of the draft convention on the Law of the Sea operates in paragraph 1 with two types of continental shelf. The first type is that part of the sea-bed and subsoil of the submarine areas that extend beyond the State's territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin. The other type is the sea-bed and subsoil of a State up

> "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".

It follows from this latter definition that it is not a criterion for claiming a continental shelf up to 200 miles that this part of the shelf constitutes a *natural* prolongation of the land territory. The 200-mile continental shelf can extend beyond the natural prolongation and into the rise and deep ocean floor (abyssal plain) of the relevant ocean. Actually, this second criterion of Article 76 is a corollary to the provisions laid down in Articles 55-57 on the 200-mile Exclusive Economic Zone.

Paragraph 3 of Article 76 has an additional definition of the continental margin relating to the first criterion mentioned above. It provides :

> "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."

Paragraphs 4, 5 and 7 have interesting provisions concerning the extent of a continental margin that exceeds 200 miles. These provisions are of interest in the present case. Thus, paragraph 4 *(a)* (i) demonstrates that the upper layers of the sediment may be of importance for the extent (beyond 200 miles) of the continental margin, in so far as the extent of the continental margin may be established by reference to the points where "the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope". Article 76, paragraph 4 *(a)* (ii), and paragraph 5, demonstrate that adjacency and proximity are likewise relevant considerations as shown by the distance or depth criteria there laid down.

9. The conclusions to be drawn from the new trends arrived at in Parts V and VI of the draft convention may be stated as follows :

The emergence of the 200-mile Exclusive Economic Zone concept in

Part V of the draft convention is not based on the concept of natural prolongation, but on the concept that a coastal State should have functional sovereign rights over the natural resources in a belt of water and sea-bed 200 miles seawards whether the coastal State concerned possesses a continental shelf in the traditional sense or not. This new development has been accepted in recent State practice. This 200-mile economic zone concept refers not only to the resources of the seas (living or non-living), but also to the natural resources on or in the sea-bed. To this extent it is also in practice a continental shelf concept.

Note should likewise be taken of the fact that the provisions concerning the delimitation of the Exclusive Economic Zones in Article 74 of the draft convention and the provisions on the delimitation of continental shelves between States with opposite or adjacent coasts, contained in Article 83, are identical.

Certain questions appear to arise because of the inter-relation between the new concept of exclusive economic zones and the continental shelf concept, the more so since certain new trends in Article 76 of the draft convention seem to strengthen this inter-relation and interdependence.

The first question which may be raised is whether the concept of natural prolongation has not been weakened by these recent trends within the 200-mile zone. Even without these developments, the question still arises as to whether the natural prolongation concept may appreciably assist in drawing up the dividing line between the continental shelves of adjacent States in cases like the present where the Parties share a common continental shelf which is the joint natural prolongation of the landmass of both Parties. Another question which appears to arise is whether different lines of delimitation are conceivable for the Exclusive Economic Zone and the continental shelf in such a case, bearing in mind that the exclusive economic zone concept laid down in Part V of the draft convention also comprises the natural mineral resources of the sea-bed and its subsoil, that is the natural resources of the continental shelf. A question about this underlying problem was put to the Parties during the oral pleadings by one Member of the Court. The answers seemed somewhat inconclusive. With all due respect, it seems to me as though sufficient attention has not been given in the Judgment to this aspect of delimitation based on the new accepted trends ; neither in the legal reasoning – including the equity considerations – nor in the operative part thereof.

10. I share the view (Judgment, para. 41) that the term "continental shelf" refers to "an institution of international law which, while it remains linked to a physical fact, is not to be identified with the phenomenon designated by the same term – 'continental shelf' – in other disciplines". It is a concept of international law. And this concept may obviously be moulded and changed by developments and changes in international law.

The development of the exclusive economic zone concept is not an insignificant element in this respect and might perhaps influence the practical method of delimitation.

In this context, note should be taken of a development in the Law of the Sea Conference and in the domain of State practice which has weakened the practical impact of the concept of natural prolongation through the development of that of the 200-mile economic zone ; this aside from the practical difficulties of basing a line of delimitation for a joint shelf on the natural prolongation thereof when the two adjacent countries also share the same landmass.

The Parties have only briefly touched upon the 200-mile exclusive economic zone concept as a new accepted trend in the Law of the Sea Conference. This new concept might not fit well into some of the main submissions and legal reasoning of the Parties. Even so, the question arises as to whether the Court in its Judgment should not have laid more emphasis on this recent trend. I feel that it is hardly conceivable in the present case to draw a different line of delimitation for the exclusive economic zone and for the continental shelf. The areas to be delimited will in both instances be situated well inside the 200 nautical miles "from the baselines from which the breadth of the territorial sea is measured". To my mind, it is somewhat doubtful that a practical method for the delimitation of the areas concerned should be based solely or mainly on continental shelf considerations. Thus, it may perhaps be a too restrictive approach in the present case to maintain that "the 'principles and rules of international law which may be applied' for the delimitation of continental shelf areas must be derived from the concept of the continental shelf itself" (Judgment, para. 36).

11. I share the view expressed in paragraph 61 of the Judgment that

> "despite the confident assertions of the geologists on both sides that a given area is 'an evident prolongation' or 'the real prolongation' of the one or the other State for legal purposes it is not possible to define the areas of continental shelf appertaining to Tunisia and to Libya by reference solely or mainly to geological considerations. The function of the Court is to make use of geology only so far as required for the application of international law."

Libya discerns a purely northward direction of the prolongation of the landmass – "the northward thrust" – based mainly on geology (Judgment, para. 62). In the written and oral pleadings of Libya, a variety of arguments have been put forward to support the allegations concerning the northward thrust ; neither taken separately nor considered together do these arguments support the northward thrust theory which seems untenable in law as well as on the facts.

Tunisia sees "an eastward natural prolongation off eastern Tunisia"

(Judgment, para. 64), based on a more complex set of factors including, *inter alia,* geology, bathymetry and geomorphology. The geography, bathymetry and geomorphology demonstrate interesting features with regard to an eastward trend of the shelf.

These features alone disprove the allegations of a northward thrust. Even so, I share the view of the Court to the effect that :

> "The Court, while not accepting that the relative size and importance of these features can be reduced to such insubstantial proportions as counsel for Libya suggest, is unable to find that any of them involve such a marked disruption or discontinuance of the sea-bed as to constitute an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations." (Para. 66.)

As a consequence of the eastward natural prolongation, as seen by it, Tunisia has submitted a sheaf of lines constituting a method of alternatives as the equitable method of delimitation of the continental shelf. However, I share the view of the Court that none of these lines is tenable as the equitable line of delimitation. The geometric constructions seem somewhat too artificial to be considered equitable. At the same time they may have implications for lines of delimitation with third States that may be unacceptable.

I shall, however, deal briefly with one interesting line of argument advanced by Tunisia in this context, based on the physiographic definition of the continental margin laid down in Article 76, paragraph 3, of the draft convention. This paragraph provides :

> "The continental margin comprises the submerged prolongation of the landmass of the coastal State, and consists of the sea-bed and the subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor . . ."

Based on this definition of the "continental margin" Tunisia submits that the Pelagian Block corresponds to "the sea-bed and subsoil of the shelf" while the "Misratah-Malta Escarpment or Ionian Flexure" corresponds to the slope and the rise in the above definition. The Ionian Abyssal Plain corresponds to "the deep ocean floor" mentioned in the definition. Accordingly it should be possible to define the orientation of, and draw the dividing line for, the continental shelf between the two Parties by a line drawn from a point at the Tunisian-Libyan coast to the centre of the Ionian Abyssal Plain. In my opinion Article 76, paragraph 3, should be considered a "new accepted trend in the Third Conference on the Law of the Sea" according to Article 1 of the Special Agreement. But I share the view that the argument advanced by Tunisia may not be tenable, and would hardly lead to an equitable result, all circumstances taken into consideration. The main purpose of Article 76, paragraph 3, is to serve as a yardstick for the

outer limit of a State's continental shelf into the oceans. More concrete rules for this seaward delimitation are given in the subsequent paragraphs of Article 76 ; in particular, paragraphs 4-7. The definition given in Article 76, paragraph 3, may have a bearing on the delimitation of the continental shelves of neighbouring countries. This is obvious with regard to "opposite" States. It is not so obvious that the definition of paragraph 3 will have equal practical bearing on the lateral delimitation of the shelves of adjacent States. The present case has features of delimitation related both to those of opposite and to those of lateral States. However, the special features of the areas of the Mediterranean here concerned do not lend themselves easily to a practical application of Article 76, paragraph 3, for delimitation purposes, at least not where the delimitation in question is concerned. Nor is it apparent that it would result in an equitable solution. In this context one must also bear in mind the provisions laid down in Article 76, paragraph 10, to the effect that :

> "The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts,"

which seems relevant in this context.

12. Article 1 of the Special Agreement of 1 December 1978 provides that the Court : "shall take its decision according to equitable principles, and the relevant circumstances which characterize the area . . ."

It appears from these provisions that there is a close relation between the "equitable principles" and the "relevant circumstances which characterize the area".

Aside from these express references to equitable principles in the Special Agreement, it is indisputable that equity forms part of international law. But as a legal principle it cannot operate in a vacuum either juridically – it is part of the international law system – or factually – as a legal principle it applies to a concrete case. In the present case, it must be clearly distinguished from an *"ex aequo et bono"* decision. The equitable solution in this case based on equitable principles must have its foundation in international law not in a discretionary decision-making process. Or, as Maitland stated in his famous dictum quoted in oral argument, "Equity came not to destroy the law but to fulfil it". This dictum is as valid within the international law system as in the common law systems.

In the Judgment of the Permanent Court of International Justice in the *River Meuse* case of 28 June 1937, Judge Hudson stated how equitable principles form an integral part of international law, as follows :

"What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals . . . A sharp division between law and equity, such as prevails in the administration of justice in some States, should find no place in international jurisprudence ; even in some national legal systems, there has been a strong tendency towards the fusion of law and equity. Some international tribunals are expressly directed by the *compromis* which control them to apply 'Law and Equity' . . . Of such a provision, a special tribunal of the Permanent Court of Arbitration said in 1922 that 'the majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular systems of jurisprudence' . . ." (*P.C.I.J., Series A/B, No. 70,* p. 76.)

Equity as part of international law was dealt with in some detail in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969,* paras. 88-89). It has been extensively dealt with by the Parties in their written pleadings and oral argument.

By the very nature of things the line between a decision based on equitable principles – lying within the realm of international law according to Article 38, paragraph 1, of the Statute – and a decision *ex aequo et bono* according to Article 38, paragraph 2, of the Statute is a very delicate distinction. This distinction should not be blurred. Thus, in my respectful opinion, equity principles cannot operate in a void. In this context, it is interesting to note that in the Delimitation of the Continental Shelf case between France and the United Kingdom the Court of Arbitration in its Decision of 30 June 1977 was careful not to operate in a void so as to leave it to a totally discretionary decision-making process where to draw the dividing line. The equidistance principle was applied as a juridical starting point for the application of equity. In this context, it states, *inter alia* :

"The Court notes that in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection. In the present instance, the problem also arises precisely from the distorting effect of a geographical feature in circumstances in which the line equidistant from the coasts of the two States would otherwise constitute the appropriate boundary. Consequently, it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution *in a method modifying or varying the equidistance method rather than to have recourse to a wholly*

different criterion of delimitation." (See HMSO, Cmnd. 7438, 1978, para. 249.) (Emphasis added.)

Thus, in this arbitration as well as in the *North Sea Continental Shelf* cases, the Court of Arbitration and the International Court of Justice, respectively, used at least as one point of departure the equidistance principle for the application of equity. Furthermore, in the *North Sea Continental Shelf* cases the principle prevailed that the Parties should divide the continental shelf between them *by agreement* although subsequent to and pursuant to the Court's decision.

In the *North Sea Continental Shelf* cases, the Court held, as is well known, that the use of the equidistance method of delimitation was not obligatory between the Parties. Actually no single method of delimitation could be considered obligatory in all circumstances.

The Court made, however, some interesting findings bearing upon the equidistance principle. Thus, in paragraph 99 of its Judgment, the Court indicated solutions where the claims to a continental shelf overlap as follows :

> "In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit." (*I.C.J. Reports 1969,* p. 52, para. 99.)

The importance which the International Court of Justice attached to the equidistance principle in applying equitable principles has been summed up as follows by the Court of Arbitration in the Delimitation of the Continental Shelf case in the following manner :

> "As to the Court's [the I.C.J.'s] observations on the role of the equidistance principle, it was far from discounting the value of the equidistance method of delimitation, while declining to regard it as obligatory under customary law. 'It has never been doubted', the Court commented, 'that the equidistance method is a very convenient one, the use of which is indicated in a considerable number of cases' (*I.C.J. Reports 1969,* para. 22) ; and again it commented 'it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of applica-

tion' (*ibid.,* para. 23). The truth of these observations is certainly borne out by State practice, which shows that up to date a large proportion of the delimitations of the continental shelf have been effected by the application either of the equidistance method or, not infrequently, of some variant of that method." (See HMSO, Cmnd. 7438, 1978, p. 54, para. 85.)

13. In its Judgment in the *North Sea Continental Shelf* cases, the Court made certain distinctions between opposite States and adjacent States. With regard to opposite States, the Court remarked :

> "The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line ; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved." (*I.C.J. Reports 1969,* p. 36, para. 57.)

Where the delimitation of the continental shelf of adjacent States was concerned, the Court made the following observations :

> "This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problem . . ." (*Ibid.*)

The line of reasoning for the distinction between lateral and opposite delimitation is interesting, especially the express assumption that in lateral delimitation "adjacent States on the same coast [have] no immediately opposite coast in front of [them]". In the present case, however, one of the main difficulties arises from the fact that although Tunisia and Libya are adjacent States, their relevant coasts have to a substantial extent the characteristics of opposite States as well as those of lateral States. This main characteristic must be reflected in the practical method of delimitation. If not, the relevant circumstances which characterize the area have not been taken into account, and the solutions arrived at may be discretionary rather than equitable.

14. The question arises as to whether it would be possible to elucidate certain of the equitable principles or considerations which may play a role in the present case, taking into consideration, *inter alia,* "the relevant circumstances which characterize the area, as well as the new accepted trends in the Third Conference on the Law of the Sea".

To give an exhaustive enumeration of such principles or elements applicable in the present case would be impossible and unwarranted. Unwarranted because it would be contrary to the very nature of the concept of equitable principles to attempt exhaustive formulations or enumerations and impossible for much the same reasons. The Court stated in the *North Sea Continental Shelf* cases to this effect :

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

But for this very reason, I respectfully submit that the equity considerations to be applied must be placed in some legal context. If applied in a legal void as entirely self-sufficient, equity may easily change the character of a decision from being a legal decision under Article 38, paragraph 1, of the Statute to becoming an *ex aequo et bono* decision governed by the provisions of paragraph 2 of Article 38 of the Statute. The Court has no such authority in the present case.

One legal principle which obviously may play a role in this case as a corollary to equity considerations is the equidistance principle mentioned above. I share the view of the Court that the equidistance principle is not a mandatory principle for delimiting the continental shelf (or Exclusive Economic Zones) of neighbouring States (Judgment, para. 109). But I respectfully hold an opinion different from that expressed by the Court in paragraph 110.

It is of course correct that, in the present case, the Court is not required "as a first step, to examine the effects of a delimitation by application of the equidistance method, and to reject that method in favour of some other only if it considers the results of an equidistance line to be inequitable". But in this context, it should be borne in mind that in the Fourth Geneva Convention of 29 April 1958, on the continental shelf, Article 6 provides, *inter alia* :

> "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."

I would likewise draw attention to Article 12 of the first Geneva Convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone. Article 12 provides :

> "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 dividing line every point of which is equidistant from the nearest points on the baseline from which the breadth of the territorial seas of each of the States is measured."

I further respectfully submit that in stating in paragraph 110 of the Judgment that "equidistance is not, in the view of the Court . . . a method having some privileged status in relation to other methods" the Court also seems unaware of the fact that even in the draft convention of 1981, of the Third Law of the Sea Conference, the text has given special consideration to the equidistance/median line principle. Article 15 on the delimitation of the territorial sea between States with opposite or adjacent coasts is in terms identical to those of the Geneva Convention. Article 15 provides as follows :

> "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."

In its almost total disregard or belittlement of the equidistance method in paragraph 110 of the Judgment the Court now clearly is at variance with the succinct statement made by the Court in its Judgment of 20 February 1969, paragraph 22, to the effect that :

> "Particular attention is directed to the use, in the foregoing formulations, of the terms 'mandatory' and 'obligation'. 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, – if for instance, the Parties are unable to enter into negotiations, – 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." (*I.C.J. Reports 1969,* p. 23.)

The Court likewise seems to disregard the fact that the equidistance/median line principle is the only concrete principle added to the broad reference to equity which has been discussed in the Third Law of the Sea Conference as related to the delimitation of the Exclusive Economic Zones and the Continental Shelf of adjacent and opposite States. This is apparent

from the various Informal Negotiating Texts and the Informal Text of the draft convention on the Law of the Sea of 27 August 1980, Articles 74 and 83.

The Court likewise seems to disregard the findings of the Court of Arbitration in its Decision of 30 June 1977 as quoted in paragraph 12 of this dissenting opinion. The Court completely disregards the very abundant State practice laid down in numerous delimitation agreements and enactments demonstrating the practical importance of the equidistance principle for the delimitation of continental shelves and the exclusive economic zones.

In my opinion the arguments advanced in paragraph 110 fail to mention any legal principles on which a decision on delimitation should be based. The "relevant circumstances" to be evaluated must be applied in relation to some rules of law. However, in the present case, the Court seems to consider that delimitation based on "relevant circumstances" as a purely discretionary operation where the Court more or less at will can disregard relevant geographical factors like the island of Jerba, the Zarzis promontories and the Kerkennah Islands ; can draw lines of delimitation which run closely in front of such geographical factors and veer lines in an arbitrary manner without any attempt to establish reasonable equality as to distance between the nearly opposite coasts concerned. In my respectful submission, both the reasoning in paragraph 110 and elsewhere in the Judgment as well as the operative paragraphs thereof seem closer to a decision-making process based on an *ex aequo et bono* approach according to Article 38, paragraph 2, of the Statute of the Court than to the authority given to the Court in Article 38, paragraph 1, of the Statute. The results, however, are not equitable in my respectful opinion.

15. Another element to be taken into consideration is the development of the 200-mile zone concept ; both as it has been developed in the draft convention – Chapter VI on the Continental Shelf, Article 76, paragraph 1, and in Chapter V, Article 54, on the Exclusive Economic Zone. Admittedly this case is concerned with the delimitation of the continental shelf of the two Parties. But the 200-mile concept as developed both in Chapter V and in Chapter VI of the draft convention must, in my respectful opinion, be considered at least as "new accepted trends" in the "Third Law of the Sea Conference". In clarifying "the practical method for the application" of the principles and rules of international law, consideration should be given to this development, and for various reasons. When neighbouring States claim functional sovereign rights up to 200 miles – be they opposite States or adjacent States – their claims are based on a *distance criterion.* This very fact seems to strengthen the equidistance/median line principle as an equitable approach for delimiting overlapping areas. Furthermore, the Court should not exclude that Exclusive Economic Zones may be established in the areas concerned as in other areas of the Mediterranean. It seems reasonable that the dividing line for such zones should coincide with those laid down for continental shelf purposes. Also for this reason, I believe that the line of delimitation should be based on

somewhat different considerations than those chosen by the Court. The resulting practical method of delimitation would have been more adequate and equitable considering the special circumstances and needs of the region. In paragraph 109 of the Judgment, the Court states, after having noted that equidistance "has been employed in a number of cases" in the practice of States that : "equidistance may be applied if it leads to an equitable solution ; if not, other methods should be employed". But the Court has not attempted to use this test in the present case. Nor has it examined whether the equidistance principle could be fruitfully used, adjusted by principles of equity and the relevant circumstances characterizing the region concerned to bring about an equitable solution. In this context, I wish to refer to paragraph 126 of the Judgment, where the observation is made that :

> "The major change in direction undergone by the coast of Tunisia seems to the Court to go some way, though not the whole way, towards transforming the relationship of Libya and Tunisia from that of adjacent States to that of opposite States"

and the Court continues :

> "and thus to produce a situation in which the position of an equidistance line becomes a factor to be given more weight in the balancing of equitable considerations than would otherwise be the case".

Aside from paying homage to the equidistance principle by this last sentence, the Court seems to have disregarded it completely also with regard to these "opposite" coasts. The island of Jerba, an island of some 690 square kilometres, has been totally disregarded, as have the promontories of Zarzis. The archipelago of Kerkennah has, for reasons not spelled out by the Court, been given "half weight", but not in regard to establishing an equidistance line but a 52° line which deviates fundamentally from an equidistance line.

I also beg respectfully to disagree with the assessment of the Court in the above-quoted passage in paragraph 109, that "equidistance may be applied if it leads to an equitable solution ; if not, other methods should be employed". This relegation of the equidistance principle to the last rank of practical methods does not correspond – in my opinion – to prevailing principles of international law as evidenced by State practice, multilateral and bilateral conventions ; the findings of the Court in its 1969 decisions and the findings by the Court of Arbitration in 1977 in the Delimitation of the Continental Shelf case.

16. An equitable principle which has been considered as important both in the Judgment of the International Court of Justice in the 1969 Judgment in the *North Sea Continental Shelf* cases as well as in the Court of Arbitration's Decision in the Delimitation of the Continental Shelf case in 1977 is the principle of not refashioning nature.

The International Court of Justice in its 1969 Judgment had this to say about the principle :

> "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." (*I.C.J. Reports 1969,* pp. 49-50, para. 91.)

As to the application of this principle in the case at hand, the Court stated :

> "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." (*Ibid.,* p. 50, para. 91.) (Emphasis added.)

In its 1977 Decision in the Delimitation of the Continental Shelf case, the Court of Arbitration dealt with this principle in regard to Ushant and the Scilly Isles. The Court stated, *inter alia* :

> "Both Ushant and the Scilly Isles are, moreover, islands of a certain size and populated ; and, in the view of the Court, they both constitute natural geographical facts of the Atlantic region which cannot be disregarded in delimiting the continental shelf boundary without 'refashioning geography'.
>
> . . . . . .
>
> Just as it is not the function of equity in the delimitation of the continental shelf completely to refashion geography, so it is also *not the function of equity to create a situation of complete equity where nature and geography have established an inequity.* Equity does not, therefore, call for coasts, the relation of which to the continental shelf is not equal, to be treated as having completely equal effects." (See HMSO, Cmnd. 7438, 1978, p. 116, paras. 248 and 249.) (Emphasis added.)

This principle is of course closely bound up with the principle that "the

relevant circumstances which characterize the area" must be taken into consideration. It is obvious that in a case of drawing the lines of delimitation between States – be it on land or in marine areas – the relevant circumstances characterizing the region concerned must play a decisive role. This follows from the very nature of things. In addition it has expressly been laid down in the Special Agreement in Article 1, paragraph 1, and reverted to in Article 1, paragraph 2, that the concrete elements of, *inter alia,* nature and geography shall be taken into account. This certainly does not mean that they should be disregarded wholly or in part. If, irrespective of these facts such relevant regional circumstances should be held irrelevant and consequently disregarded, very solid reasons of equity and justice must exist therefore. In paragraph 79 of the Judgment, the Court states :

> "The body of 'islands, islets and low-tide elevations which form a constituent part of the Tunisian littoral', referred to in the Tunisian submissions, is a feature closely related to the claim of Tunisia to historic rights . . ."

But islands, islets and low-tide elevations have of course more far-reaching effects for the delimitation of the continental shelves than those mentioned in the above quotation. This follows from principles of law as well as from considerations of equity.

Thus, in Article 1 of the Geneva Convention on the Continental Shelf of 1958, it is provided that the definition of the term "continental shelf" is used also as referring "to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands". As mentioned above, Article 121 of the draft convention on the Law of the Sea of 1981, provides that islands have their territorial sea, their Exclusive Economic Zone and their continental shelf proper "in accordance with the provisions of this Convention applicable to other land territory".

17. The Court affirms in paragraph 79 of the Judgment that the presence of the island of Jerba and of the Kerkennah Islands is a circumstance which clearly calls for consideration ; and further that "the Court cannot accept the exclusion in principle of the island of Jerba and the Kerkennah Islands from consideration". But in the next sentence, the Court holds that the island of Jerba is to be totally disregarded ; as to the relevancy of the Kerkennah Islands, it is stated that "the existence and position of the Kerkennah Islands . . ., on the other hand, is highly material". However, in paragraph 129 of the Judgment, the Court has deemed it appropriate to attribute only half-effect to the Kerkennah Islands. The enormous low-tide elevations surrounding both the Kerkennah Islands and Jerba are disregarded so completely that no mention of them has been made at all.

Neither has any mention been made of the important promontories of Zarzis, of which the island of Jerba is but a continuation ; nor of the fact that the coastline from Ras Ajdir to the Bay of Al-Biban, which has a direction west-northwest, veers almost due north when meeting the coast-

line of the Zarzis Peninsula and its continuation, the island of Jerba. This complete change of direction has been disregarded in the Judgment.

Disregarding completely these special characteristics of very relevant sections of the Tunisian coastline and only giving half effect to the Kerkennah Archipelago is in my respectful opinion a refashioning of nature which is neither warranted in law nor by the facts, nor is the disregard of such important geographical features equitable.

Some further details may be illustrative. The island of Jerba is actually a continuation of the mainland in a northerly direction ; at low-tide it is scarcely an island, but is separated from the mainland by a very narrow strait (ford). Already in Roman times the island was linked to the mainland with a causeway which is still in use by camel drivers. The waters surrounding the rest of Jerba are also very shallow. Jerba is, like the Kerkennahs, surrounded by a belt of banks and low-tide elevations where stationary surface fishing-gear is in extensive use (Tunisian Memorial, paras. 3.25-3.27). The island has an area of some 690 square kilometres, which corresponds to twice the size of the island of Malta. The economic importance of the island is significant. It has a considerable permanent population and has likewise developed into an important tourist centre.

18. The Kerkennah Archipelago forms a natural prolongation of the north shore of the Gulf of Gabes. The Kerkennah Archipelago consists of two main islands and a number of smaller islands (Tunisian Memorial, paras. 3.18-3.20). The area of the Kerkennahs is some 180 square kilometres, i.e., almost the size of the island of Malta. The Kerkennahs are surrounded by an extensive belt of low-tide elevations and shoals some 9-27 kilometres in width. The Kerkennahs lie 11 miles to the east of the mainland but are virtually a continuation of the mainland by virtue of the extreme shallowness of the waters separating them from the mainland. Navigation in the passage between the islands and the mainland is difficult and only possible for small craft. On the seaward side of the Archipelago there is likewise a large surrounding area of low-tide elevations. These areas are closely linked to the islands and are exploited by the local population, as has been the case throughout history, by a special form of aquaculture bearing striking similarities to agriculture. The countless permanent surface fishing installations are tended and harvested by the fishermen (owners) on foot. This immense rampart of low-tide elevations is marked by buoys and beacons (Tunisian Memorial, para. 3.21). Both the islands of the Kerkennah Archipelago as well as the low-tide elevations and the unique shallowness of the waters form very striking and relevant circumstances, which certainly characterize the area. Such characteristics have been given significant weight in the annals of international law, in State practice, in the findings of the International Court of Justice in the Anglo-Norwegian *Fisheries* case of 18 December 1951 (*I.C.J. Reports 1951,* pp. 116 ff.), and in multilateral and bilateral conventions such as the Geneva Convention on the Law of the Sea and the Geneva Convention on the Continental Shelf both dated 29 April 1958. The new accepted trends

in the Third Law of the Sea Conference have gone further in this direction of recognizing the importance of regional characteristics such as islands, archipelagos, rocks, reefs and low-tide elevations. In the Anglo-Norwegian *Fisheries* case, mentioned above, the critical problem was whether the Norwegian straight baseline system, drawn between the innumerable islands, islets, rocks and low-tide elevations of the coastal rampart called the "skjaergaard" along the coasts of northern Norway was "inconsistent with the rules of international law". The Court held :

> "The Court finds itself obliged to decide whether the relevant low-water mark is that of the mainland or of the 'skjaergaard'. Since the mainland is bordered in its western sector by the 'skjaergaard', which constitutes a whole with the mainland, it is the outer line of the 'skjaergaard' which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities." (*I.C.J. Reports 1951,* p. 128.)

Consequently the Court held that the straight baseline method (drawn between islands, islets, rocks and low-tide elevations) "employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12th, 1935, is not contrary to international law" (*I.C.J. Reports 1951,* p. 143).

The Geneva Convention of 1958 on the Territorial Sea provides, in Article 4, concerning islands and coastal archipelagos, in paragraph 1 that :

> "In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."

In a separate article on islands (Art. 10) it provides :

> "(1) An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
> (2) The territorial sea of an island is measured in accordance with the provisions of these articles."

The Convention has the following provisions on low-tide elevations in Article 11 :

> "(1) A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide. 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 the elevation may be used for measuring the breadth of the territorial sea.

(2) Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."

Article 1 of the Geneva Convention of 1958 on the Continental Shelf likewise contains provisions to the effect that islands have continental shelves of their own as follows :

"For the purpose of these articles, the term 'continental shelf' is used as referring . . . *(b)* to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

Article 7 of the draft convention on the Third Law of the Sea Conference of 1981 on straight baselines contains provisions identical with those quoted above from Article 4 of the Geneva Convention of 1958 on the Law of the Sea. Article 13 of the draft on low-tide elevations has provisions identical with those contained in Article 11 of the 1958 Convention on the Territorial Sea. See also Article 7, paragraph 4.

In the present case, especially with regard to the Kerkennah Archipelago and the Gulf of Gabes, paragraph 5 of Article 7 should be borne in mind as a highly relevant trend in the Third Law of the Sea Conference. It provides :

"Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage."

The special characteristics of the low-tide elevations surrounding both the Kerkennah Archipelago and the island of Jerba, as shown to the Court by the film of those areas, bear a clear resemblance to the formations regulated in Article 6 of the draft convention on reefs. It provides :

"In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State."

I respectfully submit that giving only *half effect* to the Kerkennah Archipelago and at the same time disregarding completely the low-tide elevations surrounding and forming a natural part thereof, is not warranted in law and does not correspond to equity.

19. The line of argument adopted in paragraph 128 of the Judgment is not convincing in my respectful opinion. The Court notes that a line drawn from the westernmost point of the Gulf of Gabes (presumably at 34° 10.5′ north latitude) to Ras Kaboudia would have a bearing of 42° to the meridian. This is a totally imaginary line some 160 kilometres long. As a straight line it is *drawn inland* some 6 miles (11 kilometres) from the actual sea-coast, thus disregarding the actual shoreline. To pay attention to the bearing of this artificial line – which is "approximately 42° to the meridian", is, in my respectful opinion "a refashioning of nature". Actually a straight line drawn to the protruding points of the coast in a direction towards Sfax to Ras Busmada would be at an angle of approximately 51° to the meridian, not 42°.

In paragraph 128, the Court observes that to the east of the imaginary line of 42°

> "lie the Kerkennah Islands, surrounded by islets and low-tide elevations, and constituting by their size and position a circumstance relevant for the delimitation, and to which the Court must therefore attribute some effect".

Actually the Kerkennahs together with their unique and vast low-tide elevations form a geographical configuration typical of a coastal archipelago. Because of the shallowness of the surrounding waters and the special characteristics of the area as a whole, the Kerkennahs are in fact in many respects a hybrid, between a promontory extending the northern part of the Gulf of Gabes, and islands. For these reasons alone, but also in view of the heavy emphasis the Special Agreement of 1977 put on the relevant circumstances that characterize the area, I disagree respectfully with the Court's observation that this archipelago should only be given "some effect".

Further down in the same paragraph, the Court states :

> "In these geographical circumstances, the Court has to take into account not only the islands, but also the low-tide elevations which, while they do not, as do islands, have any continental shelf of their own, do enjoy some recognition in international law for certain purposes . . ."

In spite of these assertions the Court seems to proceed in the next sentence to disregard the low-tide elevations and also to give very little effect to the Kerkennah Archipelago. After having asserted that a line from the most westerly point of the Gulf of Gabes to the Kerkennah Islands (and disregarding the low-tide elevations) would run at a bearing of approximately 62° to the meridian, the Court continues :

> "The Court considers that 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 Court does not give any reasons why the 62° line would give "excessive weight to the Kerkennahs". Nor does it give any reasons why it totally disregards the low-tide elevations surrounding the Archipelago, repeatedly invoked in the case as geographic features that characterize the area. If these low-tide elevations had been taken into account the line drawn from the westernmost point of the Gulf of Gabes to the Kerkennahs would run approximately in the direction of 66° to the meridian and not 62°. Even according to the Court's ruling of giving half effect to the Kerkennahs – a result which to my mind is unequal and a refashioning of nature – the veering should in no event be a 52° line but a line running some 57.5° to the meridian. Even this line would be less equitable than an equidistance line.

20. In paragraphs 118 ff. the Judgment deals with an issue of paramount importance for "the practical method for the application of" the principles and rules of international law in the "specific situation", that is, the 26° line which is described in the following manner in the operative part of the Judgment, paragraph 133 C (2),

> "in the first sector, namely in the sector closer to the coast of the Parties, the starting point for the line of delimitation is the point where the outer limit of the territorial sea of the Parties is intersected by a straight line drawn from the land frontier point of Ras Ajdir through the point 33° 55′ N, 12° E, which line runs at a bearing of approximately 26° east of north, corresponding to the angle followed by the north-western boundary of Libyan petroleum concessions numbers NC 76, 137, NC 41 and NC 53, which was aligned on the south-eastern boundary of Tunisian petroleum concession 'Permis complémentaire offshore du Golfe de Gabès' (21 October 1966) ; from the intersection point so determined, the line of delimitation between the two continental shelves is to run north-east through the point 33° 55′ N, 12° E, thus on that same bearing, to the point of intersection with the parallel passing through the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, that is to say, the most westerly point on the shore-line (low-water mark) of the Gulf of Gabes".

In the Court's view, the 26° line from "the land frontier point of Ras Ajdir" should continue on the same bearing until it reaches the parallel of the "most westerly point of the Tunisian coastline" in the Gulf of Gabes (34° 10′ 30″ N approximately). The Court has not explained why the most westerly bottom point of the Gulf of Gabes should be the relevant point here while at the same time the Court is ignoring the island of Jerba and the promontories of Zarzis. These configurations change completely the direction of the Tunisian coastline northward at a longitude more than 60 miles to the east of the bottom point of the Gulf of Gabes actually used by the Court. That is from some 10° east to some 11° 10′ east latitude. I respectfully feel that this choice of the Court is discretionary and not equitable.

In paragraph 118 of the Judgment, the Court states that the 26° line is

not based on a "tacit agreement between the Parties – which, in view of their more extensive and firmly maintained claims, would not be possible –", nor does the Court hold "that they are debarred by conduct from pressing claims inconsistent with such conduct on some such basis as estoppel". At the same time, however, the Court states that "it is evident that the Court must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such – if only as an interim solution". I regret that I have serious doubts with regard to the validity and equity of this line of reasoning. Why should the Court *be bound* to take into account "whatever indicia are available", especially when it seems clear that these "indicia" were meant "only as an interim solution" especially when the Court in the foregoing sentence holds that such arrangements are not a "tacit agreement between the Parties" because they have made "extensive and firmly maintained claims" to the opposite. The Court further holds that the Parties cannot be "estoppe[d]" from objecting to such interim solution.

I respectfully submit that although I have great difficulties with the Court's statement that it "must take into account whatever indicia are available", my concern grows even deeper when such "indicia" are elevated to the main solution governing this case. The adoption by the Court of the 26° line, these so-called "indicia", as the starting point for an extensive part of the Tunisian coast, in spite of the fact that the coastline veers sharply to the north, fundamentally affects the whole outcome. Both on account of its effect on the outcome of the case and on account of the underlying reasoning for the 26° line I am deeply concerned that this line is discretionary rather than equitable.

In my respectful opinion, the petroleum concessions of the two Governments in the area concerned cannot serve as "indicia" that the Parties considered the 26° line as equitable.

The Tunisian Oil Decree of 13 December 1948, the Decree of 1 January 1953 and the Act of 15 March 1958 lay down a system whereby the Government does not open up areas for prospecting and exploitation, but, on the request of oil companies, concessions are granted. It was for the companies themselves to define the desired perimeters of the concession areas. (See Tunisian Reply, para. 1.07, and Tunisian Memorial, Vol. II, Ann. 1.) The first offshore concession was granted to the Husky Oil Company (Permit No. 3) on the basis of a request made in 1960 delimited by longitudinal and latitudinal lines ; that is by grids or blocks. In the north, this concession extends considerably eastward of a longitude from Ras Ajdir. (Tunisian Reply, para. 1.09 and Map 1.01.) On the basis of a request from the oil company SNPA-Rap in 1963, a concession was granted to it in 1964/1965. This concession, called "No. 2 du Golfe de Gabes", is shown on Map 1.01 in the Tunisian Reply. According to Annex 1 to the Tunisian Memorial, Volume II, this concession was granted on 25 February 1964. The concession is also delineated by latitudes and longitudes as set forth in the request for a concession. (The longitudes are

east of the longitudes of Ras Ajdir.) On 21 October 1966, and again upon the request of the oil companies concerned, the Tunisian Government gave a complementary oil concession in the Gulf of Gabes, concession No. 4 delineated in the request. (Tunisian Memorial, Vol. II, Ann. 1.) It is delineated by latitudes and longitudes. In the east, the northern part thereof is delineated by a longitude considerably east of Ras Ajdir. In the south-eastern part the concession area is delineated by a system of grids extending north-eastward more or less in the direction of 26°.

However, in 1968 (presumably in April, see hearing of 30 September 1981, p. 40), Libya granted a concession which exactly abutted and fitted into the grid system laid down in Tunisian concession No. 4. The exact date of this concession is not known according to the Tunisian Memorial (Tunisian Memorial, para. 1.05, note 1).

The Tunisian Government never acquiesced in or accepted that the line of this grid system was equitable. On the contrary, negotiations were commenced immediately afterwards between the two countries on 15 July 1968 and were continuously carried on until 1977 when the Special Agreement of 10 June 1977 was concluded.

According to the detailed "compte rendus" and notes produced as Tunisian Memorial, Annexes 8-42, the Tunisian Party maintained and proposed the median dividing line as the proper line of delimitation (see, *inter alia,* Map, Ann. 24, Tunisian Memorial, Vol. II), while the Libyan Party maintained a line drawn due north from Ras Ajdir. These protracted negotiations, starting immediately after the granting of the Libyan oil concession in 1968, and lasting for almost nine years, clearly demonstrate that neither of the two Parties acquiesced in any compromise line, or found the 26° line equitable. In addition to the clear stand taken by the Parties during these negotiations, the concessions granted by Tunisia in 1972 – concession No. 9 of 21 March 1972 (see Tunisian Memorial, Vol. II, Ann. 21) in 1976 – concession No. 12 of 18 March 1976 (*ibid.,* Ann. 3), and transfer of concessions 2 and 4 on 8 April 1974 (*ibid.,* Ann. 4) demonstrate that no acquiescence or indicia of equity can be assumed as to a 26° line.

In describing the 26° line in paragraph 123, the Court states that "there came into existence a *modus vivendi* concerning the lateral delimitation of fisheries jurisdiction". But a *modus vivendi* arrangement basically implies two elements, namely, that the *modus vivendi* arrangement is *provisional* pending a solution of the disagreement and that the arrangement is *non-prejudicial* for the two Parties. A *modus vivendi* arrangement is aptly described in *Satow's Guide to Diplomatic Practice* (5th ed.) on page 262 as follows :

> "This is the title given to a temporary or provisional agreement, usually intended to be replaced later on, if circumstances permit, by one of a more permanent and detailed character. It may not, however, always be designated as such : more often than not, what is in sub-

stance a *modus vivendi* may be designated as a 'temporary agreement' or an 'interim agreement'."

A more recent example

"of what is in substance a *modus vivendi* (although not so designated) is the Exchange of Notes of 13 November 1973, constituting an Interim Agreement in the Fisheries Dispute between the United Kingdom Government and the Icelandic Government. This records that, following discussion between the two Governments : ... the following arrangements have been worked out for an interim agreement relating to fisheries in the disputed area, pending a settlement of the dispute and without prejudice to the legal position or rights of either Government in relation thereto ..." (*ibid.*, p. 263).

In its Judgment in the Iceland *Fisheries* case the International Court of Justice held as to this agreement :

"The interim agreement of 1973, unlike the 1961 Exchange of Notes, does not describe itself as a 'settlement' of the dispute, and, apart from being of limited duration, clearly possesses the character of a provisional arrangement adopted without prejudice to the rights of the Parties, nor does it provide for the waiver of claims by either Party in respect of the matters in dispute." (*I.C.J. Reports 1974,* p. 18.)

21. In paragraph 85, the Court holds that it is unable to accept the suggestion by Libya that the "boundary on the seaward side of Ras Ajdir would continue, or could be expected to continue, in the northward direction of the land frontier". In paragraph 120, however, the Court takes a somewhat different stand, namely that :

"the factor of perpendicularity to the coast and the concept of prolongation of the general direction of the land boundary are, in the view of the Court, relevant criteria to be taken into account in selecting a line of delimitation calculated to ensure an equitable solution".

The Court is, of course, not unaware of the fact that the land boundary of 1910 is often curved and that it changes direction continuously. In order to meet this weakness, which is inherent in most land boundaries, the Court continues :

"and while there is undoubtedly room for difference of opinion between geographers as to the 'direction' of any land frontier which is not constituted by a straight line, or of any coast which does not run straight for an extensive distance on each side of the point at which a perpendicular is to be drawn, the Court considers that in the present case any margin of disagreement would centre round the 26° line which was identified both by the Parties and by the States of which they are the territorial successors as an appropriate limit".

In my respectful opinion, it seems inconsistent in one paragraph to state that an allegation to the effect that the land boundary should be projected into the sea must be rejected but on the other hand to state that the "concept of prolongation of the general direction of the land boundary" is, in the view of the Court, one of the "relevant criteria to be taken into account". No legal principle exists to this effect. It has no foundation in law of the sea conventions, in customary international law or in State practice. On the contrary, a land boundary is as a rule drawn in conformity with the special circumstances prevailing on land : geographical, historical, military, etc. To assume that the projection of such a land boundary out to sea is suitable as a means of establishing an equitable dividing line far out to sea is not reasonable. There are – of course – cases where States have agreed to a projection of the land boundaries in limited areas, or have agreed to use a straight line starting from the terminal point of their coast following a longitude or latitude as the dividing line. But such examples are not frequent and cannot serve as a basis for an alleged principle to this effect.

It is not correct, as alleged by Libya, that the land boundary projected seawards as a maritime boundary "is well established by State practice". In the Libyan Memorial, paragraphs 117-119, three examples are mentioned of such alleged State practice, namely, the agreement of 4 June 1974 between Gambia and Senegal ; the agreement of 23 August 1975 between Colombia and Ecuador and the agreement of 21 July 1972 between Brazil and Uruguay. The agreement of 4 June 1974 between Gambia and Senegal provides in Article 1 that the "maritime boundary" to the north follows the parallel of latitude 13° 35′ 36″ north (*Limits in the Seas No. 85,* pp. 2-3). Article 2 provides that the maritime boundary to the south just for a short distance (about a kilometre) runs in a south-westerly direction, then in a northerly direction for a few hundred metres and then continues as a parallel of latitude 13° 03′ 27″ north.

The Agreement between Colombia and Ecuador of 23 August 1975 provides in Article 1 that the two countries have agreed :

> "To determine, as a limit between their respective marine and submarine areas which are now established or that may be established in future, the line of the geographical parallel intersecting that point at which the international terrestrial border line between Ecuador and Colombia reaches the sea" (*Limits in the Seas No. 69,* p. 2),

that is, a boundary line stretching seaward 200 miles from west to east along the parallel 1° 27′ 24″ NL. It runs in an entirely different direction from the land boundary, which runs in a north-easterly direction.

Nor is the Agreement of 21 July 1972 between Brazil and Uruguay an example of a land boundary projection. The maritime boundary line was

fixed as a line "nearly perpendicular to the general line of the coast". The Foreign Ministers of the two countries stated in a declaration of 10 May 1969 that :

> "the two Governments recognize 'as the lateral limit of their respective maritime jurisdictions, the median line whose points are equidistant from the nearest points on the baseline'. Apparently the Uruguayan-Brazilian Joint Boundary Commission decided that a simplified and normal line was equitable to both sides." (*Limits in the Seas No. 73,* pp. 1-3.)

Another difficulty encountered in attempts to project a land boundary seawards is plainly apparent in the present case. *What segments of the land boundary shall have a bearing on the direction of the seaward projection ?* Land boundaries are frequently irregular for a number of reasons. A land boundary has minor and major curvatures, often a host of different directions along the various parts of the boundary. Is it solely the last segment of the land boundary ending in the terminal point of the coast that is relevant ? How large must this segment be to count in order to project a dividing line perhaps over very extensive maritime areas ? Or should such a projection be drawn from the average direction of the whole border ? It seems to follow that at least in the present case as in a numer of others, the seaward projection of the land boundary would be a rather haphazard element to introduce as a criterion for drawing the line of delimitation.

22. In paragraph 120 the Court also touches upon "the factor of perpendicularity to the coast" as a relevant criterion "to be taken into account in selecting a line of delimitation". Admittedly States can agree to a perpendicular where it seems convenient in the concrete case. But to rely on it in complicated cases for difficult coastal areas, contrary to the views of the parties concerned, seems unreasonable, for a number of reasons, some of which will be given below.

First : neither the fourth Geneva Convention of 1958 nor the draft convention on the Third Law of the Sea Conference of 1981 have adopted the system of the perpendicular to the coast. The reasons seem obvious. Geographical coastlines are very seldom straight lines for any considerable distance. Consequently a perpendicular system might easily be inapplicable or unfair if only short straight coastlines could be applied as baselines for a perpendicular drawn far out at sea to 200-350 miles from the point of departure on the coastline concerned.

In the present case where one actually has two opposing coastlines facing each other, this is apparent. In practice a perpendicular on a coastline would as often as not only be a perverted equidistance line, either because the baseline from which it would be drawn would be rather short or because the coasts concerned are so irregular as to call for the drawing of

an imaginary straight baseline for the perpendicular disregarding to a greater or lesser degree the geographical peculiarities of the concrete coastline. In the present case, where the coastline is extremely complicated, constructing a perpendicular on an imaginary straight baseline would perhaps have to be turned the other way around, namely first to try to imagine the direction of the "perpendicular" which would give an equitable dividing line and then to construct the "baseline" which should form the basis for this allegedly reasonable perpendicular.

This would be especially true where the perpendicular is to serve as an extensive dividing line for continental shelves or economic zones. It is in reality a simplified or perverted equidistance principle. It can of course not be excluded that a perpendicular may be acceptable in special cases but its obvious weaknesses call for great caution.

In the present case, I respectfully submit first that the coastline on both sides of Ras Ajdir is rather irregular so as to make it necessary to construct the perpendicular on an imaginary straight baseline extending to an equal distance on both sides of Ras Ajdir. This baseline would obviously be rather short.

Secondly I submit that this perpendicular at an angle of some 26° could only operate up to a limited distance from Ras Ajdir, at most out to the outer limit of the 12-mile territorial sea. Up to this limit, it would also approximate to an equidistance line. To extend it far out into the sea, for example, as suggested by the Court up to 34° 10′ 30″ NL would seem inappropriate for several reasons. It would be inequitable to extend the perpendicular some 50-60 miles seawards based on a short imaginary baseline centred in Ras Ajdir. The further out the perpendicular extends the more arbitrary it becomes, because the imaginary baseline will disregard pertinent characteristics of the coast. These would become more and more relevant the more the perpendicular deviates from the regional characteristics on its straight course seawards. In my opinion, a possible perpendicular to be drawn from the outer limit of the territorial sea must be based on a different imaginary baseline drawn, for example, from the easternmost point of the island of Jerba on the Tunisian side to a point at an equal distance from Ras Ajdir on the Libyan side. This would give an entirely different perpendicular, measured in degrees to the meridian, from that measured from a baseline drawn from the very limited coastline in the immediate vicinity of Ras Ajdir. These examples show the discretionary directions of perpendiculars when they have to be measured from imaginary baselines – as in the present case – due to the irregular coastlines in question.

Thus I feel that the observations made by the Court in paragraph 115 as to the distorting effects "of the individual circumstances characterizing the area" is equally applicable to the application of perpendiculars to the

coast. The perpendicular to the coast becomes less and less suitable as a line of delimitation the farther it extends from the coast. This is in my respectful opinion apparent in the present case with the extension of the perpendicular all the way up to 34° 10′ 30″ NL.

23. The question of proportionality has been dealt with by the Court, *inter alia,* in paragraphs 102-104 and paragraphs 130-131. I feel certain misgivings both with regard to the manner and method applied by the Court to ascertain whether a reasonable proportionality has been attained and to its role in the present case.

I share the view of the Court in paragraph 103 of the Judgment that proportionality may be a relevant factor ; perhaps not as an independent source of law as to the delimitation but as a factor to evaluate whether certain principles are equitable and whether the final solution is equitable.

The proportionality element was recognized as relevant by the International Court of Justice in the *North Sea Continental Shelf* case. Thus in paragraph 101 (D) (3) of the Judgment the following reference to proportionality was made as a factor "to be taken into account" in the course of the negotiations :

> "the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles 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, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region" (*I.C.J. Reports 1969,* p. 54).

The statement of the Court is interesting in several respects.

First, the Court emphasizes that it refers to a *reasonable* degree of proportionality. Any attempt of a mathematical portioning of continental shelves does not seem warranted by the Court's findings.

Secondly, the element of proportionality is closely related to "a delimitation carried out in accordance with equitable principles".

Thirdly, the element of porportionality ought to bring about a reasonable relation between "the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline".

Fourthly, the Court emphasized an element which may be of concrete interest in the present case, namely that "account [should be] taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region".

It is a fact that the continental shelf of the east-facing coast of Tunisia is severely curtailed by the delimitation line drawn between Italy and Tunisia and could possibly be similarly curtailed by further delimitations with (Italy and) Malta. The north-east facing coast of Libya confronts con-

siderably larger expanses of the Mediterranean and has thus the possibility of much wider continental shelves.

The Court of Arbitration in the Delimitation of the Continental Shelf Decision of 1977 has, in paragraph 101 (Miscellaneous No. 15 (1978), pp. 60-61), interesting observations with regard to the element of proportionality and its role in the delimitation of continental shelves. The findings of the Court of Arbitration contain four main observations on proportionality.

(a) The Court of Arbitration states as its first consideration that :

> "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. The equitable delimitation of the continental shelf is not, as this Court has already emphasized in paragraph 78, a question of apportioning – sharing out – the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines ; for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares."

(b) As a second consideration, the Court of Arbitration emphasized :

> "Furthermore, the fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory places definite limits on recourse to the factor of proportionality."

(c) In this connection the Court of Arbitration further stated :

> "As was emphasized in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969,* para. 91), there 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 coastline ; 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 facts."

(d) Finally, the Court of Arbitration concluded its analysis of proportionality as follows :

> "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." (Para 101.)

In applying its proportionality test, the Court states in paragraph 104 of the Judgment that

> "the element of proportionality is related to lengths of the coasts of the States concerned, not to straight baselines drawn round those coasts".

In paragraph 131, the Court in applying this criterion finds that the "relevant coastline of Libya stands in the proportion of approximately 31 : 69 to the relevant coastline of Tunisia". If a straight-line coastal front is used

> "the coastal front of Libya, represented by a straight line drawn from Ras Tajoura to Ras Ajdir, stands in the proportion of approximately 34 : 66 to the sum of the two Tunisian coastal fronts represented by a straight line drawn from Ras Kaboudia to the most westerly point of the Gulf of Gabes, and a second straight line from that point to Ras Ajdir".

The Court does not give details as to how these mathematical proportions have been arrived at. Does the proportion 31 : 69 follow all the sinuosities of the coast ? Does the second proportion 34 : 66 straight-line coastal front cut inland so as to totally disregard the two promontories in the south of the Tunisian coast including the promontories of Zarzis and does it also disregard the island of Jerba ? In either of these two proportions, the Kerkennah Archipelago with its long coastlines seems to be totally disregarded. No details are given about the low-tide elevations or the island of Kneis.

I likewise beg to disagree with the Court as to the position the Court has chosen with regard to "internal waters" and their effect on proportionality. In paragraph 104, the Court states that it "is not convinced by the Tunisian contention that the areas of internal and territorial waters must be excluded from consideration". Although the Court reaffirms that in the legal sense the continental shelf does not include the sea-bed of internal waters and the territorial sea, the Court holds in paragraph 131 that such areas must be included for the assessment of proportionality. I respectfully submit that such a notion runs contrary to the very concept of continental shelf and is based neither on positive law nor on equity. This seems especially apparent with regard to the internal waters in this case.

In the legal and political sense, internal waters are in principle equated with the land territory. A State exercises its sovereignty over internal waters in the same manner and ordinarily on the basis of the same laws as are applicable to the land domain. In the present case, the geographical and physical facts should furthermore be taken into consideration. In vast areas of the Gulf of Gabes as well as in the areas surrounding the Kerkennah Archipelago, the island of Jerba and the two promontories of Zarzis, the waters are so shallow as to form an intermediary zone between land and sea. In these vast areas, the depth seldom exceeds 3-4 metres and they form dry land at low tide. The economic exploitation of these areas is

likewise a hybrid between aquaculture and agriculture. In these areas, it is obvious that oil drilling, for example, cannot employ ordinary maritime oil rigs such as semi-submersible platforms, drilling vessels or floating jack-up platforms. Should such areas be considered part of a continental shelf for any purpose ? Furthermore, the 10-metre and 20-metre isobaths extend seawards for a considerable distance in the Gulf of Gabes. Some of these shallow areas extend even beyond the straight baselines established by Tunisia by Law No. 73-79 of 2 August 1973. In view of these considerations of fact and law, is it really in accordance with the principles and rules of international law or equity to base proportionality considerations on the areas of Tunisia's internal waters even in areas where land drilling equipment would have to be used for oil drilling ? It seems perhaps to me that the Court here loses sight of the very concept of continental shelf as a maritime zone with limited functional sovereignty for the coastal States as opposed to the full sovereignty it exercises over its territorial sea not to speak of its areas of internal waters.

In justifying the use of the proportionality test, the Court applies as one reason that "one must compare like with like" (Judgment, para. 130). In my respectful opinion, the Court has applied just the opposite approach at least in including the internal waters of the Gulf of Gabes in the proportionality test.

I further respectfully submit that the Court in the present case seems to have gone much farther in almost elevating the proportionality test – applied as a mathematical formula – to the status of international law in its search for legal arguments compared to the more modest use of the proportionality test made by the Court in its Judgment of 1969 in the *North Sea Continental Shelf* case, and by the Court of Arbitration in its Decision of 1977 in the Delimitation of the Continental Shelf case. In my opinion, the 1969 Judgment and the 1977 Decision struck the proper balance between proportionality and the applicable principles of international law.

24. In paragraphs 102 ff. in the Judgment the Court touches upon the question of the straight baselines established by Tunisia. In paragraph 22 of my dissenting opinion, I have expressed my firm disagreement with the Court's findings in paragraphs 102 ff. that Tunisian internal waters and territorial sea should be included in the relevant areas for the application of a proportionality test. However, the validity of the straight baselines applied by Tunisia in the Kerkennah area may have considerable bearing on the question of the inclusion of the internal waters of Tunisia in the areas relevant for the proportionality test. Therefore, I shall dwell briefly on this issue.

By Law No. 73-49 of 2 August 1973, the Tunisian Government provided straight baselines for measuring its 12 miles territorial sea for certain areas along its coasts ; namely, those parts thereof that are fringed by islands, islets and shoals (the Kerkennahs) and the Bay of Tunis and Gulf of Gabes. (See Annex 86 to the Tunisian Memorial.) A continuous set of straight

baselines is drawn from Ras Kaboudia to the shoals fringing the Kerkennah Islands, continuing to Ras-Es-Moun on the Isles of Gharbi in the Kerkennahs and then a straight baseline across the Gulf of Gabes to Ras Turques.

Admittedly the outer limit of an Exclusive Economic Zone as well as a 200 miles continental shelf under Article 76 of the draft convention must be based on "the baselines from which the breadth of the territorial sea is measured".

The baselines laid down in the Act of 2 August 1973 are not contrary to the prevailing rules of international law. The starting point is that a coastal State has the sovereign right to establish unilaterally straight baselines for measuring its territorial sea and its economic zones, etc. It does not need any agreement with or acceptance by other countries to do so. But if such baselines are contrary to international law other States may protest. According to a very extensive State practice, the Judgment in the *Fisheries* case of 18 December 1951 by the International Court of Justice (*I.C.J. Reports 1951*, pp. 116 ff.) as well as the provisions in the Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958 (the First Geneva Convention), Article 4 ff., and the draft convention on the Law of the Sea of 28 August 1981, Article 7 ff. – which actually codify the governing principles concerning straight baselines – it seems clear that the straight baselines of the 1973 enactment are not contrary to international law.

As a starting point, Article 7, paragraph 1, of the draft convention of 1981 may be quoted. It is taken verbatim from Article 4, paragraph 1, of the First Geneva Convention of 1958 :

> "In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."

In connection with the particular geographical formations constituting the low-tide elevations lying seaward of the Kerkennah Islands and the Island of Jerba it may be of interest to note the new Article 6 introduced in the draft convention of 1981 concerning reefs to the following effect :

> "In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State."

Paragraph 4 of Article 7 provides that :

> "Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition."

Light buoys seem to have been positioned on most of these low-tide elevations. In any event, the stationary fishing gear which has been placed on them in abundance and which is permanently above sea-level should be taken into consideration in this context. It is further an indisputable fact that new technology has made the installation of light beacons a simple and inexpensive operation ; and they can be installed within hours.

Further, paragraph 5 of Article 7 is highly valid in this context, it provides :

> "Where the method of straight baselines is applicable under paragraph 1, account may be taken in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage."

The historic and economic facts of the region concerned fully meet these requirements, as is set forth in the written and oral proceedings (see, *inter alia,* the Tunisian Memorial, paras 3.17-3.31 and 4.43 ff.).

Furthermore, the straight baselines drawn around the Kerkennah Archipelago are modest in length. The longest, the northernmost one, seems to be some 15 miles long according to nautical charts. The others are shorter ; some of them down to a couple of miles. Compared to State practice throughout the world, these baselines are conservative both with regard to length and with regard to mode of application.

The same conclusions are applicable to the straight baseline across the Gulf of Gabes. The length of this baseline is some 45/46 miles from Ras-Es-Moun to Ras Turques according to the available nautical charts.

In this context it should be borne in mind that – although the starting point for straight baselines across the "natural entrance points" of a bay should not exceed 24 miles according to Article 10, paragraph 4, of the draft convention of 1981 – Article 10, paragraph 6, has very important modifications to this starting point. It states :

> "The foregoing provisions do not apply to so-called *'historic bays'*, or in any case where the *system of straight baselines provided for in Article 7* is applied."

Both these conditions are applicable to the straight baseline drawn across the Gulf of Gabes :

(1) It is a natural continuation of the system of straight baselines drawn outside the Archipelago of Kerkennah continuing to the Island of Jerba and then on to the mainland.
(2) The very particular economic interests of the local population in these marine areas, especially in connection with their traditional fisheries based on stationary fishing gear or traditional fishing banks, which over the ages have assumed the character of proprietary rights, have been demonstrated. It seems equally clear that the Gulf of Gabes has the characteristics of an historic bay.

Furthermore, the very special features of the area in question with the combination of densely populated islands such as the Kerkennah Archipelago, the Islands of Jerba and of Kneiss, as well as the particular geographical features of the low-tide elevations of the region combined with the most important indentation (the Gulf of Gabes) of these coastlines, are clearly "relevant circumstances which characterize the area" (see Art. 1 of the Special Agreement). In addition, these waters are so shallow that they to a large extent are considered as appurtenances to the land territory by the local population.

25. In the pleadings, it was maintained that a line of delimitation should not pass in front of a Party's coasts.

Of course, the drawing of frontiers both on land and at sea must always entail restrictions on the extensions of a country's territorial expanse. So the frontal collision or restriction would be inherent in the drawing of lines of delimitation.

In the present case, the coastlines of the two countries lie opposite to each other at an approximate angle of 90° or more. In such a case, the delimitation line would necessarily extend seawards in a direction where it would front both countries at least in a macrogeographical aspect. It seems equally clear that one of the Parties cannot invoke the "frontal" argument in such a manner as to win acceptance for a solution whereby the dividing line should solely "front" the other country.

I respectfully submit that this frontal line argumentation could be a measure of the equity of the results arrived at. It seems that the line proposed in the operative part of the Judgment will be drawn much closer to the coasts of Tunisia than those of Libya. As a matter of fact, the line proposed by the Court – as appears from Map No. 3 attached to this Judgment – is in its whole length almost twice as close to the coasts of Tunisia as to the coasts of Libya. This result does not seem equitable. Actually, the Court here seems to attribute some inferior rank to the coasts of Tunisia.

The "coastal front" argument would in my respectful submission be more equitably met in the present case by the application of an adjusted equidistance line approach.

26. In paragraph 107 of the Judgment, the Court states that "As to the presence of oil-wells in an area to be delimited, it may, depending on the facts, be an element to be taken into account in the process of weighing all

relevant factors to achieve an equitable result". However, it seems to appear clearly from Map 85 presented by the Tunisian Party during the oral pleadings (see also Libyan Counter-Memorial, Vol. 3, Ann. 9), that at least one well drilled in good faith by Tunisia, without objections it seems, namely the Jarrafa No. 1 with co-ordinates 13° 4′ 23.6″ E longitude and 34° 31′ 28.8″ N latitude is situated well inside the Libyan part of the continental shelf based on the 52° line of delimitation. The Court seems to have completely disregarded the existence of this well in reaching its solution based on equity, which seems perhaps to be contrary to the starting point taken by the Court in the above-mentioned quotation.

A more serious question to me, however, is to what extent economic considerations should lead to the acceptance of *faits accomplis* ; that is to say : should the dividing line be drawn in such a manner as to recognize unilaterally granted concessions by one of the Parties to the detriment of the other ? Or wells drilled by either Party in an area in dispute ? Such an approach would possibly be contrary to international law as well as to equity. The delimitation of the continental shelf between adjacent (and opposite) States is, in principle, to be determined by agreement between the Parties, which is just the opposite of unilateral action either in the form of unilateral legislative actions, the unilateral granting of concessions in a disputed area, or, more serious still, by drilling wells and starting up petroleum production in disputed areas. Any acceptance by the Court that the drilling of oil-wells, in an area which was disputed, should have any relevance for the delimitation, would really be an invitation to Parties to violate certain basic trends laid down in the Fourth Geneva Convention of 1958 and the draft convention of 1981, and might invite aggressive attitudes, through the staking out of claims, instead of conciliatory approaches.

Articles 74 and 83 of the draft convention on the Law of the Sea, on delimitation of the continental shelf (economic zone) between States with opposite or adjacent coasts, have very interesting provisions in paragraph 3, as follows :

> "Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

Notice should also be taken of Article 77, paragraph 3, of the draft convention of 1981. It provides :

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

This provision, taken verbatim from Article 2, paragraph 3, of the Fourth Geneva Convention of 1958 is not without importance in the present context. Positive actions are not required for a coastal State to possess a continental shelf. Vice versa, positive actions by another State should not easily deprive a coastal State of its rights. At the least, such action should not be encouraged.

CONCLUSIONS

For the reasons set forth in the foregoing, I have, with deep regret, come to the conclusion that I cannot concur in a number of the main reasons and in the conclusions of the Court.

Among my concerns are the following :

Main relevant circumstances characterizing the area have either been disregarded or not given the weight which should have been attributed to them. Considerations of equity have been allowed to operate in a void, disregarding the necessary connection between such equity considerations and recognized – albeit non-compulsory – principles and rules of international law, thus blurring the distinction between principles of equity as part of the international legal order and considerations *ex aequo et bono.* Nor am I convinced that the equity considerations invoked lead to the desired results of an equitable solution. Further, I am of the opinion that the Court has not paid sufficient regard to the equidistance principle as one of the possible principles to be applied to this delimitation. In my view, the equidistance principle would, in the present case – adjusted or tempered by considerations of equity – have given a more equitable and a more verifiable solution than the line given by the Court. The Court should at least have endeavoured to give a detailed analysis of an equidistance line adjusted by equity considerations, and why such a line would lead to inequitable results. In my respectful opinion, the Court has not paid sufficient attention to the new accepted trends in the Third Law of the Sea Conference. Among such trends is the development of the concept of the 200-mile Exclusive Economic Zones. In basing its line of delimitation to a great extent on aspects of oil exploitation and oil concessions the Court seems to have disregarded the obvious advisability of having identical lines of delimitation for the continental shelf and the 200-mile Exclusive Economic Zone.

I realize the futility and perhaps even the inappropriateness of suggesting an alternative line of delimitation based on an adjusted equidistance

principle. Consequently, I shall refrain from so doing. I believe, however, that such a line might have been more easily founded, and have been more appropriate as a dividing line in the future establishment of Exclusive Economic Zones in the area.

Notwithstanding the several respects in which I find myself unable to agree with the Judgment of the Court, including the operative paragraphs thereof, I recognize that the Court has endeavoured to effect a delimitation which in its view is responsive to search for an equitable solution. I further recognize that in its decision the Court has endeavoured to draw a line which divided the disputed areas between the two Parties. Consequently, I express the fervent hope that the Court's Judgment, which of course is binding upon the two Parties by virtue of the United Nations Charter, the Statute of the Court and the commitments of the two Parties, will be conducive to further enhancing the friendship and good neighbourliness between the two Parties and peaceful and progressive developments on our troubled globe.

In addition to my dissenting opinion set forth in the foregoing, I respectfully venture to present the following thoughts to the two Parties.

The rapid development over the last few decades in the field of the international law of the sea – following the staggering revolution in marine technology, as in technology as a whole – entails that vast areas of the marine environment must be subjected to the functional, limited sovereignty of the adjacent coastal State. The need for drawing up new maritime boundaries between lateral or opposite neighbouring States – often hundreds of miles seawards – is obviously inherent in this development. It is equally obvious that these new challenges must cause certain difficulties and even political strains between the best of neighbours, not because of their lack of will to find just and equitable solutions to their problems, but because of the enormity and uniqueness of the problems themselves.

Consequently, I beg to present the following thoughts for their consideration. I feel strongly that : There may be other elements in the delimitation process and in the delimitation results than the bare drawing of lines : elements that may make a line or a system of delimitation more just and equitable than otherwise might have been the case.

In the present case, the underlying immediate concerns are first and foremost petroleum exploitation. But it is a well-known fact that petroleum exploitation is a mixture of know-how and luck. The drawing of a line of delimitation between States may, as far as oil potentials are concerned, be a pure gamble, an accidental fact which may leave rich structures on one side of the line and barrenness on the other.

An arrangement for joint exploration, user or even joint jurisdiction over restricted overlapping areas may be a corollary to other equity con-

siderations. It was not alien to this Court in the *North Sea Continental Shelf* cases, as is demonstrated in the *dispositif* by the Court in paragraph 101 (C), subparagraph (2), page 53, and also by paragraphs 97 and 99 of the Judgment (*I.C.J. Reports 1969*, pp. 51-52).

Here the Court touched upon a possible solution with regard to overlapping areas. If the Parties were not able to agree on a dividing line, the Court's proposal was to divide the overlapping area "equally", unless the Parties "decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them".

My starting point for such a proposal of joint exploitation would be an adjusted equidistance line starting at the point where the 26° line from Ras Ajdir intersects the 12-mile territorial sea limit. I venture to propose an adjusted line of delimitation veering from this point in a direction some 46-47° (north-east).

In addition, the following system of joint exploitation of petroleum resources may be indicated. On both sides of the straightened line a line veering some 10°-15° from the delimitation line should be drawn. The areas thus indicated should be of approximately the same size. The two areas thus indicated should constitute a joint exploitation zone.

For this joint exploitation zone, the Parties should establish a joint policy of exploration and exploitation. The following modest suggestion may be made as to such policies.

In the area lying on the Tunisian side of the line of delimitation, Tunisian legislation, oil policy and administration should govern the petroleum activities. In the area lying on the Libyan side, Libyan legislation, oil policy and administration should prevail.

Each Party should have the possibility to participate in the petroleum activities in the restricted area of the other Party as defined above, *with 50 per cent participation* either directly or through concessionaires. The national Party should have the right to be the operator unless otherwise agreed.

Each Party would have to pay the costs involved in the exploration and exploitation in accordance with the percentage of his participation.

The Parties should establish a permanent consultative committee for activities in the joint exploitation areas.

In case disagreements should arise out of activities in the aforementioned areas which the Parties were not able to solve by agreement, conciliation procedures and arbitration procedures should be provided for.

Likewise, unitization procedures should be provided in order to regulate the exploitation and the shared ownership where a petroleum deposit either straddles the line of delimitation or the outer lines restricting the zones of joint exploration.

In the *North Sea Continental Shelf* case, the Court deals with the problems of unitization in paragraph 97 as follows :

> "Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent States is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal régime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no further than the North Sea, the practice of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted – (see in particular the agreement of 10 March 1965 between the United Kingdom and Norway, Article 4 ; the agreement of 6 October 1965 between the Netherlands and the United Kingdom relating to 'the exploitation of single geological structures extending across the dividing line on the continental shelf under the North Sea' ; and the agreement of 14 May 1962 between the Federal Republic and the Netherlands concerning a joint plan for exploiting the natural resources underlying the area of the Ems Estuary where the frontier between the two States has not been finally delimited). The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it." (*I.C.J. Reports 1969*, pp. 51-52.)

In his interesting separate opinion, Judge Jessup dwells on the questions of co-operation and unitization in some detail (pp. 81-83 of the Judgment). I respectfully share his views that : even if the principle of co-operation "is not considered to reveal an emerging rule of international law, (it) may at least be regarded as an elaboration of the factors to be taken into account in the negotiations now to be undertaken by the Parties".

There are a number of examples where the question of unitization has been dealt with expressly in agreements on the delimitation of the continental shelf. Some are mentioned in the Court's Judgment of 1969 in the *North Sea Continental Shelf* cases, on page 52.

Thus, in the Agreement between the United Kingdom and Norway of 10 March 1965, it is provided in Article 4 :

> "If any single geological petroleum structure or petroleum field, or

any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned."

Similar provisions were included in the Agreement on the delimitation of the continental shelf between Sweden and Norway of 24 July 1968.

A somewhat firmer commitment was made in the Agreement between Denmark and Norway of 8 December 1965. Article 4 of this Agreement provides that in such cases a unitization agreement "shall be concluded" upon the request of one of the contracting parties. Identical provisions are included in the delimitation Agreement between the Faroes and Norway of 15 June 1979.

It seems advisable that the Parties in the present case in the agreement referred to in Article 2 of the Special Agreement should include provisions on unitization in cases where a petroleum field is situated on both sides of the dividing line or the dividing line for the above proposed zone of joint exploitation.

(Signed) Jens EVENSEN.