

**SPEECH BY H.E. JUDGE PETER TOMKA, PRESIDENT OF THE INTERNATIONAL COURT  
OF JUSTICE, TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY**

**2 November 2012**

Mr. Chairman,  
Distinguished Delegates of the Sixth Committee,

I am pleased to address your Committee today. The Court greatly appreciates this opportunity to further strengthen the bonds of harmony and co-operation which bind our respective institutions.

I congratulate His Excellency Ambassador Yuriy Sergeyev on his election as Chairman of the Sixth Committee for the Sixty-Seventh Session of the General Assembly.

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Today, rather than going over the ground I already covered in the General Assembly in recounting the work carried out by the Court, I would like to take this opportunity to address you with a more narrow focus on what I consider to be a timely topic. In particular, I would like to discuss the contributions of the Court to the law governing maritime delimitation. It seems that there is an ever-increasing interest in the work of the Court on this front and, more specifically, with respect to maritime delimitation more broadly. One only has to glance at the burgeoning docket of international judicial and arbitral institutions to appreciate the timeliness of this topic and, correspondingly, the need to further bolster the principled legal approaches to maritime delimitation.

The ICJ's delimitation-heavy docket is eloquent: in its history, some fourteen cases involving maritime delimitation issues have been submitted to the Court for adjudication with respect to maritime zones located in Western and Eastern Europe, North and South America, including the Caribbean, the Middle East and Africa<sup>1</sup>. There are currently two cases pending before the Court: the *Territorial and Maritime Dispute* opposing Nicaragua and Colombia, in which the Court began its deliberations last May, and the *Maritime Dispute* between Peru and Chile, in which the Court will hold public hearings next month.

Similarly, several other tribunals, including arbitral ones, have also considerably advanced the jurisprudential discourse in this field. For instance, ITLOS rendered a judgment last spring in its first ever maritime delimitation case in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal*. This case illustrated both the salience of maritime delimitation issues in contemporary international law and the influence of the Court's jurisprudence in further developing this legal field. Likewise, the docket of the Permanent Court of Arbitration has also been rich in recent years with cases involving maritime disputes, including the pending *Arbitration between the Republic of Croatia and the Republic of Slovenia*.

Thus, the Court's contribution to the advancement of the law governing maritime delimitation cannot be overemphasized, as evidenced by the wide reach and scope of the precedential value of its judgments and their influence in other decisional fora. When handling maritime delimitation cases, the Court not only interprets and applies relevant customary norms to reach equitable outcomes in maritime disputes in unique contexts, but it continuously contributes to

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<sup>1</sup>See, e.g., Jiuyong Shi, "The Wang Tieya Lecture in Public International Law: Maritime Delimitation in the Jurisprudence of the International Court of Justice", (2010) 9 *Chinese Journal of International Law*, 271, 272.

the greater unification of the relevant rules applicable to different maritime areas while confirming its established methodology for achieving those equitable solutions. I propose sketching a broad picture of the major milestones in the evolution of the Court's jurisprudence, which has undoubtedly solidified the unity and coherence of the resulting normative scheme.

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There is no doubt that a paramount contribution deriving from the Court's jurisprudence resides in its elaboration of the "equidistance/relevant circumstances" methodology when confronted with the delimitation of the continental shelf and the exclusive economic zone ("EEZ") with a view to achieving an equitable solution. I shall return to this aspect of the Court's jurisprudence in a moment but, for the time being, I would like to underscore a few important principles underpinning the most pertinent norms in the field.

### General principles

Of particular relevance, and now firmly entrenched in the Court's jurisprudence, is the notion that maritime delimitation remains shaped and informed by international law, as opposed to leaving coastal States up to their own devices. Merely five years after the Court's inception in 1946, the *Anglo-Norwegian Fisheries* Judgment had already consecrated this foundational principle, which I would equate with the primacy of international law in maritime delimitation matters, in the following terms:

"The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."<sup>2</sup>

Thus, the limits and outer boundaries of different maritime areas appertaining to a State in any given case are necessarily defined by international law<sup>3</sup>. As a corollary, such principle entails not only the conferral of rights and entitlements to States over their appurtenant maritime areas, but also the assumption, by those sovereign entities, of obligations owed towards other members of the international community. Such duties aim at protecting the maritime environment and, to a certain degree, also promote the protection of foreign persons and property against crimes perpetrated in States' areas of maritime entitlement, to list a few examples.

Equally important is the principle, commonly expressed as "the land dominates the sea", according to which maritime entitlements flow from State sovereignty over land and are thus determined by reference to pre-existing territorial rights. The Court first referred to this principle in 1969 in its *Continental Shelf* cases when addressing the delimitation of the seabed in the North Sea<sup>4</sup>, only to reassert it several times in subsequent jurisprudence, including in the *Aegean Sea Continental Shelf (Greece v. Turkey)* case<sup>5</sup> and the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*<sup>6</sup>.

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<sup>2</sup>*Fisheries (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951*, p. 132.

<sup>3</sup>See, e.g., Sir Gerald G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), 203.

<sup>4</sup>*I.C.J. Reports 1969*, p. 51, para. 96.

<sup>5</sup>*I.C.J. Reports 1978*, p. 36, para. 86.

<sup>6</sup>*(Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 696, para. 113.

The Court had the opportunity to provide further contour to this principle in the *Qatar v. Bahrain* case, when it declared that “[i]t is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State”<sup>7</sup>. It is worth mentioning that, in that case, the Court attributed sovereignty to Qatar over a low-tide elevation, Fasht ad Dibal, given that such feature was situated on the “right side” of the maritime boundary, once the delimitation line was constructed and adjusted<sup>8</sup>. The Court’s reasoning may be best explained by the fact that since this maritime feature formed part of the sea, it would necessarily fall within the purview of entitlement of the State exercising jurisdiction over the territorial sea surrounding this low-tide elevation. Indeed, the opposite conclusion might have irreconcilably flown in the face of the “land dominates the sea” principle.

### **Increasing requests for single maritime boundaries**

In recent years, States have increasingly requested the Court to draw a single maritime boundary with a view to dividing, by a single line, all their respective maritime areas extending beyond the territorial sea, namely the continental shelf and EEZ. The single boundary approach, which closely followed the emergence of the legal framework governing the EEZ, was entertained by a Chamber of the Court for the first time in its 1984 *Gulf of Maine* Judgment. This was the first occasion on which the Court was called upon not only to delimit the respective continental shelf areas of the parties, but also to determine the boundary pertaining to their respective superjacent water columns<sup>9</sup>. By contrast, the 1969 *Continental Shelf* cases and the 1982 *Tunisia/Libya* case remained confined to the delimitation of a single maritime area, that of the continental shelf.

Even in the absence of prior jurisprudence espousing such method, the Chamber in the *Gulf of Maine* case was receptive to the parties’ request that it draw a single boundary to apportion both maritime zones, “in accordance with the principles and rules of international law applicable in the matter as between the Parties”. The Chamber went on to

“observe that the Parties have simply taken it for granted that it would be possible, both legally and materially, to draw a single boundary for two different jurisdictions. They have not put forward any arguments in support of this assumption. The Chamber, for its part, is of the opinion that there is certainly no rule of international law to the contrary, and, in the present case, there is no material impossibility in drawing a boundary of this kind. There can thus be no doubt that the Chamber can carry out the operation requested of it.”<sup>10</sup>

From that case onward, most parties to maritime delimitation disputes before the Court requested it to draw a single maritime line to divide their respective zones of entitlement, including in the 2009 case concerning *Maritime Delimitation in the Black Sea*, opposing Romania and Ukraine<sup>11</sup>. It is telling that the notion of a single maritime boundary appears nowhere in the United Nations Convention on the Law of the Sea (“UNCLOS”); rather, it originated in the practice of States and the Court has welcomed this development in its jurisprudence, while still upholding other relevant conventional and customary norms governing maritime delimitation.

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<sup>7</sup>*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports, 2001*, p. 97, para. 185.

<sup>8</sup>*Ibid.*, p. 109, para. 220.

<sup>9</sup>*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports, 1984*, p. 267, para. 26.

<sup>10</sup>*Ibid.*, p. 267, paras. 26-27.

<sup>11</sup>*(Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 70, para. 17. In the pending case before the Court opposing Nicaragua and Colombia, a request for a single maritime boundary was also initially put forth by the Applicant to delimit the respective areas of continental shelf and EEZ. However, Nicaragua later rescinded its position in favour of claiming an extended continental shelf in the Caribbean Sea. See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Reply of the Government of Nicaragua, Vol. 1, 18 September 2009, paras. 25-26.

## Relevant coasts and baselines

It is of fundamental importance that the Court's determining of a delimitation line dividing the respective rights of the parties be carried out only when the baselines are known, while taking account of the relevant coastlines. In many ways, therefore, they amount to a preliminary consideration to be taken into account when the Court initiates the delimitation process. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court spoke to this point:

“Before it can draw an equidistance line and consider whether there are relevant circumstances that might make it necessary to adjust that line and consider whether there are relevant circumstances that might make it necessary to adjust that line, the Court must . . . define the relevant coastlines of the Parties by reference to which the location of the base points to be used in the construction of the equidistance line will be determined.”<sup>12</sup>

Unsurprisingly, the Court has often had to deal with cases in which the baselines to be used for the determination of the breadth of the territorial sea and, ultimately, for the delimitation of the final maritime boundary had not been specified by the parties. *Qatar v. Bahrain* is a case in point<sup>13</sup>. This happens because in many cases, before carrying out its delimitation, the Court first has to resolve sovereignty issues pertaining to certain maritime features that may have a bearing on the establishment of some baselines.

The 1951 *Fisheries* case, opposing the United Kingdom and Norway, contributed greatly to advancing the method of determining the relevant baselines from which the breadth of the territorial sea is measured seaward. Because of historical factors and the particular indented shape of its coast, Norway argued that it could use straight baselines to measure its territorial sea, as opposed to the habitual low-water mark along the coast. I should mention that the UK had conceded a breadth of four miles to Norway, so the actual breadth of that State's territorial sea was not in dispute<sup>14</sup>. Ultimately, the Court recognised Norway's entitlement to rely upon a general straight baselines system to measure the breadth of its territorial sea in light of the geographical peculiarity of its coast. In so doing, the Court significantly advanced the judicial appreciation of the relevant legal norms, many of which are now mirrored in UNCLOS.

That said, the *Fisheries* case likely consecrated the exceptional status of the straight baselines system, signifying that due deference is to be given to the habitual low-water mark standard in any given case. One need only read article 5 of UNCLOS, which states: “[e]xcept where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scaled charts officially recognized by the coastal State”<sup>15</sup>. Similarly, article 7 of the same instrument also reflects several of the elements offered by the Court in the *Fisheries* case when confirming the applicability of the straight baselines system, chief amongst them being the following: “[i]n localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity”<sup>16</sup>.

However, paragraph 3 of the same provision does impose some restrictions, indicating that straight baselines must not be drawn in a manner which “depart[s] to any appreciable extent from the general direction of the coast”, and that “the sea areas lying within the lines must be sufficiently

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<sup>12</sup>(*Cameroon v. Nigeria: Equatorial Guinea intervening*), *Judgment*, *I.C.J. Reports* 2002, p. 442, para. 290.

<sup>13</sup>Above note 7, p. 94, para. 177.

<sup>14</sup>*Fisheries (United Kingdom v. Norway)*, *Judgment*, *I.C.J. Reports* 1951, pp. 119-120

<sup>15</sup>United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, *UNTS*, 1833).

<sup>16</sup>*Ibid.*

closely linked to the land domain to be subject to the regime of internal waters”, thereby reflecting the views expressed by the Court in the *Fisheries* case<sup>17</sup>. Interestingly, while not forming a full-fledge independent element driving the reasoning of the Court, economic factors, such as reliance by local communities on fishing activities in a given maritime area, did nonetheless inform its decision to ascertain whether the straight baselines system was applicable to the Norwegian coastline. Article 7, paragraph 5, of UNCLOS ultimately incorporated a similar approach, that is only where the method of straight baselines applies may account be taken of “economic interests peculiar to the region concerned” when determining particular baselines.

Some 60 years later, in the *Qatar v. Bahrain* case, the Court revisited the question whether a State may draw straight baselines in order to effect delimitation of its maritime areas, this time in a decidedly different scenario. Drawing inspiration from the method prescribed by UNCLOS by reference to its status as a *de facto* archipelagic State, Bahrain felt it was entitled to draw archipelagic baselines. Indeed, Article 47 of that convention provides that such States may draw “straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago”. However, given that Bahrain had not subsumed this request under its formal submissions to the Court, the ICJ declined to rule on this question; rather, it construed its role as confined to drawing a single maritime boundary in accordance with international law, as requested by the parties<sup>18</sup>.

Recalling the binding force of its judgments pursuant to article 59 of its Statute, the Court insisted that its delimitation would remain unchanged by Bahrain’s eventual decision to declare itself an archipelagic State, or by any other such unilateral action undertaken by either party. In short, the Court affirmed the paramount importance of the stability of maritime boundaries<sup>19</sup>.

Equally interesting was the Court’s consideration of the relevance and impact of maritime features, other than the main coast, on the determination of the baselines. Relying on UNCLOS, the Court underscored that “[i]n accordance with Article 121, paragraph 2, of the 1982 [Convention], which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory”<sup>20</sup>. Article 121, paragraph 1, of UNCLOS excludes low-tide elevations from the ambit of the definition of “island”, and provides that such feature is “a naturally formed area of land, surrounded by water, which is above water at high tide”.

However, when a boundary is to be drawn between two opposite or adjacent States with overlapping maritime areas, complications ensue and it may well be that some islands might be disregarded when establishing baselines, should they bring about a disproportionate effect on the resulting boundary. Of course, it remains a matter for interpretation whether this operation should occur before the Court even posits a provisional line, or whether it should rather be addressed at the adjustment stage of the delimitation, when the Court considers relevant factors warranting correction of its provisional line, or during both stages of the delimitation. What Article 13 of UNCLOS tells us is that when a low-tide elevation is “situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island”, “the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea”<sup>21</sup>.

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<sup>17</sup>*Fisheries* case, above note 14, p. 133.

<sup>18</sup>*Qatar v. Bahrain*, above note 7, p. 97, para. 183.

<sup>19</sup>*Ibid.*

<sup>20</sup>*Ibid.*, p. 97, para. 185.

<sup>21</sup>UNCLOS, above note 15, Art. 13.

### **Equitable outcomes when delimiting the territorial sea, the continental shelf and EEZ**

Another monumental contribution in the Court's jurisprudence lies in the introduction of the concept of "equity" in maritime delimitation contexts. This development is explained, in large part, by the fact that the applicable legal rules cannot exhaustively cover all situations of overlapping maritime claims. The 1969 *North Sea Continental Shelf* cases were instrumental in introducing the notion of equity, in which the Court was called upon to ascertain the legal rules applicable as between Germany and the Netherlands and Germany and Denmark with respect to the delimitation of their respective continental shelf areas in the North Sea. In the Court's view, such delimitation had to be carried out "in accordance with equitable principles, and taking account of all the relevant circumstances"<sup>22</sup>.

UNCLOS ultimately mirrored the Court's pronouncements in its provisions pertaining to delimitation of the continental shelf and the EEZ between States with opposite or adjacent coasts. Indeed, the attainment of an "equitable solution" remains the central objective in both Articles 74 and 83 of UNCLOS. The ensuing delimitation must, therefore, be effected in conformity with customary principles and rules regulating the continental shelf and EEZ, as UNCLOS provides no further guidance on how the equitable aspects of a given solution are to be envisaged. By contrast, Article 15 of the same instrument, which reflects customary international law as confirmed by the Court in the *Qatar v. Bahrain* case<sup>23</sup>, expressly mentions the equidistance/special circumstances method with respect to delimitation of the territorial sea as between adjacent or opposite States.

In the *North Sea Continental Shelf* cases, the Court had to ascertain whether the equidistance principle, enshrined in Article 6 of the 1958 Geneva Convention on the Continental Shelf, formed part of customary international law, Germany not being a party to that instrument. Ultimately, the Court held that neither the equidistance method, nor any other delimitation methodology, had to mandatorily be applied between the parties to determine their respective continental shelf entitlements in the North Sea<sup>24</sup>. Several years later, this time in the *Continental Shelf* case opposing Libya and Malta, the Court similarly declined to "accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which *must* be used"<sup>25</sup>.

Despite this initial resistance exhibited by the Court, the method by which it posits a provisional equidistance line in the area to be delimited before adjusting that line, if necessary, by taking account of special circumstances for the purposes of achieving an equitable solution ultimately became its preferred delimitation approach. In fact, virtually all cases brought before the Court since the *Gulf of Maine* Judgment in 1984 were disposed of by reference to this methodology, which was applied by the Court to all maritime areas in dispute, with the notable exception of the 2007 case between Nicaragua and Honduras. Because of the particular geographical situation in that case, the Court ultimately resorted to a bisector line as it was

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<sup>22</sup>Above note 4, p. 53, para. 101.

<sup>23</sup>Above note 7, p. 94, para. 176.

<sup>24</sup>*North Sea Continental Shelf* cases, above note 4, p. 53, para. 101.

<sup>25</sup>*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 37, para. 43 (emphasis in original).

unfeasible to construct an equidistance line. However, it underscored that “[a]t the same time equidistance remains the general rule”<sup>26</sup>.

Thus, the Court’s jurisprudence has been instrumental in ensuring greater unity in the field of maritime delimitation. In its view, there exists a solid connection between the legal regime governing delimitation of the territorial sea, which it termed the “equidistance/special circumstances rule”, on one hand, and the principles regulating delimitation of the continental shelf and EEZ, which it expressed as the “equidistance/relevant circumstances rules”, on the other hand. As it confirmed in the *Qatar v. Bahrain* case, both régimes warrant the application of a similar delimitation approach, rooted in principles of equity and taking into account particular circumstances relevant to each case<sup>27</sup>.

Moreover, the concept of “median line”, which was appreciated interchangeably with “equidistance line” in the recent *Maritime Delimitation in the Black Sea* case with respect to delimitation methodology<sup>28</sup>, and was defined in both UNCLOS and the earlier Geneva Convention, was described by the Court as follows in *Qatar v. Bahrain*: “the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas [or the continental shelf and EEZ] of each of the two States is measured”<sup>29</sup>. Conversely, identifying particular circumstances susceptible of affecting the direction of a provisional equidistance line is more challenging, as no exhaustive list of such relevant/special circumstances exists<sup>30</sup>. In any event, State practice and the arguments submitted by parties to the Court have largely shaped the development of those relevant factors, which also progressively appeared in the Court’s jurisprudence. I now turn to a few of these special circumstances.

### **Special/relevant circumstances**

The coastlines of the parties has undoubtedly proven to be one of the most important factors taken into account by the Court as a relevant circumstance justifying a correction to a provisional delimitation line so as to achieve an equitable solution. However, it is not of recent vintage, as the Court had alluded to it for the first time in the *North Sea Continental Shelf* cases when it determined the rules and principles applicable to the delimitation of the parties’ respective continental shelf areas. When laying down the portion of the *dispositif* regarding factors to consider during the negotiations of an equitable boundary, the Court referred to the notion of having “a reasonable degree of proportionality ... 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”<sup>31</sup>. It is unsurprising that the “proportionality” factor has been invoked frequently by

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<sup>26</sup>Given the instability of the mouth of the River Coco near the Nicaragua-Honduras land boundary, coupled with the uncertain nature of some maritime features located offshore, thereby affecting the position of the appropriate base points to construct an equidistance line, the Court discarded the equidistance approach on the basis that it would not produce an equitable solution. In order to depart from the traditional rule, the Court found support in the wording of Article 15 of UNCLOS, which it did not interpret as precluding geomorphological problems from amounting to “special circumstances” and, therefore, from falling within the purview of the exception laid down in that provision. The Court took note of the fact that the parties had raised, in their pleadings, the possibility of using a different delimitation methodology. See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, pp. 742-45, paras. 275, 277-82.

<sup>27</sup>Above note 7, p. 111, para. 231.

<sup>28</sup>Indeed, the Court opined that no legal consequences flow from the use of both terminologies since “the method of delimitation is the same for both”. See above note 11, p. 101, para. 116.

<sup>29</sup>Above note 7, p. 94, para. 177.

<sup>30</sup>As the tribunal observed in the *Guyana/Suriname* Arbitration, “special circumstances that may affect a delimitation are to be assessed on a case-by-case basis, with reference to international jurisprudence and State practice”. See Award of 17 September 2007, pp. 95-96, para 303. See also *ibid.*, para. 304 (equating “[n]avigational interests” with “special circumstances”).

<sup>31</sup>*North Sea Continental Shelf* cases, above note 4, p. 54, para. 101.

parties before the Court so as to substantiate an adjustment to an equidistance line provisionally drawn.

In the 1982 *Tunisia/Libya* case, concerned with preserving the rights that other States could claim in the future, the Court determined that it was reasonable to initiate a proportionality analysis. The Court grounded this conclusion on a hypothesis that the entire maritime area between the two States had been divided, even if, in actuality, the delimitation line could not completely be drawn in the relevant area. A contrary conclusion would have made the prospect of an equitable delimitation challenging until all other delimitations in the relevant area — including those concerning the rights of third States — had been effected<sup>32</sup>. In this connection, the Court insisted upon the fact that it was “not dealing here with absolute areas, but with proportions”<sup>33</sup>.

The Court then proceeded to ascertain the ratio between the length of the Libyan coast, measured alongside its coastline, and the length of the Tunisian coast, measured in a similar manner, leading it to identify a proportion of approximately 31:69 in favour of the Tunisian coast. The Court arrived at a similar proportion when it conducted the same operation, this time with the use of straight lines drawn along the two coasts. Again, a very similar ratio was generated by the Court’s assessment of the ratio representing the two States’ respective seabed areas. Ultimately, the Court concluded that “[t]his result, taking into account all the relevant circumstances, seems to the Court to meet the requirements of the test of proportionality as an aspect of equity”<sup>34</sup>.

In the *Qatar/Bahrain* case, the Court was again confronted with arguments concerning a considerable disparity in coastal lengths. The Court did not carry out a precise assessment of the coastal ratios as it had done in the *Tunisia/Libya* case; rather, it observed that the Qatari contention as to disparity hinged solely on the assumption that the disputed Hawar Islands fell under its sovereignty. Having rejected this line of argument, the Court then proceeded to swiftly dismiss Qatar’s claim for an appropriate correction of the boundary it had provisionally posited<sup>35</sup>.

Parties to maritime disputes before the Court have also invoked another relevant circumstance, rather unsuccessfully so far, namely that of the existence of economic activities undertaken by the parties in the maritime areas subject to delimitation. In the *Qatar v. Bahrain* case, for example, Bahrain insisted that the presence of pearling banks on the northern coast of the Qatar peninsula, home to a long-standing culture of Bahraini fishing, should affect the delimitation in its favour. In responding to this argument, the Court highlighted that pearl fishing in that area was always considered “as a right which was common to the coastal population”, not exclusively reserved for Bahraini fishermen; furthermore, the Court took note of the cessation of the pearling industry along those banks, which occurred some time before. Dismissing Bahrain’s claim, the Court held that it did “not consider the existence of pearling banks, though predominantly exploited in the past by Bahrain fishermen, as forming a circumstance which would justify an eastward shifting of the equidistance line as requested by Bahrain”<sup>36</sup>.

Several other claims grounded in economic concerns were similarly put forth by the parties in the *Tunisia/Libya* case. For instance, Tunisia lamented its lack of access to the same natural resources that Libya could secure, primarily mineral and agricultural, and argued that it was in a state of relative poverty compared to the wealth of resources enjoyed by Libya. Tunisia further contended that the fishing resources situated in the waters claimed on the basis of “historic rights”

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<sup>32</sup>*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 91, para. 130.

<sup>33</sup>*Ibid.*

<sup>34</sup>*Ibid.*, p. 91, para. 131.

<sup>35</sup>*Qatar v. Bahrain*, above note 7, p. 114, paras. 241-43.

<sup>36</sup>*Ibid.*, p. 113, para. 236.



was a way for Tunisia to supplement its national economy in order to ensure its survival<sup>37</sup>. For its part, Libya argued that the presence or absence of oil or gas resources in the continental shelf of either party should be a significant factor to be considered in the delimitation process<sup>38</sup>.

The Court rejected the Tunisian contentions, equating them with “extraneous factors” that may vary over time. It went on to say that “[a] country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource”<sup>39</sup>. Conversely, the Court did not categorically pronounce on the argument concerning oil and gas resources located in the continental shelf to be delimited, opining that it could have its place in a series of relevant factors to be considered on the road to an equitable solution<sup>40</sup>.

In the *Qatar v. Bahrain* case, Qatar also raised the existence of a division of a seabed between the parties that had been decided by the British authorities in 1947, when both parties were under their protection. This contention did not sway the Court, as neither party had argued that the British decision was binding upon it, rather both invoking parts of the decision to support their own claims. What is more, the Court was mandated by the parties with delimiting, by a single boundary, both the continental shelf and the EEZ areas of the parties, whereas the British decision of 1947 was solely confined to dividing the seabed of the two States<sup>41</sup>.

A grant of concessions for offshore exploitation of oil and gas constitutes another special circumstance considered by the Court as a potential justification for adjusting a delimitation line. In the *Tunisia/Libya* case, concerning the delimitation of the respective continental shelf areas, the Court opined that the granting of oil concessions in certain spaces revealed the existence of a *de facto* line. Short of instituting an implicit agreement between the parties on a particular line of demarcation, the Court nonetheless concluded that the location of the concessions amounted to a relevant factor, if only as a starting point, in effecting the delimitation of the continental shelf<sup>42</sup>.

A similar contention was advanced by Nigeria in the *Cameroon v. Nigeria* case, namely whether “the oil practice of the Parties provide[d] helpful indications for purposes of the delimitation of their respective maritime areas”<sup>43</sup>. Upon canvassing its own jurisprudence and other arbitral awards on the subject, the Court concluded that

“although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line”<sup>44</sup>.

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<sup>37</sup>*Tunisia/Libya*, above note 32, p. 77, para. 106.

<sup>38</sup>*Ibid.*

<sup>39</sup>*Ibid.*, p. 77, para 107. Similarly, in the *Libya/Malta* case, the Court dismissed the contention that the wealth of States constitutes a relevant circumstance that should affect maritime delimitation. See *Libya/Malta*, above note 25, p. 41, para. 50.

<sup>40</sup>*Tunisia/Libya*, above note 32, pp. 77-78, para. 107.

<sup>41</sup>*Qatar v. Bahrain*, above note 7, pp. 113-14, paras. 239-40.

<sup>42</sup>*Tunisia/Libya*, above note 32, p. 84, para. 118.

<sup>43</sup>*Cameroon v. Nigeria*, above note 12, p. 447, para. 302.

<sup>44</sup>*Ibid.*, pp. 447-48, para. 304.

Thus, the Court declined to take account of this circumstance given the absence of any agreement between the parties concerning their oil concessions. This approach was also followed more recently in the *Maritime Delimitation in the Black Sea* case<sup>45</sup>.

Lastly, the presence of islands and other maritime features in the relevant area also warranted consideration in the Court's jurisprudence as a circumstance justifying a correction to a provisional line. In cases where competing claims exist in a given maritime area, islands and other features have sometimes been disregarded in the delimitation process so as to do away with their disproportionate effect, especially when dealing with insignificant maritime features. It is with this in mind that the Court in the *Qatar v. Bahrain* case excluded Qit'at Jaradah from the base points used to construct the equidistance line between the two States, a tiny uninhabited island situated halfway between the main island of Bahrain and the Qatar peninsula<sup>46</sup>.

Similarly, in *Libya/Malta* the provisional equidistance line posited by the Court remained unaffected by the uninhabited islet of Filfla for equitable purposes<sup>47</sup>. In the *Cameroon v. Nigeria* case, Cameroon argued that the presence of Bioko Island off its coast could serve as a ground for shifting the median line. However, Bioko Island was subject to the sovereignty of a third State, Equatorial Guinea, prompting the Court to declare that "the effect of Bioko Island on the seaward projection of the Cameroonian coastal front is an issue between Cameroon and Equatorial Guinea and not between Cameroon and Nigeria, and is not relevant to the issue of delimitation before the Court"<sup>48</sup>.

### **Concluding thoughts: towards greater unity and coherence in maritime delimitation**

The Court's jurisprudence has thus played a central role in further developing the law governing maritime delimitation. Its influence has been pervasive in the works of arbitral tribunals and other relevant international decision-making bodies. By way of example, the equidistance/special circumstances methodology, whose genesis was first mapped out in the 1985 *Libya/Malta* case<sup>49</sup>, was referred to and confirmed by the tribunals in the *Guyana/Suriname* and *Barbados/Trinidad and Tobago* arbitrations as the leading delimitation approach in public international law<sup>50</sup>.

There is no doubt that one of the Court's most recent contributions might become one of its most enduring pronouncements in the field. The unanimous decision in the *Maritime Delimitation in the Black Sea* case brought the coherence and unity of maritime delimitation law into sharp relief, first by confirming the validity of the delimitation methodology, and second, by further advancing the extant legal scheme. In short, the Court indicated that three defined steps must be contemplated when it is called upon to delimit the continental shelf or EEZ, or when it must determine a single maritime boundary.

To summarise, the Court first posits a provisional delimitation line by reference to geometrically objective criteria that accord with the geography of the area to be delimited. When faced with delimitation between adjacent coasts, the Court specified that "an equidistance line will

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<sup>45</sup>Above note 11, pp. 124-26, paras. 193-98.

<sup>46</sup>*Qatar v. Bahrain*, above note 7, pp. 104, 109, para. 219.

<sup>47</sup>*Libya/Malta*, above note 25, p. 48, para. 64.

<sup>48</sup>*Cameroon v. Nigeria*, above note 12, p. 446, para. 299.

<sup>49</sup>*Libya/Malta*, above note 25, p. 46, para. 60.

<sup>50</sup>Indeed, the tribunal stated that "[t]he case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in appropriate cases, begin by positing a provisional equidistance line which may be adjusted in the light of relevant circumstances in order to achieve an equitable solution". See above note 30, para. 342. See also *Barbados/Trinidad and Tobago*, Jurisdiction and Merits (UN Law of the Sea, Ann. VII, Arb. Trib., 11 Apr. 2006), para. 242.

be drawn unless there are compelling reasons that make this unfeasible in the particular case”<sup>51</sup>. Moreover, the “provisional delimitation line will consist of a median line between the two coasts” when delimitation is to be effected between two opposite coasts<sup>52</sup>. In the *Maritime Delimitation in the Black Sea*, the Court first posited a provisional equidistance line between the adjacent coasts of Romania and Ukraine, which then transformed into a median line between their opposite coasts, in light of the particular geography of the relevant area.

Keeping in line with Articles 74 and 83 of UNCLOS, the Court stressed that the “course of the line should result in an equitable solution”<sup>53</sup>. Consequently, the second stage of the inquiry requires the Court to consider relevant factors or circumstances in determining whether an adjustment or shift of the provisional equidistance line is warranted to achieve an equitable outcome<sup>54</sup>. Finally, the Court went on to describe the third and last stage of its delimitation approach, which is supported by State and jurisprudential practice. It is commonly referred to as the “disproportionality test”. In short,

“the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line . . . A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.”<sup>55</sup>

By way of final comment on this third step, the Court offered the following clarification: “This is not to suggest that these respective areas should be proportionate to coastal lengths”<sup>56</sup>.

There is every indication that this three-step methodology now constitutes the usual approach to be espoused in appropriate cases of maritime delimitation. Its validity as a tried and true reflection of the current state of international law has recently been affirmed by ITLOS in its first ever maritime delimitation case. Thus, ITLOS endorsed the Court’s three-step methodology in a case where it was called upon to determine a maritime boundary between Bangladesh and Myanmar in the Bay of Bengal<sup>57</sup>.

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Mr. Chairman,  
Distinguished Delegates,

Maritime delimitation jurisprudence has evolved harmoniously and coherently over the last two decades, with the ICJ playing a central role in the progressive development of the relevant legal scheme. Indeed, a rich horizontal dialogue and cross-fertilisation actuate various judicial and arbitral processes confirming the validity of the relevant rules applicable to delimitation exercises.

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<sup>51</sup>*Maritime Delimitation in the Black Sea*, above note 11, p. 101, para. 116.

<sup>52</sup>*Ibid.*, p. 101, para. 116.

<sup>53</sup>*Ibid.*, p. 101, para 120.

<sup>54</sup>*Ibid.*, pp. 101, 103, paras. 120-121.

<sup>55</sup>*Ibid.*, p. 103, para. 122.

<sup>56</sup>*Ibid.*

<sup>57</sup>Dispute concerning *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, paras. 233-40.

Such unity in decision-making appears to have assuaged initial fears and concerns, voiced in some circles most notably in the 1980s, that the law of maritime delimitation was headed towards a fragmented future. What is more, it vindicated the assertion of the then ICJ President, Dame Rosalyn Higgins, that “so-called ‘fragmentation of international law’ is best avoided by regular dialogue between courts and exchange of information”<sup>58</sup>.

Relevant guiding principles and consecration by the Court of the provisional equidistance line/relevant circumstances methodology — or the three-step approach I have just described if the final verification of the boundary line is envisaged as a separate stage of the inquiry — is now firmly entrenched in maritime delimitation decision-making. In this light, there is every indication that the lockstep march and practice of States and international judicial and arbitral bodies will continue onward, and toward greater unity and coherence in the application and interpretation of the relevant legal principles.

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<sup>58</sup>Statement by H.E. Judge Rosalyn Higgins, President of the ICJ, at the Meeting of Legal Advisers of the Ministries of Foreign Affairs, 29 October 2007, available at [www.icj-cij.org/presscom/files/7/14097.pdf](http://www.icj-cij.org/presscom/files/7/14097.pdf).

On Friday 2 November 2012, the ICJ President participated in a discussion held by the Committee. His speech was not delivered during this meeting but was recorded later. The video is available on the website of the UN Audiovisual Library of International Law (AVL): [www.un.org/law/avl](http://www.un.org/law/avl)

Le vendredi 2 novembre 2012, le président de la Cour a participé à la discussion au sein de la commission. Son discours n'a pas été prononcé pendant cette réunion, mais a été enregistré plus tard. L'enregistrement vidéo est disponible sur le site Internet de la bibliothèque audiovisuelle de droit international (AVL) de l'Organisation : [www.un.org/law/avl](http://www.un.org/law/avl)