

**The maritime jurisdiction of the Western Sahara
and
the duty of states to preserve Saharan fisheries resources
pending self-determination**

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Introduction

In 2002 the natural resources of Western Sahara again became the subject of controversy. In late 2001 the government of Morocco concluded two contracts allowing the exploration or “reconnaissance” of oil in seabed areas off Western Sahara. Each contract has a term of one year and allows seabed exploration to proceed in defined areas within 200 nautical miles of the Saharan coast in areas south of the Canary Islands. One was concluded between Morocco’s state oil company, Office National de Recherches et d’Exploitations Pétrolières (ONAREP), and the United States based oil company Kerr-McGee du Maroc Ltd. The other is between ONAREP and the French based oil company TotalFinaElf E&P Maroc. No exploration results from either foreign company have been thus far publicly released. Both contracts allow for seabed oil development after the expiry of their initial one year terms.¹

This development, resulting in the most extensive seabed exploration activity in Saharan waters since Spain withdrew from Western Sahara in 1975, led to an unprecedented request from the United Nations Security Council to the Under-Secretary General for Legal Affairs to give opinion on "the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations . . . of actions

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¹ The Kerr-McGee reconnaissance contract will either expire or convert to permit exploitation of seabed oil and gas on October 29, 2002. It allows exploration in the northern part of the Saharan offshore over an area of 110,400 square kilometres of seabed. The TotalFinaElf contract will expire on November 18, 2002 and allows exploration of 114,556 square kilometers of the seabed south of Dakhla.

allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara".² The opinion, delivered in a January 29, 2002 letter to the Security Council, concluded that the legality of the oil reconnaissance contracts depended not so much "whether mineral resource activities in a Non-Self-Governing Territory by an administering Power is illegal" but if the activity was done "in disregard of the needs and interests of the people of that territory." The Under-Secretary noted that:

The principle that the interests of the peoples of Non-Self-Governing Territories are paramount, and their well-being and development is the "sacred trust" of their respective administering Powers, was established in the Charter of the United Nations and further developed in General Assembly by resolutions on the question of decolonization and economic activities in Non-Self-Governing Territories. In recognizing the inalienable rights of the peoples of Non-Self-Governing Territories to the natural resources in their territories, the General Assembly has consistently condemned the exploitation and plundering of natural resources and any economic activities which are detrimental to the interests of the peoples of these territories and deprive them of their legitimate rights over their natural resource. It recognized, however, the value of economic activities that are undertaken in accordance with the wishes of the peoples of those territories, and their contribution to the development of such territories (. . .)

The foregoing legal principles established in the practice of States and the United Nations pertain to economic activities in Non-Self-Governing Territories, in general, and mineral resource exploitation, in particular. It must be recognized, however, that in the present case, the contracts for oil reconnaissance and evaluation do not entail exploitation or the physical removal of the mineral resources, and no benefits have as of yet accrued. **The conclusion is, therefore, that, while the specific contracts which are the subject of the Security Council's request are not in themselves illegal, if further exploration and**

² In 1978 ONAREP awarded seabed oil exploration contracts in limited areas of the Saharan offshore to British Petroleum, Phillips Oil Company and then in 1982 north of Tarfaya, to Mobil Oil. See T. Hodges, *Western Sahara: The Roots of a Desert War* (Westport, Conn: Lawrence Hill & Co., 1983) at 125.

exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories.³ [Emphasis added.]

A crisis in the European Union's southern fishery resulting from too many commercial vessels in some national fleets has also brought Western Sahara's ocean resources into new focus.⁴ Adding to this, on October 15, 2002 Morocco and the Russian Federation announced their agreement over a "fisheries cooperation accord." The agreement, for a term of three years, has not yet been made publicly available. However, it is known to provide for commercial access to a pelagic mackerel fishery with payment to be made annually by Russia on a harvested volume basis. A "mixed Russia-Morocco fishing commission" is to be established to foster cooperation and resolve disputes.⁵

These events have led to a renewed debate about the preservation of Western Sahara's ocean resources pending the exercise of its people's right of self-determination under international law.

The aim of this paper is to review Western Sahara's entitlement under international law to an exclusive economic zone in the maritime area adjacent to the Saharan coast and the obligations of States to respect its maritime resources, notably in light of the October 2002 Morocco-Russia fisheries cooperation accord.

³ The opinion, "Report of the UN Office of Legal Affairs on the legality of the Oil-contracts signed by Morocco over the natural resources of the Western Sahara" (letter dated 29 January 2002) can be viewed at www.derechos.org/human-rights/mena/moro/SahOil.html

⁴ The most recent European Union-Morocco fisheries agreement expired November 30, 1999. A fisheries agreement between Morocco and the Russian Federation was also not renewed at that time.

⁵ See "Russia, Morocco sign fisheries cooperation accord", *Pravda* (October 15, 2002) at <http://english.pravda.ru/economics/2002/10/15/38194.html>

I - The maritime jurisdiction of an independent Western Sahara⁶

The law of the sea as applied to the geographic and historical circumstances of Western Sahara leaves little doubt over the entitlement of the Saharan State to an offshore area. The spatial areas available for claim in the Saharan offshore and the criteria to draw maritime boundaries that will define the extent of those areas are well developed in international law. A State's maritime jurisdiction is made clear through delimitation. The objective is to determine in what areas of the offshore territorial and sovereign rights can be exercised. It is the drawing of maritime boundaries that fulfills this objective.

In the case of Western Sahara there are three maritime areas or zones to be considered.⁷ They are prescribed in the 1982 *United Nations Convention on the Law of the Sea* (“*LOS Convention*”)⁸ and are defined in customary international law as follows:

- (a) the **territorial sea**. “The sovereignty of a coastal State extends, beyond its land territory and internal waters ... to an adjacent belt of sea described as the territorial sea. This sovereignty extends to the air space over the territorial sea as well as to its seabed and subsoil.” Customary international law does not generally allow the territorial sea to be more than 12 nautical miles wide, as measured from the low water line of a

⁶ “Western Sahara” is used here in both its legal and geographic contexts, in place of the formal name of the Saharawi Arab Democratic Republic.

⁷ These maritime areas, if not expressly claimed, are arguably provided for in Western Sahara's constitution. See *Constitution de la RASD adoptée par le dixième Congrès national*, 26.08. - 04.09.99 at <http://www.arso.org/03-const.99.htm>. Article 14 provides for the exercise of national sovereignty over “territorial waters”.

⁸ *United Nations Convention on the Law of the Sea of December 10, 1982*. The *Convention* entered into force on November 16, 1994. See the full text of the *LOS Convention* and related instruments and documents at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

State's coast or accepted closing baselines (*LOS Convention*, Article 2(1), 2(2).)

- (b) the **continental shelf**. “The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.” (*LOS Convention*, Article 76(1).)
- (c) the **exclusive economic zone (“EEZ”)**. “**The exclusive economic zone is an area beyond and adjacent to the territorial sea [in which] the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the water superjacent to the sea-bed and of the sea-bed and its subsoil . . .** The exclusive economic area shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.” It is important to note that the EEZ regime includes all sovereign rights for resource development in the seabed that are available under the continental shelf regime. (*LOS Convention*, Articles 55, 56, 57.) [Emphasis added.]

Of these three maritime zones, while the extent of each must be prescribed in national legislation, the rights of a State over the seabed off its coast are automatic. That is, while the legal limit of a State's continental shelf might remain uncertain, the State's ability to exercise sovereign and original jurisdiction over its seabed resources is clear in international law:

The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional or on any express proclamation. (*LOS Convention*, Article 77(3).)

The process of claiming and defining a State's offshore jurisdiction begins with the coastline it possesses. From here, the various boundary delimitation criteria as developed in international law can be applied, with the paramount requirement being "an equitable result" between the States concerned.

International law requires that, where two States are in such proximity to each other in situations where their exclusive economic zones will overlap if each claims a full 200 nautical mile entitlement, the States must negotiate a boundary between their zones or settle the dispute by peaceful means in order to achieve an "equitable solution". Article 83 of the *LOS Convention* imposes the same requirement in respect of overlapping continental shelf claims. If these measures fail then, in the ordinary course, delimitation can be achieved by recourse to a court, including the International Court of Justice and the International Tribunal for the Law of the Sea, or a court of arbitration.

As there are potentially overlapping or conflicting exclusive economic zone and continental shelf claims between Western Sahara and its three neighbour States, the detailed and occasionally complex criteria of ocean boundary delimitation must be considered. How should Western Sahara's maritime boundaries, especially an EEZ boundary, be delimited?

In its effort to achieve equitable results, and to a lesser extent, to ensure lasting criteria that are applicable to all maritime boundary delimitations, international law has emerged with great certainty in the analytical approach to be applied in the drawing of a maritime boundary. On first impression, the development of the law in this area is remarkable, given the differing types of maritime zones to be delimited, each with varying criteria and the infinite number of geographic circumstances in which to apply the criteria. Moreover, the relevant international legal instruments, including the *LOS Convention*, provide limited guidance in the actual delimitation process. The largely settled approach owes

much to the decisions of the International Court of Justice and, to some extent, the practice of States.

Two continuing trends in the development of international maritime law assure the continued evolution of such analytical structure. The first is that, with the coming into force and wide acceptance of the *LOS Convention*, a universal consensus over State entitlement will result in the increased acceptance of the general approach to maritime delimitation. The second trend has emerged from the work of the International Court of Justice, notably in its *Qatar/Bahrain* decision of March 2001.⁹ Several cases now before the Court will ensure the continued development of a normative analytical approach to maritime delimitation. They include a maritime territorial dispute between Indonesia and Malaysia, boundary litigation between Honduras and Nicaragua in the Caribbean Sea, and a riparian boundary dispute between Benin and Niger.

It has been suggested that the law of maritime delimitation has arrived at a point of certainty on how the analysis of boundary making should proceed. Professor Prosper Weil has observed that:

The structure of the delimitation process is the area of greatest certainty. It is true that the judgments remain a little hesitant and that the courts have not defined the process with rigour or uniformity. Even *Libya/Malta*, which, of all the judgments, approached most closely a precise description of the process, preferred a pragmatic approach, free of any normative definition - and thus of any general validity. However, by tying delimitation to legal title and basing title to all maritime areas on distance, the courts have blazed the trail for developments which should lead logically to the "normalization" of the two-pronged process which the courts have applied many times, but without so far according it the obligatory character which alone can turn it into a rule of law.¹⁰

⁹ *Case concerning Maritime delimitation and Territorial Questions between Qatar and Bahrain*, 16 March 2001. A full text of the decision and appended maps can be seen at the Court's website: <http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm>

¹⁰ *The law of maritime delimitation - reflections*. (Cambridge: Grotius Press, 1989) at

Given the flexibility of delimitation criteria necessary to ensure an equitable result it seems unlikely that a rigidly defined approach can be universally applied to all situations. Geography and history are too varied to achieve a complete uniformity. However, it is apparent that the law of the sea has developed a structure or framework for the drawing of a maritime boundary. Within it, the very extensive a catalogue of “equitable” criteria can be applied from case to case with justice and certainty. So it should be in the instance of Western Sahara.

This guiding approach can be found in the impressive case law of the International Court of Justice and other tribunals and also in the less certain influence of State practice. The decisions of the Court have resulted in the following analytical structure of a maritime delimitation.¹¹ The approach has generally, even with varying emphasis at different stages of assessment, ensured geography and all other

244. See also Jonathan Charney, "Progress in international maritime boundary delimitation law" (1994) *AJIL* 227 at 255. "[Recent decisions of the ICJ] mark important advances and refinements in the law, which, in turn, will promote the settlement of maritime boundary disputes. For the most part, they have focused attention on coastal geography and have analyzed that information by use of increasingly structured and uniform procedures and techniques."

¹¹ These decisions include the *Case Concerning the Delimitation of the Maritime Areas Between Canada and France*, (1992) 31 ILM 1149, the *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*, [1984] ICJ Reports 246, the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, [1985] ICJ Reports 13, the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, [1982] ICJ Reports 18, the *Delimitation of the Continental Shelf (1977) (UK v. France)* case, [1979] 54 ILR, 18 ILM 398, the *Guinea/Guinea Bissau Maritime Boundary Arbitration* (1985), [1986] 25 ILM 251, the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case, [1992] ICJ Reports 351, the *Maritime Delimitation in the Area between Greenland and Jan Mayen* case, [1993] ICJ Rep. 8 and the *North Sea Continental Shelf (Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands)* cases, [1969] ICJ Reports 3, 41 ILR 29. See generally the summaries of certain decisions at the Court's website.

Of lesser influence are the *Fisheries Jurisdiction* case, [1973] ICJ Rep. 3, the 1978 *Beagle Channel Arbitration (Argentina v. Chile)*, 17 ILM 62 and the decision in the 1981 *Dubai/Sharjah Boundary Arbitration*, which was not published until 1993. See 91 ILR 543.

equitable elements such as historical rights and political-economic concerns are properly accounted for, especially in the determination of EEZ boundaries. The approach has its origins in three early decisions; the *Canada/USA (Gulf of Maine)*, *Libya/Malta* and *Tunisia/Libya* cases. The analysis adopted by the majority of the Court in *Libya/Malta* decision – since confirmed in the most recent *Qatar/Bahrain* decision – is straightforward.¹² Equity is achieved by considering relevant and special criteria. The process is largely and initially one based on geography and distance.¹³ The approach has been refined in subsequent cases, including the *Canada/France (St. Pierre and Miquelon)* and *Greenland/Jan Mayen* decisions, and now in the *Eritrea/Yemen* decision of the Permanent Court of Arbitration and the ICJ's *Qatar/Bahrain* decision.¹⁴

The approach to maritime delimitation is this. At the outset the type of delimitation to be carried out and the overall geographic context of the area in dispute must be determined. Geographic context - the outer spatial limits of the ocean region in dispute - should be apparent, even if it has been controversial in some of the cases. It must then be determined what type of ocean zone is to be delimited or, to put it another way, what claims to ocean areas must be apportioned. The decline in State claims to exclusive fishery zones after the *LOS Convention* was opened for signature in 1982 ensures simplicity at this stage. Western Sahara, because of its geographic proximity to three other maritime States must first define the extreme northern and southern limits of its

The decision is also notable for its discussion of the extent to which the *LOS Convention* had then become part of customary international law and adoption of distance criteria for delimitation. The Court reasoned that the principles and rules applicable to the EEZ regime could not be divorced from that applicable to a continental shelf delimitation. See paragraphs 26-35, *idem*.

¹⁴ *Eritrea v. Yemen (Second Stage: Maritime Delimitation)* (17 December 1999). The decision and related documents can be seen at the website of the Permanent Court of Arbitration: <http://pca-cpa.org/PDF/EY%20Phase%20II.PDF> See, respectively, paragraphs 18-24 and 49-71 in these two decisions.

12 nautical mile territorial sea. It can then begin to define the extent of its entitlement to an exclusive economic zone.

The limits of a State's coastline and territorial fronting on the area can be uncertain, notably in instances where the area to be delimited lies between an island and a larger continental landmass as in the *St. Pierre and Miquelon* and *Greenland/Jan Mayen* cases.¹⁵ For Western Sahara no such problem arises. It has a continuous coastline and only minimal complicating presence of the Canary Islands to contend with. As the decisions of the International Court of Justice make clear, the extent of the regional area in which the delimitation is effected is not without controversy.¹⁶ However, the larger northwest African coastline has a relatively simple geography. Only the Canary and Cape Verde Islands complicate this region. Two more factors prevail at this stage, the identification of the competing coastlines at issue, and the presence of possible third party claims and boundaries.¹⁷

The second step in the analysis is therefore to assess the competing projections or overlaps of the relevant coastlines. In the case of Western Sahara with its existing land boundaries and relatively smooth coastal profile, this is a straightforward task. The assessment here of overlapping coastal areas, based on the effect of a coastal "profile" and any complicating geographic features is not complicated. Of course, the outcome of such an assessment - the extent of

¹⁵ "The *sine qua non* of a delimitation is the basic and often unarticulated premise that there must be an area over which each party in dispute claims sole jurisdiction." M.D. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Clarendon Press, 1989) at 64. Professor Evans notes that three aspects of the disputed area are to be considered. (1) "Area for the delimitation" - the area through which the delimitation will be made; (2) "The relevant coasts" - generally, the coastline fronting upon the relevant area; and (3) "The relevant framework" - "just as coasts outside the delimitation area influence the delimitation, features and factors derived from a wider area also influence it." On the requirement to account for third party claims, consider the approach of the ICJ in the *Libya/Malta* case, the *Guinea/Guinea Bissau* decision in which a boundary was expressly drawn to account for possible claims of other littoral states in the west African region, and also the *Qatar/Bahrain* decision.

competing or overlapping maritime areas - is more readily determined when the landmasses of competing states are in direct opposition across an expanse of ocean area, rather than adjacent to each other. This is the case with the Canary Islands and the mainland Saharan coast.

The projecting coastal “fronts” of the states involved must be drawn seaward from territorial sea baselines, whether such baselines are defined in the delimitation proceeding or already exist in national legislation. A baseline, as with the case of the Saharan coast, may simply be the low water line.¹⁸ Profile smoothing baselines across varied or indented coastal features are accepted under customary international law. The regime of baselines has also been made more certain through comprehensive standards prescribed by the *LOS Convention*.¹⁹ As well, the drawing of straight baselines across the mouths of rivers and to enclose channels between closely spaced islands is an accepted practice.²⁰ There should be no requirement to draw straight baselines along the Saharan coast given its smooth, gradually curving profile. Western Sahara’s coastline is an uncomplicated one relative to those of Mauritania and Morocco. The process of defining the limits of the coastline from which a territorial sea and EEZ will emanate is made easier when the effect of Mauritanian and Moroccan maritime boundary legislation is considered.

Mauritania has declared the extent of its territorial sea in the Baie de Levrier south of its land frontier with Western Sahara to extend from a straight baseline

¹⁸ Article 5 of the *LOS Convention* provides that the “normal baseline” of the territorial sea (and normally that for the exclusive economic zone) “is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.” Article 7 permits the drawing of closing baselines across deeply indented coastal features. In the case of Western Sahara such a baseline might only be allowably drawn to close the harbour entrance at Dakhla.

¹⁹ See Article 5 of the *LOS Convention*, above note 18.

²⁰ Baselines may be drawn as a matter of customary international law to close “juridical bays” and rivers with openings less than 24 nautical miles wide. See G.S. Westerman, *The Juridical Bay* (New York: Oxford University Press, 1987) and Article 7 of the *LOS Convention* “Straight Baselines”.

drawn between Cap Blanc to Cap Timiris.²¹ This baseline probably offends the requirements for territorial sea baselines at Articles 7 and 10 of the *LOS Convention*, but does not pose problems for or potentially overlap with a Saharan territorial sea baseline and the EEZ to project seaward from it.

Morocco has similar national legislation defining its territorial sea and EEZ.²² It is important to note that the legislation only establishes maritime areas off the Atlantic and Mediterranean coasts of Morocco proper, and not that of Western Sahara. For example, the external limit of Morocco's territorial sea extends only as far south as 27° 42' 00" latitude 13° 09' 50" longitude at a point in the sea 12 nautical miles northwest of its land frontier with Western Sahara. As Morocco makes no express claim to any territorial sea and exclusive economic zone off the coast of Western Sahara, including through its national legislation, it arguably does not have the necessary authority under international law to permit any exploration or resource development in Saharan waters.

For the present analysis it must also be recalled that Morocco's national legislation establishing an EEZ north of Cape Tarfaya and in the Mediterranean Sea contains an express provision for delimitation. It is a technical provision

²¹ *Ordinance 88-120 of 31 August 1988 establishing the limits and the legal regime of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of the Islamic Republic of Mauritania.* See www.un.org/Depts/los/reference_files/National_legislation. Mauritania claims a 12 nm territorial sea, a 24 nm contiguous zone, and 200 nm EEZ with a continental shelf extending to the limits of the continental margin. Mauritania acceded to the *LOS Convention* on July 17, 1996. It has not formally claimed a maritime boundary between its waters and those of Western Sahara.

²² *Act No. 1.73.211 establishing the Limits of the Territorial waters and the Exclusive Fishing Zone of Morocco, of 2 March 1973; Decree No. 2.75.311 of 11 Rajab 1395 (21 July 1975) defining the Closing Lines of Bays on the Coast of Morocco and the Geographical Co-ordinates of the Limit of Territorial waters and the Exclusive Fishing Zone; and Act No. 1-81 of December 1980, Promulgated by Dahir No. 1-81-179 of 8 April 1981 establishing a 200 nautical-mile Exclusive Economic Zone off the Moroccan coasts.* See www.un.org/Depts/los/reference_files/National_legislation. Through this legislation Morocco claims a 12 nm territorial sea, a 24 nm contiguous zone and a 200 nm EEZ, with provision for straight baselines. Morocco is not a State signatory to the *LOS Convention*.

that simplifies the delimitation of a Saharan territorial sea and EEZ with Morocco in the north between Cape Tarfaya and the Canary Islands. Article 11 of Act No. 1-81 states:

Without prejudice to geographical or geomorphological circumstances in which, taking into account relevant factors, the delimitation must be effected in accordance with the equitable principles laid down by international law, through bilateral agreements between States, **the outer limit of the exclusive economic zone shall not extend beyond a median line every point of which shall be equidistant from the nearest points on the baselines of the Moroccan coasts and the coasts of foreign countries opposite to Moroccan coasts or which border them.**²³ [Emphasis added.]

With an understanding of the basic geography and pre-existing boundaries of the area in which a maritime boundary is to be drawn, the next step in the process can be taken up. It is step that has occasionally proven controversial. The task here is to determine equitable criteria, whether "relevant" or, in the language of the 1958 *Continental Shelf Convention* "special circumstances", is to be properly applied in the drawing and adjustment of a provisional maritime boundary. Equity in international law demands that relevant/special circumstances be used as more than a corrective, to play a substantive role throughout the delimitation process. But an overemphasis on subjective criteria poses the risk of too many competing and possibly poorly defined determinants to be weighed. However, without proper reference to relevant circumstances or equitable criteria, the process could prove be overly mathematical or rigid.²⁴ In the case of Western Sahara these risks should be minimal and even avoidable.

²³ Above note 22. An EEZ delimitation issue arose in 2000 between Morocco and Spain, in respect of what was referred to as "a one-sided delineation of Spain of the maritime space around the Canary Islands. "Government still waits for official answer on delimitation of Canary Islands maritime borders, Benaissa says", *Arabic News*, December 21, 2000. See www.arabicnews.com/ansub/Daily/Day/001221/2000122123.html

²⁴ See Prosper Weil's dissenting opinion in the *St. Pierre and Miquelon* case, above note 11 at paragraphs 30-37. He argues convincingly that the approach should be to draw a provisional equidistant line over the area under dispute and to have regard only to obviously geographic criteria in the search for equity at this stage of the process.

The seaward projection of the Saharan coastline does not markedly overlap the maritime areas of Mauritania, Spain and Morocco. The overall mainland region of northwest Africa has a convex shaped coastal profile. No relative encroachment between the adjacent coastal areas Mauritania, Morocco and Western Sahara is evident. As for the Canary Islands, the approach adopted by the Court in the *Greenland/Jan Mayen* and *Qatar/Bahrain* cases is to be respected: the initial application of the equidistance method between opposite coastlines "produces, in most geographic circumstances, an equitable result."²⁵

The irony of the delimitation process is that, while it must always proceed with regard to equitable considerations and the application of equitable criteria, the initial certainty of provisionally drawn boundaries determined from geographic features will better enable equity to play its proper role, as corrective or "check" applied later in the process to ensure a just boundary. Given the near complete trend to provisionally delimit territorial sea, continental shelf and exclusive economic zone claims on the basis of distance the application of equity later in the process as a corrective seems inescapable.

There are innumerable equitable criteria to be potentially applied in maritime boundary delimitation.²⁶ The diverse range of criteria, from the purely geographic to possible concerns over security and economic issues, is set in a

²⁵ *Greenland/Jan Mayen*, above note 11 at paragraph 65.

Professor Charney notes also that "the information collected in *International Maritime Boundaries* [J.I. Charney & L.M. Alexander, eds. (Dordrecht: Martinus Nijhoff, 1993)] demonstrates that equidistance easily exceeds all the other methods of maritime boundary delimitation in frequency of use. It is a valuable method and serves as a useful basis for beginning the analysis of a dispute."

²⁶ "The Court now turns to the question of whether there are special circumstances which make it necessary to adjust the equidistance line as provisionally drawn in order to obtain an equitable result in relation to this part of the single maritime boundary to be fixed." *Qatar/Bahrain*, above note 11 at paragraph 217. The case establishes again that varied and unique criteria can apply to a maritime delimitation. Here such criteria included the presence of a pearl fishery and the geographic effect of low tide elevations.

continuum so broad that any attempt to define and assign weight to even the most relevant of them cannot be completely realized.²⁷ However, general categories of these criteria can be identified, bringing certainty to the delimitation process. So, too, can certain criteria be excluded from analysis having been recognized by experience and the case law as irrelevant. The International Court of Justice's rejection of seabed geology and geomorphologic features in the case law after 1985 is the clearest such exclusion.²⁸

The result is that the equitable criteria to be applied in the delimitation of Western Sahara's maritime boundaries will be drawn from two general categories, namely the geographic and the non-geographic. The former group provides what should be considered as the most settled or uniform delimitation criteria.

The application of non-geographic factors was limited at first by the International Court of Justice in its *Tunisia/Libya* and *Libya/Malta* continental shelf decisions, then entered a period of renewed application in the *Greenland/Jan Mayen* case, and has been attenuated by the more recent *Eritrea/Yemen* and *Qatar/Bahrain* decisions. In *Jan Mayen* the Court adjusted its provisional boundary to allow somewhat of an apportionment of a migratory

²⁷ It should also be expected that the increasing number of multilateral agreements in such areas as environmental protection and habitat conservation will give rise to new criteria in the delimitation process. On this trend see the dissenting opinion of Vice-President Weeramantry in the ICJ's *Botswana/Namibia* decision, at paragraphs 80-92. "I will now address a resultant question which will confront international law with increasing intensity in the future - the tension between principles of territorial sovereignty and principles of ecological protection which will involve a fiduciary responsibility towards the ecosystems of the States concerned." The *Botswana/Namibia* decision can be viewed at the ICJ website: <http://www.icj-cij.org/icjwww/idocket/ibona/ibonaframe.htm>

²⁸ The Court first rejected such criteria in its *Libya/Malta* continental shelf decision. See note 11, above, at paragraphs 26-35 and 94. Because of the de-emphasis on geomorphology and geology, the tribunals are more reluctant than ever to recognize the concept of a natural boundary on the continental shelf. Similarly, in the case of fishery zone or EEZ boundary delimitation disputes, they have tended to reject arguments based on ecology.

capelin fishery on the basis of relative economic need.²⁹ However, the caution of the Court in not permitting resource allocation and economic issues to rank equally with purely geographic criteria in delimitation has been a constant of the emerging normative framework. The Court, while conscious of the effects on parties' economic interests in the delimitation process, has so far accorded such issues limited weight.³⁰

In the case of Western Sahara there is theoretically no restriction to the *non-geographic* factors to be applied in determining its offshore jurisdiction. However, given an uncomplicated coastal geography, the factors will feature minimally, save perhaps for the issue of historic fishing rights off the Canary Islands. Such factors include the political and historical, economic and resource specific claims, environmental issues, security considerations, as well as existing third party agreements and claims. Among these certain fisheries and marine ecosystem management issues might be considered:

Some have been reluctant fully to embrace the limitation to coastal geography because maritime boundaries have human and economic impacts. **Thus, the conservation and management of marine resources may be made more difficult if maritime boundaries do not reflect natural boundaries or exploitation patterns. Arguably, the maritime boundary might be designed to conform to natural or traditional behaviour patterns or social needs.** The boundary could be drawn to divide the value of resources in the disputed area into equal

²⁹ See "Access to resources" at paragraphs 72-78 and "Population and economy" at paragraphs 79-80 of the decision, above note 11. "By dividing the southernmost zone of the disputed area, which roughly coincides with the estimated concentration of fishing resources, so that equitable/equal access be given to both parties, the door has been very much left open to all wealth distribution-related arguments. So that there is a strong likelihood, in fact a risk, that States in future cases would no longer devote much of their energies to essay on geopolitics (as it was put in the Tunisia-Libya case), but rather on economic futurology." G.P. Politakis, "The 1993 Jan Mayen Judgment: The End of Illusions?" [1994] *Netherl. Int'l L. Rev.* 1 at 27.

³⁰ See for example the *St. Pierre and Miquelon* decision, above note 11 at paragraphs 83-88. Here, the panel was most concerned that Canada and France be able to continue their existing joint management of fisheries in the delimited area under a 1972 agreement.

shares. Arguments along those lines have been put forward in the past. With the exception of the *Jan Mayen* Judgment, the ICJ and ad hoc tribunals have been unable or unwilling to base maritime boundary lines on these considerations. Not only is it difficult to find credible evidence to support a boundary that reconciles these factors, but resource interests and human activities change over time, making a permanent delimitation constructed to accommodate them untenable . . . That may be why the international community was willing to establish the 200-nautical -mile line in the 1982 LOS Convention. **Maritime zones and boundary delimitations established on the basis of coastal geography, distances measured from the coastline, and proximity more closely reflect states' interests in spatial-based authority and control and their preference for maximization of the physical separation between states, as viewed from the two-dimensional perspective of the earth's surface.**³¹ [Emphasis added. Footnotes omitted.]

The geographic criteria applicable to delimit Western Sahara's offshore jurisdiction are decidedly less controversial and can be applied with certainty and uniformity.³² It is through the application of relevant geographic factors that equity is realized and not simply by the selection of appropriate criteria - for any factor can be made to apply with sufficient justification - but in the careful weighting of each. In the case of Western Sahara the primary geographic criteria applying to an exclusive economic zone boundary include the treatment of adjacent and opposite coastlines, the influence of the Canary Islands, the application of proportionality as an equitable check of the ratios of the areas provisionally delimited and equidistance. To consider the geographic, one must recognize spatial relationships between coastal (and island) features. A balance between the coastlines in conflict is achieved by reasonable proportion accorded to more "relevant" or prominent features. In assessing the impact of an island, for example, which lays near a proposed delimitation line,

³¹ "Progress in international maritime boundary delimitation law", above note 10 at 239.

³² Consider the remarks of the majority of the Court in the *Greenland/Jan Mayen* decision, above note 11 at paragraph 80. "[T]he attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline."

one considers the spatial context of that island; its relative size, distance from the metropolitan state, proximity to a proposed boundary and nearby competing features. The equitable treatment of such a feature is not so much in its recognition but rather in the emphasis or "weight" assigned to it.³³

To consider the maritime claims of Western Sahara and the demarcation of these claims, the territory's existing land boundaries and history of maritime development must be considered.

Western Sahara has two land boundaries that terminate at its coastline, one in the north and one in the south, on the Cap Blanc peninsula. These frontiers were established by colonial treaties between Spain and France in 1900, 1904 and 1912.³⁴ Such frontiers are permanent as a matter of customary international law, a principle first affirmed by the International Court of Justice in its 1962 *Temple of Preah Vihear* decision and, in a regional context, by the Organization of African Unity in 1964.³⁵ Therefore, the new State's offshore boundaries, initially the boundaries defining a 12 nautical mile territorial sea, must commence at these points.

In the south at Cap Blanc, the Saharan territorial sea boundary will proceed more or less directly south into the water just outside the Baie du Levrier.

³³ There are several established methods to account for islands in maritime boundary delimitations which result from several of the decisions. In general islands can be given full weight or "effect"; there can be an exchange of maritime areas to account for islands ("*quid pro quo*"); islands can be partially or "half" weighted ("half effect"); they may be discounted entirely or have a limited territorial sea or EEZ boundary drawn around them ("enclavement").

³⁴ On the history of Saharan land frontiers and colonial development, see generally *Western Sahara: The roots of a desert war* above note 3 at 40 ff. The advisory opinion of the ICJ concerning Western Sahara (October 16, 1975) and related materials should also be consulted. For a summary of the opinion see the ICJ website at <http://www.icj-cij.org/icjwww/idecisions/isummaries/isasummary751016.htm>

³⁵ *Cambodia v. Thailand* (15 June 1962). For a summary of the decision, the Court's website at <http://www.icj-cij.org/icjwww/idecisions/isummaries/ictsummary620615.htm>

There appears to be no reason why the boundary should not extend the full distance of 12 nautical miles that is permitted by customary international law and the *LOS Convention*. The territorial sea boundary here must follow an equidistant course between Western Sahara and Mauritania, notwithstanding the entrance to a shipping channel for the Mauritanian port of Nouadhibou and an inshore fisheries area.

From this point south of Cap Blanc, the territorial sea boundary will turn and proceed west, along an adjusted equidistant line delimiting its territorial waters with those of Mauritania. Theoretically, the boundary at this location should follow a line somewhat to the southwest, thus being in favour of Western Sahara. However, in the far offshore, this orientation of the territorial sea boundary could unduly enlarge an EEZ in favour of Western Sahara. This is because Mauritania's EEZ might be constrained in its overall reach as a result of such an influence in the north and by the Cape Verde Islands to the southwest. The *Guinea/Guinea Bissau* decision of the International Court of Justice requires the overall regional geography of the northwest African coast be accounted for, to avoid the possibility of excessive EEZ encroachment into offshore areas not yet delimited or under some possible geographic disadvantage. As such, the EEZ projecting from Western Sahara's territorial sea in the south will extend more or less directly to the west. This line would likely be a perpendicular to the general direction of the territory's coast in this area.

In the distant offshore, some 200 nautical miles from Cap Blanc, the EEZ boundary will then turn directly north and follow a line parallel with general direction of the Saharan coast. As the EEZ cannot exceed 200 nautical miles in width, its outer limit will follow the northeast curving arc of the coastline. At a point 200 nautical miles south of the Canary Islands this EEZ boundary will come under the geographic influence of a closing baseline drawn between Hierro and Gran Canaria Islands. The course of the boundary will then be

determined by the weighting or “effect” accorded to the Canary Islands. Because of the limited coastal projection or geographic influence of the Canary Islands they will have a much reduced influence on a provisionally drawn equidistant boundary. The islands are at least to be reduced in their influence by being weighted with “half effect”. The Canary Islands are minor and disparate features relative to the significant expanse of the Saharan coastline. From its provisional course the provisional equidistant (or median line) boundary will be shifted north. The basis such an equitable is well established in the ICJ caselaw, including the *Greenland/Jan Mayen* and *Eritrea/Yemen* decisions.

A strong case exists to “enclave” the Canary Islands. The basis of this lies in the notable precedent of the *St. Pierre and Miquelon* decision. The Canary Islands have such limited geographic influence that a combined 12 to 24 nautical mile territorial sea and EEZ might justly be delimited around them to the south and east. This reduced area would be compensated for by a significantly larger EEZ extending from the archipelago to the northwest into the Atlantic Ocean.

In the area south of the Canary Islands an adjusted EEZ boundary will proceed north-east into the narrowing Canary channel before terminating at a tripoint EEZ boundary with Morocco and Spain just north of 27° 40’ North latitude. This point accords with the southern terminus of Morocco’s territorial sea that has been established in its national legislation.

In summary, Western Sahara’s entitlement to an offshore area – a territorial sea extending 12 nautical miles seaward and a 200 nautical mile exclusive economic zone – are as certain in international law as the boundaries which can be drawn to define those areas. No complex geographic factor or equitable delimitation factor exists to constrain the seaward reach of the Saharan territorial sea. The Canary Islands will have a limited effect on the northern

extent of its EEZ. The areas of the sea in which Western Sahara can exercise territorial and sovereign rights can be determined with certainty.

Given such certainty the continuing exploitation of the maritime resources of the area by foreign states must be considered.

II – Resource exploitation in Western Sahara’s offshore

There are two resources off the Saharan coast with considerable potential economic benefit. They are the energy resources of the seabed – oil and gas – and a proven fishery in the Canary current large marine ecosystem and waters further offshore. Oil and gas reserves in the seabed have not yet been well defined. Exploration and research into the extent of their possible and probable reserves continues, a matter of considerable controversy. The pending completion of one year oil reconnaissance awarded to foreign energy companies by the Moroccan government might result in the start of oil and gas extraction, initially through test wells in the seabed. It is uncertain when such activity may begin or what might be the eventual result. As we have seen the preliminary exploration activity in the Saharan seabed is not considered contrary to international law.

However, a state’s sovereign rights over the natural resources in an exclusive economic zone allow more than simply their exploitation or extraction. Such rights extend to include the exploration and management of resources of those natural resources.³⁶

The clearest example of the ongoing exploitation of natural resources in Saharan waters can be seen in fishing by foreign flagged commercial vessels. In the case

³⁶ Article 55 *LOS Convention*. Article 58 requires other States to “have due regard to rights and duties of the coastal State” with sovereignty over an EEZ.

of Western Sahara, fishing activities has not been defined as expressly contrary to international law. The opinion of the Under-Secretary General for Legal Affairs was confined to the legality of “mineral resource activities in Non-Self Governing Territories.” However, in respect to fisheries, the Under-Secretary General did note that “the exploitation and plundering of the marine and other natural resources of colonial and Non-Self-Governing Territories by foreign economic interests, in violation of the relevant resolution of the United Nations, is a threat to the integrity and prosperity of these territories.”

The *LOS Convention* also established a duty for States to conserve if not to actually refrain from all exploitation of the natural resources of the Saharan offshore. The duty can be found in Resolution III of the *Convention*, which establishes a logical nexus between various United Nations decolonization proclamations and the *Convention* itself.³⁷ Resolution III, which has no title, reads as follows:

The Third United Nations Conference on the Law of the Sea, Having regard to the Convention on the Law of the Sea, Bearing in mind the Charter of the United Nations, in particular Article 73

1. *Declares that:*
 - (a) In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.

³⁷ Article 305 of the *LOS Convention* was drafted with reference to UN General Assembly Resolution 1514, allowing the Convention to be signed by "all territories which enjoy full self internal government, recognized as such by the United Nations, but have not attained full independence . . ." Article 305 expressly provided for Namibia to be a State signatory to the *Law of the Sea Convention* "as represented by the United Nations Council for Namibia."

- (b) Where a dispute exists between States over the sovereignty of a territory to which this resolution applies, in respect of which the United Nations has recommended specific means of settlement, there shall be consultations between the parties to that dispute regarding the exercise of the rights referred to in subparagraph (a). In such consultations the interests of the people of the territory concerned shall take into account the relevant resolutions of the United Nations and shall be without prejudice to the position of any party to the dispute. The States concerned shall make every effort to enter into provisional arrangements of a practical nature and shall not jeopardize or hamper the reaching of a final settlement of the dispute.
- (2) *Requests* the Secretary-General of the United Nations to bring this resolution to the attention of all Members of the United Nations ... and to request their compliance with it.³⁸

The obligations under Resolution III are general in nature. They underscore the duty at international law discussed in the Under-Secretary General's January 2002 opinion. A more specific duty in the instance of the October 2002 Morocco-Russia fisheries cooperation accord can be found in the 1995 *United Nations Fish Stocks Agreement*.³⁹ The *Agreement*, a separate treaty instrument, expands upon the *LOS Convention* provisions for the conservation and management of straddling fish stocks and highly migratory fish stocks.

The 1995 *United Nations Fish Stocks Agreement* sets out principles for the conservation and management of straddling and migratory fish stocks and

³⁸ These provisions were revised on numerous occasions. For a commentary and summary of the revisions see M.H. Nordquist, S. Rosenne & L.B. Sohn, eds. *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (London: Martinus Nijhoff Publishers, 1989) at 478. "In the absence of experience, it is impossible to attempt to foretell how this resolution, limited in its operative paragraph to relations between States, will be applied in practice."

³⁹ *Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks*. The Russian Federation became a State party to the 1995 *United Nations Fish Stocks Agreement* on August 4, 1997. The *Agreement* entered into force on December 11, 2001. See http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CO NF164_37.htm

provides that the management of their fisheries is based what is known as the “precautionary approach”. A State party to the *Agreement* undertakes to use the best available scientific information in carrying out its fisheries. The *Agreement* elaborates on the fundamental principle, established in the *LOS Convention*, that States should cooperate to ensure ocean conservation and promote an objective of the optimum utilization of fisheries resources both within and beyond their exclusive economic zones.

The *Agreement* attempts to achieve this objective by providing a framework for cooperation in the conservation and management of those fisheries resources outside of national jurisdiction. It is designed to promote “good order in the oceans” through the effective management and conservation of high seas resources by establishing detailed minimum international standards for the conservation and management of straddling fish stocks and highly migratory fish stocks, ensuring that measures taken for the conservation and management of those stocks in areas under national jurisdiction and in the adjacent high seas are compatible and coherent, ensuring that there are effective mechanisms for compliance and enforcement of those measures on the high seas, and recognizing the special requirements of developing States in relation to conservation and management as well as the development and participation in fisheries for both straddling and highly migratory fisheries.

In the case of Western Sahara the 1995 *United Nations Fish Stocks Agreement* is relevant to Russia’s obligations. The October 2002 Morocco-Russia fisheries cooperation accord provides that mackerel will be the principal species to be fished “in the part of the Atlantic controlled by Morocco”. This species is found in the larger Canary Current marine ecosystem and is considered a straddling stock. The general principles of the precautionary approach detailed at Article 5 of the *Agreement* include the requirements to improve decision making in resource exploitation, to apply fisheries guidelines and to not exceed catch limits of stocks. Moreover, Article 24 provides an obligation for States party to

recognize the special requirements of developing States. This a duty to account for:

- (a) the vulnerability of developing States which are dependent on the exploitation of living marine resources;
- (b) the need to avoid adverse impacts on, and ensure access to fisheries by subsistence, small-scale and artisanal fishers and women fishworkers . . . and
- (c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing States.

These obligations, coupled with a duty to engage in “responsible fisheries” and to ensure national flag vessels comply with “subregional and regional conservation and management measures” impose a practical duty on the Russian federation to refrain from fishing in those waters off Western Sahara clearly constituting its EEZ, and to respect those fisheries which migrate through the EEZ area.

It remains to be seen if the Russian Federation will respect international law and refrain from any exploitation of fisheries in Saharan waters, or those fish stocks which migrate or straddle those waters. The prospective exclusive economic zone of an independent Western Sahara is clear. That area and the ocean resources within it should remain free from use and exploitation until the right of Western Sahara’s self determination can be realized. If that is not possible, all States fishing in the greater Saharan offshore are obligated to apply the best possible marine management and conservation measures available.