CORNELIS VAN VOLLENHOVEN MEMORIAL LECTURE

THE INTERNATIONAL COURT AND THE LAW OF THE SEA

by Sir Cl. Humphrey M. Waldock
C.M.G., O.B.E., D.C.L., Q.C.

T.M.C. ASSER INSTITUTE
CORNELIS VAN VOLLENHOVEN FOUNDATION

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The T.M.C. Asser Institute is an interuniversity institute founded in 1965 by the eight Dutch universities offering courses in international law. The Institute is responsible for the promotion of education and research in international law, particularly by carrying out documentation and research programmes, in the fields covered by the three departments. It participates in both the editing and publishing of the Netherlands International Law Review and the Netherlands Yearbook of International law.

INTRODUCTION

The "Cornelis van Vollenhoven Foundation" bears the name of a great scholar who, before and between the two worlds wars, placed his unusual gifts at the service of the promotion of a world wide international organization and the prevention of international conflict. The Foundation promotes the study of International Law at Holland's oldest university and contributes to the study of the international world order.

In order to perpetuate the memory of the Leyden Professor after whom the foundation was named, it was decided to request distinguished personalities in the fields in which Professor Van Vollenhoven had been actively engaged to deliver memorial lectures named after him.

The curators of the foundation are very happy that Sir Humphrey Waldock, President of the International Court of Justice was willing to deliver the first "Cornelis van Vollenhoven Memorial Lecture" in the main auditorium of the university on a subject of such general interest as the rôle of the International Court of Justice in recent developments in the International Law of the Sea.

The fortunate circumstance that the President of the International Court was willing to initiate what it is hoped will become a series of important contributions to the study of international law seems a fitting tribute to Cornelis van Vollenhoven, who never tired of upholding the concept of an international world order in which an international court of justice would be the supreme arbiter of differences and conflicts.

H. Boon
Chairman of the Board of Curators of the
Cornelis van Vollenhoven Foundation.

THE INTERNATIONAL COURT AND THE LAW OF THE SEA

When the Cornelis van Vollenhoven Foundation decided to initiate a series of Memorial Lectures they intimated that they would like the subject of this first lecture to be 'The Prospects for the Law of the Sea'. The uncertainty as to the outcome of the Third United Nations Conference on the Law of the Sea, they thought, might 'offer an opportunity to venture some constructive ideas'. However, the effects of the work of the conference on the law may be made an issue in cases before the International Court, and the foundation accepted a suggestion that the lecture should in stead be devoted to an examination of the contribution to the development of the law of the sea made by the Court, and of the interaction between its decisions and the codification process.

Being at once a highway for navigation and a reservoir of vital natural resources, the sea is a sphere in which the interests of States have throughout history been particularly prone to conflict. Yet the Permanent Court was called upon to consider the law of the sea only once, in 1927, in the *Lotus* case[1]. That case, it may be recalled, concerned a French vessel that had been in a collision on the high seas with a Turkish vessel, in which the latter was sunk and several persons on board lost their lives. After rescuing survivors, the Lotus put into what we now call Istanbul, where both her officer of the watch and the captain of the Turkish vessel were prosecuted and convicted on charges of manslaughter. The French Government then objected that the principle of freedom of the high seas gave France, as the flag State, exclusive jurisdiction with respect to the acts of the French officer on board the Lotus at the time and place of the collision. This general proposition was not questioned by Turkey which, on the basis of that same principle, argued that the Turkish vessel was to be regarded as legally Turkish territory and the acts of the French officer as having produced effects on Turkish

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1. *P.C.I.J., Series A, No. 10.* The case entitled *'Delimitation of the Territorial Waters between the Island of Castellorizo and the Coasts of Anatolia', P.C.I.J., Series A/B, No. 51,* pp. 4-6, concerned the title to certain islets and, in any event, was withdrawn.

Sir Humphrey Waldock,
President of the International Court of Justice

territory. The Court, too, treated it as axiomatic that, 'apart from certain special cases which are defined by international law, vessels on the high seas are subject to no authority except that of the State whose flag they fly'. By way of underlining the point, it added:

> 'Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law[2].'

The Permanent Court there did no more than put its seal upon a rule which is one of the constituent elements of the *mare liberum* and was later incorporated in Article 6 of the 1958 Geneva Concention on the High Seas. True, the 'special cases', which the Permanent Court referred to as possible exceptions to the rule, to-day loom much larger than they did in 1927, owing to the spread of claims of coastal States to the continental shelf, the economic zone, or archipelagic waters. But these modern developments increase rather than lessen the importance of that rule, without which freedom of navigation upon the high seas may be gravely impaired. So, we find the exclusive jurisdiction of the flag State also reaffirmed in Article 92 of the Informal Composite Negotiating Text[3], and can only hope that this may prevent the principle from being overlaid by the 'special cases'.

In the *Lotus* case, however, the vessel had entered Turkish waters of its own volition, and it was within Turkish territory that Turkey's exercise of jurisdiction with respect to the French officer took place. This led the Court to view the case as turning rather upon the limits of a State's territorial jurisdiction in regard to crimes committed abroad than upon competing rights of jurisdiction on the high seas. Making its famous, if controversial, pronouncement that restrictions upon the independence of States cannot be presumed, the Court in effect held that it was for France to establish the existence of a general rule prohibiting Turkey from exercising its criminal jurisdiction in the particular circumstances. It said that otherwise Turkey's title to exercise the disputed jurisdiction rested in its sovereignty and it went on to find that its own examination of the available State practice, precedents and doctrinal writings had not convinced it of the existence of any such rule.

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2. *P.C.I.J., Series A, No. 10,* p. 25.
3. 15 July 1977, A/Conf. 62 WP.10.Rev.1. Hereafter referred to as the Negotiating Text.

This finding was reached only by the casting vote of the President, and it may have been influenced by the fact that only in the previous year the League of Nations Committee of Experts had reported against any attempt to codify the Criminal Competence of States in respect of offences committed outside their territory because it would 'encounter grave political and other obstacles[4]. Be that as it may, the decision in the *Lotus* case caused much disquiet in maritime circles because of the delays to merchant shipping likely to result from the prosecution of ships' officers in foreign ports. The question was reopened after the war at a small conference of maritime States, held in Brussels in 1952, and the rule laid down by the Permanent Court was then rejected in favour of the exclusive jurisdiction of the 'flag State'[5]; and it is the latter principle which is to be found in Article 11 of the 1958 Geneva Convention on the High Seas and now in Article 97 of the Negotiating Text. To-day, therefore, the Permanent Court's contribution to the modern law of the sea appears to have been somewhat marginal.

The paucity of cases before the Permanent Court did not, however, mean that there were no maritime disputes. The failure of the 1930 Conference to reach agreement on the three-mile limit encouraged some States to assert wider claims, which provoked protests from supporters of the three-mile limit. The introduction of ocean-going trawlers also led to increased exploitation of rich fisheries by foreign vessels, provoking apprehensions among the fisherman of the coastal State. Japanese trawling on the high seas near to the three-mile limit, for example, began to take a heavy toll of Alaskan salmon stocks, while United Kingdom and other European vessels intensified their activity off the Norwegian coast. Oil companies had also begun to employ new techniques for drilling on the sea-bed off Texas, Louisiana and California, and two of these States, despite the Federal Government's adherence to the three-mile limit, had even tried to extend their territorial waters to 27 miles in order to provide cover for off-shore concessions[6]. In short, the seeds of future disputes were already being sown between the wars.

In its very first case, the *Corfu Channel* case[7], the present

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4. Report of 29 January 1926; see Rosenne, *The Progressive Codification of International Law*, vol. 2, pp. 9-10.
5. Cf. *Yearbook of the International Law Commission* (1956), vol. ii, p. 281.
6. Waldock, *International Relations* (1956), vol. 1, pp. 163-94.
7. *I.C.J. Reports 1949*, p. 4.

Court was confronted with the question of a right of innocent passage through international straits which has been one of the key issues in the Third Law of the Sea Conference. That case concerned the blowing up of the two British warships en route through the North Corfu strait by mines newly laid in Albania's territorial sea. The Court found as a fact that the laying of the mines could not have been accomplished without the knowledge of the Albanian authorities, and that with that knowledge certain obligations became incumbent upon them. These obligations, it said:

> 'consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching warships of the imminent danger to which the minefield exposed them'.

They were based, it explained, on-

> 'certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States[8]'.

The obligation laid by the Court upon a coastal State to give warning of a known danger to navigation within its coastal sea was, it is believed, there stated for the first time in such general terms. Certainly, the rule proposed at the 1930 Codification Conference had gone no further than to require a coastal State to "put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea". In 1958, on the other hand, Article 15 of the Geneva Convention on the Territorial Sea, after repeating that rule in slightly different language, added to it a second paragraph which read:

> 'The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.'

Moreover, in its commentary upon that Article, the International Law Commission explained that the Article 'confirmed' the principles upheld by the Court in its Judgment in the *Corfu Channel* case[9]. Then, if you turn to the Negotiating Text, you

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8. Ibid., p. 22.
9. The Article was Article 16 in the Commission's draft; see *Yearbook of the International Law Commission* (1956), vol. ii, p. 273.

will find this rule reiterated in Articles 24 and 44 of the Text.

More significant for the future law of the sea was the pronouncement by which the Court rejected Albania's contention that, by navigating the strait without its previous authorization, the British warships were violating its sovereignty:

> 'It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international Convention, there is no right for a coastal State to prohibit such passage through straits in time of peace[10].'

In support of that pronouncement the Court might have cited an observation in the Report of the Territorial Waters Committee of the 1930 Conference[11], of which Professor François was the Rapporteur, which read "under no pretext whatever may the passage of warships through straits used for international navigation between two parts of the high seas be interfered with'. But the writings of jurists and the evidence of practice left some doubt as to whether at that date the passage of warships through an international strait was a matter of right or of comity: a doubt of which British Counsel themselves were conscious when preparing the British Argument. The Court's pronouncement removed the doubt and established the important principle that in peace-time a special régime of freedom of innocent passage applies in 'an international strait'. It also ensured that the International Law Commission would recommend the inclusion of the principle in the 1958 Convention on the Territorial Sea and the Contiguous Zone, where it is to be found in paragraph 4 of Article 16[12].

Recent developments have given this principle a wider significance. The move towards a twelve-mile territorial sea threatens to bring a number of vital sea passages within the territorial seas of the coastal States, while the introduction of the concept of 'archipelagic waters' raises the problem of freedom of navigation through passages between archipelagic islands. At any rate, quite a number of maritime States made it plain in their opening speeches at the Third United Nations Conference on the Law of

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10. *I.C.J. Reports 1949*, p. 28.
11. *Acts of the Conference for the Codification of International Law*, vol. III, p. 220.
12. See the Commission's commentary on what was then Article 24 of its draft; *Yearbook of the International Law Commission* (1956), vol. ii, pp. 276-7.

the Sea in 1974 that they viewed the adoption of satisfactory provisions safeguarding freedom of navigation in international straits and through archipelagic waters as a *sine qua non* of the projected new Convention on the Law of the Sea[13]. These provisions as they appear in Parts III and IV of the Negotiating Text, are too elaborate to be examined in detail here, where it must suffice to indicate the developments inspired by the *Corfu Channel* Judgment.

Part III of the Negotiating Text, which devotes no less than twelve articles to "straits used for international navigation", provides in Articles 37 to 44 for a special régime of passage, which it terms 'transit passage' to distinguish it from the normal régime of innocent passage through the territorial sea. 'Transit passage' appears designed, subject to certain safeguards for coastal States, to establish the same unrestricted right to freedom of passage for all ships and aircrafts as they enjoy on or above the high seas, and thus even to enlarge a little the right of passage recognized in the *Corfu Channel* case. This special régime the Negotiating Text applies to 'straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone' – which is the modern equivalent of what we would formerly have called two areas of the high seas. But it makes a distinction between two kinds of such international straits which some have criticized the Court for not making in the *Corfu* case[14]. Transit passage is not to apply where the strait runs between an island and mainland belonging to the same State and there is an alternative high seas or exclusive economic zone route to seaward of the island 'of similar convenience with respect to navigational and hydrographical characteristics'. In the *Corfu* case, the Court did, in fact, give special importance to the role of that strait as a means of passage to the port of Corfu within it, and it may be a nice question whether the phrase in the Negotiating Text 'of similar convenience with respect to navigational and hydrographical characteristics' does or does not exclude the Corfu strait from the regime of 'transit passage'. In any event, even when there is an alternative route of similar convenience, Article 45 provides expressly that there may be no suspension of innocent passage through the strait;

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13. e.g., the U.S.S.R., Kenya, Norway, Canada, United Kingdom and U.S.A.; see *Third United Nations Conference on the Law of the Sea Official Records*, vol. I, pp. 68, 84-6, 98, 112, 160.

14. E. Bruel, *Laun Festschrift* (1953), pp. 259-78.

and this provision it also applies to straits which link an area of high seas or exclusive economic zone with the territorial sea of a foreign State. So, quite a luxuriant growth seems now to have sprung from the root planted in the *Corfu* case. As to archipelagic waters, however, the negotiating Text does not treat the matter as one of transit through international straits but gives expression to the principles of the freedom of maritime communication rather by according a right of innocent passage to ships of all States.

The Court's Judgment in the *Anglo-Norwegian Fisheries*[15] case in 1951 was described by Sir Hersch Lauterpacht[16] as a 'daring pieces of judicial legislation'; and an article in the 1951 number of the British Yearbook[17] sets out in some detail the reasons why the Judgment may be thought, in some respects, to have taken leave of what had previously been thought to be the existing law. In 1926 the League of Nations Experts had said that the general practice of States, all projects of codification and the prevailing doctrine agreed in considering that the base-line for delimiting the territorial sea should be the low-water mark *along* the coast. So, too, the relevant Committee of the 1930 Conference, without any apparent dissenting voice, had adopted 'the low-water mark along the entire coast' as the primary rule for the base-line, subject only to certain provisions regarding bays[18]. Yet the Court held that the existence of these exceptions negatived any claim of the low-water mark *along* the coast to be a general rule for delimiting the base-line, and treated it only as determining the choice between the low-water and the high-water mark as the legal extent seawards of a State's territory at any given point on its coast.

In a somewhat similar way the Court negatived the existence of any general rule limiting the length of the straight lines that may be used to enclose bays and indentations caused by coastal islands. It is true that, although a ten-mile limit had been proposed at the 1930 Conference, some States had advocated a six-mile limit, while there were one or two examples of twelve-mile claims in State practice. It is therefore understandable that the Court should decline to endorse the ten-mile limit as an existing customary rule. But in some passages it also used language which suggested that there was no rule imposing any limit upon

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15. *I.C.J. Reports 1951*, p. 116.
16. *The Times* newspaper, 8 January 1952, p. 7.
17. Waldock, *B.Y.I.L., 1951*, vol. 28, pp. 114-171.
18. *Acts of the Conference*, vol. III, p. 217.

the length of closing lines. Yet, as Gidel had pointed out[19], the very existence of the concept of particular 'historic bays' presupposed such a general rule.

It is one thing for the Court to pronounce in favour of the existence of a general rule of international law on the basis of a very general practice, as it did in the *Corfu Channel* case and as it may also be said to have done in its pronouncements concerning the use of straight base-lines along a heavily indented or island-fringed coast like that of Norway. But it seems quite another thing for the Court to infer the non-existence of any general rule simply from the existence of well-recognized exceptions to it, or from a minority practice, in face of a general opinion that some, if as yet not fully defined, general rule did exist. At any rate, it seems significant that on both the points mentioned above the Court's conclusions have not been followed either in the Territorial Sea Convention of 1958 or in Part II of the Negotiating Text. In the Convention[20] as in the Text[21], the low-water line *along* the coast is stated as the general rule for determining the base-line of the territorial sea except where otherwise provided, while the drawing of straight lines enclosing bays is made subject to a general limit of 24 miles[22]. No doubt, both the exceptions to the low-water line rule and the general limit for bays are appreciably larger than those proposed in 1930, inflation being prevalent in the law of the sea as elsewhere. But the formulation of the law on these questions in both the Convention and the Text reflects the approach, not of the Court, but of the Committee's proposals at the 1930 Conference.

A very different reception has been given to the Court's endorsement of the use of straight base-lines in cases of deeply indented or island-fringed coasts. Not only the basic rule enunciated by the Court but also the detailed criteria which it laid down for appreciating the legitimacy of any straight baselines drawn in such cases have been incorporated almost textually both in Article 4 of the 1958 Territorial Sea Convention and in Article 7 of the Negotiating Text. In those articles the definition of the category of cases covered by the rule, the principles that the straight base-lines must not depart to any appreciable extent from the general direction of the coast, that the sea areas

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19. *Droit international public de la mer* (1934), vol III, p. 537.
20. Article 3.
21. Article 5.
22. Article 7 of the 1958 Convention; Article 10 of the Negotiating Text.

lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters, and that account may be taken of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage, are all derived directly from the Court's Judgment.

It is difficult to quarrel with Lauterpacht's view that the Court's pronouncements amounted to judicial legislation in that the law had never been formulated in such a way before. Even if at the 1930 Conference coastal archipelagos had been recognized as presenting a special problem[23], there is no indication of any proposal to deal with it on the lines adopted by the Court. On this point, however, the Judgment does not seem to be judicial legislation in the sense of travelling outside the proper scope of the judicial function. The written pleadings in the case had revealed a sufficiently impressive body of practice in regard to the use of straight base-lines on indented or island-fringed coasts to make Counsel alert the United Kingdom Government to the possibility that the Court might find in it evidence of a general practice. This was indeed the reason why the United Kingdom ultimately conceded that Norway might claim the benefit of a historic title to the waters of its fjords and sunds, as the Court would not then need to pronounce upon the general law regarding bays and islands[24]. Accordingly, in deducing a general rule of customary law from the practice, the Court appears only to have exercised the normal function of an international tribunal, even if it may have done so in what some might call a 'progressive' manner.

Be that as it may, the contribution of the Judgment to the modern law of the sea has been considerable. In addition to its impact on the delimitation of base-lines on indented and island-fringed coasts, it helped to open the way to a special treatment of 'archipelagic' waters. Part IV of the Negotiating Text, it is true, confines the concept of archipelagic waters to non-coastal islands and the régime which it introduces for such waters is in many respects different from that applied by the Court to coastal islands. But the definition of an 'archipelago' in Article 16(b) and some of the provisions regarding archipelagic base-lines in Article 17 contain elements reminiscent of the language of the Court in the *Anglo-Norwegian Fisheries* case.

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23. *Acts of the Conference*, vol. III, p. 219.
24. See Reply of the United Kingdom, para. 513; *I.C.J. Pleadings, Fisheries* case (1949), vol. II, p. 513 and statement of Sir F. Soskice, vol. IV, pp. 27-9.

The Judgment in the *North Sea Continental Shelf* cases[25] has likewise made a significant, if perhaps unsettling, contribution to the modern law. Article 6 of the Geneva Convention on the Continental Shelf of 1958 had provided that, in the absence of agreement, the continental shelf boundary in the case both of 'opposite' and of 'adjacent' States should be determined by the equidistance principle, unless another boundary is justified by special circumstances. Germany not having ratified the Convention, however, the Court found that those provisions were not as such applicable with respect to Germany. But it also held that they could not be considered as rules of general international law[26]. Instead, it deduced the general law from the origins of the doctrine of the continental shelf in the Truman Proclamation of 1945, formulating it simply as the rule that the continental shelf boundary must be the object of agreement between the States concerned and one arrived at in accordance with equitable principles. At the same time, it found in the notion of 'the natural prolongation or continuation of the land territory into or under the high seas' the fundamental criterion of the appurtenance of a given area of continental shelf to a coastal State, rather than in the notion of 'proximity' which finds its application in the equidistance principle. Combining the two criteria, the Court formulated the basic rule as follows:

> 'Delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other[27].'

As to the use of equidistance as a criterion, the Court said in an earlier passage that, in applying equitable principles, the equidistance method can be used, but other methods exist and may be employed alone or in combination according to the areas involved[28].

When reference was made above to the Judgment as in some ways perhaps an unsettling contribution to the modern law, it was because previously it had commonly been understood that

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25. *I.C.J. Reports 1969*, p. 3.
26. *Inter alia*, on the ground that Article 6 is not one of the Articles with regard to which the Convention forbids the making of reservation.
27. *I.C.J. Reports 1969*, At p. 53, para. 101.
28. *I.C.J. Reports 1969*, At p. 47, para. 85 (b); cf. also p. 49, para 90.

equidistance was to be considered a principle as well as a 'method'. It had been supposed that the equidistance principle, qualified by the reservation 'unless another boundary is justified by special circumstances' had been adopted at Geneva in 1958 as being the appropriate way of expressing in legal terms 'delimitation in accordance with equitable principles'. Nor did it seem clear why the same equitable principles of delimitation should not have been arrived at by the route of 'special circumstances'. At any rate, the effect of the Judgment was to raise a question as to the status of the equidistance principle in delimitation of the continental shelf, and this question appears to be still undecided at the Third Law of the Sea Conference. The current formula, contained in Article 83 of the Negotiating Text, reads:

> 'The delimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing where appropriate, the median or equidistance line, and taking account of all the relevant circumstances.'

Clearly, that formula takes its inspiration from the Judgment of the Court rather than from the provisions of Article 6 of the 1958 Convention, and would attribute to equidistance the role of a 'method' rather than of a principle, of delimitation. However, it has been objected to by a number of States which maintain that the status of equidistance as a general principle should be recognized, and at the recent session in Geneva the Chairman of the Negotiating Group expressed doubt as to whether 'the Conference may ever be in a position to produce a provision which would offer a precise and definite answer to the question of delimitation criterial[29] '.

What is at stake is whether, in the absence of agreement, the equidistance principle is automatically applicable as a matter of law, unless on equitable grounds another method of delimiting the boundary is called for by reason of special circumstances, or whether it is always merely a possible method for effecting an equitable delimitation. The point still being controversial cannot be pursued further here. But some consolation may perhaps be found in the fact that the Anglo-French Court of Arbitration concerning the continental shelf of the Channel and Atlantic[30], when invited by counsel to refer to the Revised Single Nego-

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29. E.J. Manner (Finland) United Nations Press Release, 27 April 1979 (S.E.A. 109)
30. Her Majesty's Stationary Office, Miscellaneous, no. 15 (1978) Cmnd. 7438.

tiating Text[31] rather than to the 1958 Convention, said it saw no reason to suppose that this would make any material difference to the determination of the boundary in the circumstances of that case.

In the *North Sea* cases, you will recall, the Court laid much emphasis on the concept of the continental shelf as the natural prolongation of the coastal State's land territory into and under the sea. This concept is given expression in the Negotiating Text as an elements in its definition of the continental shelf[32]; but, unlike the Judgment, the text does not make it a specific, determining, element in the delimitation of the continental shelf boundary. It may, however, be doubted whether the omission of that element from the Negotiating Text is very material. In the Judgment, it is true, the Court underlined that, just as the continental shelf of any State must be the natural prolongation of its land territory, so also it 'must not encroach upon what is the natural pronlongation of the territory of another State'. But, as the Anglo-French Court of Arbitration observed, that proposition merely states the problem of delimitation which arises when the territories of two or more States abut on a single continuous area of continental shelf without really furnishing a criterion for solving it[33]. This is not to deny the general relevance of the 'natural prolongation' concept as the basis of a coastal State's rights in the continental shelf, which was indeed invoked by both parties in the Anglo-French Arbitration in support of their competing claims. But other criteria are needed to determine in any given case precisely which areas of shelf are *legally* to be considered as the natural prolongation of which State.

The difficulty is that the problem of delimiting the continental shelf is apt to vary from case to case in response to an almost infinite variety of geographical circumstances. In consequence, to attempt to lay down precise criteria for solving all cases may be to chase a chimera; for the task is always essentially one of appreciating the particular circumstances of the particular case. This is true whether the law to be applied is the equidistance – special circumstances rule of Article 6 of the 1958 Convention[34] or the general rule of international law as formulated by the

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31. Article 71 of which contained the same formula as in Article 83 of the latest version of the text.
32. Article 76.
33. Her Majesty's Stationary Office, Miscellaneous, no. 15 (1978) Cmnd. 7438, para 79.
34. Article 6 does not define 'special circumstances', nor does it indicate the criterion for determining whether any given set of circumstances justify a boundary other than the equidistance line.

Court. This being so, it may prove that the most substantial contribution to the law made in the *North Sea* Judgment is to be found in certain general points made by the Court in the course of its appreciation of the facts of that case.

One such point is the Court's insistence that delimitation of the continental shelf in accordance with equitable principles is not a question of distributing just and equitable shares to each State; it is rather one of equitably drawing a boundary line between areas which already appertain to one or other of the States concerned[35]. This follows, it explained, from the very concept of the continental shelf as the natural prolongation of the coastal State's territory. Another is the point strongly emphasized by the Court that, in appreciating the appropriateness of applying the equidistance method, a distinction has to be drawn between the geographical situation where the coasts of States abutting on the same continental shelf are opposite and one where they are adjacent to each other[36]. An equidistance boundary in the latter case may extend more or less indefinitely out to sea. In consequence an irregular geographical feature on the coast of either State may affect its course over long distances and thus be more prone to produce an inequitable delimitation than would be the case between 'opposite' States. Both the 1958 Convention and the Negotiating Text, it is true, recognize the existence of two distinct situations of 'opposite' and 'adjacent' States. But they do so without drawing any conclusion from the distinction, and the Court's treatment of the matter is surely an illuminating contribution to this aspect of the delimitation of the continental shelf. This may also be said of the Court's observation that, in some geographical situations, the relationship between the two coasts may, along the same boundary, in varying degree, partake of the nature both of a median and of a lateral line[37]. Equally, the Court's finding in the *North Sea* Judgment that, in appreciating the equitable character of a delimitation between any two States, account should be taken of 'the effects, actual or prospective of any other continental shelf delimitations between adjacent States in the same region[38] ' may be of relevance in other cases. Yet another point is the Court's use in that case of the notion of proportionality, with respect to coastlines abutting

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35. *I.C.J. Reports 1969*, At pp. 21-23.
36. Ibid. At pp. 36-37.
37. Ibid. At p. 17.
38. Ibid. Page 54, para. 101, D(3).

on the same area of shelf, as a criterion for appreciating the equitable or inequitable effects of a method of delimitation[39].

Admittedly, the Court's pronouncements on all these points were made in the context of the particular circumstances of the *North Sea* cases; and none of the points finds a place either in the 1958 Convention or in the Negotiating Text. Nevertheless, the considerations on which these pronouncements were based have a more general validity so that they may be expected to be of relevance in appreciating other similar or analogous situations. All of them played a material role in the arguments of the Parties and the Court's appreciation of the case in the Anglo-French Arbitration concerning the delimitation of the boundary in the Channel and the Atlantic. The Court's pronouncements, in short, identify and throw light on problems likely to arise in the delimitation of the continental shelf whether under Article 6 of the 1958 Convention or any other formulation of the applicable law that may hereafter be accepted.

The contribution to the law made by the Judgment in the *Fisheries Jurisdiction* cases[40] in 1974, which concerned fishing rights in waters off Iceland, proved to be of a transient character. This is because that contribution consisted of two findings concerning fishery rights both of which seem to have been overtaken by subsequent events. The first was that, independently of the then still disputed question of the limit of the territorial sea, the coastal State's right to an exclusive fishery zone of 12 miles had crystallised as a rule of customary law[41]. The second was that the concept of preferential rights of fishing in adjacent waters for a coastal State in a situation of special dependence on coastal fisheries had likewise crystallised as customary law[42]. The first of these findings the Court based on the development of State practice since the 1960 Geneva Conference on the Law of the Sea, and the second partly on the proceedings of the 1960 Conference and partly on the recognition of preferential rights for coastal States in certain fisheries treaties. The Second Session of the Third Law of the Sea Conference opened at Caracas as the Court was in course of deliberating upon its Judgment; and the Court could not fail to be aware that new and much expanded concepts of a coastal State's fishery rights were being ventilated at the Conference. It was, therefore, at

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39. Ibid.
40. *I.C.J. Reports 1974*, pp. 3 and 175.
41. *I.C.J. Reports 1974*, At p. 23, para. 52.
42. Ibid.

pains to underline that, as a court of law, it could not 'render judgment *sub specie legis ferendae* or anticipate the law before the legislator had laid it down'[43]. A number of the opinions delivered by individual Judges also recognized the delicacy of a court's task when called on to apply customary law which is in an evident state of evolution. In those circumstances it was only to be expected that the validity of the Court's findings as to the law would be short-lived, and so it appears to be proving. 12-mile exclusive fishery zones are being overtaken by 12-mile territorial seas, while the preferential fishery rights of coastal States are being absorbed into 200-mile exclusive economic zones. It therefore seems probable that the Court's findings may soon be only of historic interest.

The contribution of the Court to the modern law of the sea has, it is believed, been both considerable and, in the idiom of to-day, progressive, without departing from the Court's judicial character. This is true conspicuously of the *Corfu Channel*, *Anglo-Norwegian Fisheries* and *North Sea Continental Shelf* cases, and in its Judgments in those cases the Court performed the classic function of a court in determining and clarifying what it conceived to be the existing law. In doing so, however, it threw fresh light on the considerations and the principles on which the law was based in a manner to suggest the path for its future development. In that way and by those Judgments the Court has materially influenced the actual development of the modern law of the sea, and not merely its formulation. In short, although the major factors in determining the shape of the new law of the sea may have been the immense developments in technology of recent years and the aspirations of the newly independent States, the judicial role of the International Court of Justice has also played its part.

If and when the Third Conference on the Law of the Sea completes its work, it is manifest that the need for the interpretation and application of the law through the judicial process will remain, and even increase, as the Negotiating Text expressly recognizes. This Court, by its past contributions to the law of the sea, its long tradition of judicial proceedings and its position as the principal judicial organ of the United Nations, is peculiarly equipped to play its part in that work. Indeed, the next case on the Court's list – between Tunisia and Libya – concerns the delimitation of the continental shelf, while another case of a

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43. *I.C.J. Reports 1974*, At p. 23, para. 53.

similar kind may be brought before a Chamber of the Court under a treaty recently concluded between Canada and the United States.

Professor van Vollenhoven was one of the leading comparative and international lawyers of his generation, and the purpose of the Foundation in initiating this series of lectures has been to recall and to do justice to his memory. Although the Law of the Sea does not seem to have been a special interest of his, the promotion of peace through the judicial process and the development of the rule of law among nations were certainly very close to his heart. It is therefore hoped that this address may be thought a fitting tribute to the distinguished former member of Leyden University whose work for peace and for international law it is designed to commemorate.

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