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Prospective Analysis of Faroese Legal Arguments in the Rockall Dispute

Føroyskt úrtak

Henda grein er ein framlítandi lýsing av á hvørjar rættarligar reglur Føroyar skulu grunda síni krøv í Rockall Hatton økinum. Grundað á úrskurðir hjá altjóða dómsstólum og gerðarrættum í undirgrundartrætumálum innan fyri 200 fjórðingar verður hildið uppá, at tey ásettu rættvísismát (equitable criteria) fyri at finna eina rættvísa avgerð (equitable solution) í markaósemjum einans vóru ætlað at galda fyri ósemjur innan fyri 200 fjórðingar. Tískil kann ikki verða hildið, at havrættarligu meginreglurnar um avmarking av landgrunninum innan fyri 200 fjórðingar eisini koma at galda í trætumálum um landgrunsmørk uttan fyri 200 fjórðingar.

Ognarrættur avger avmarkingina, og viðurskiftini viðvíkjandi ognarrætti eru øðrvísi fyri økið uttan fyri 200 fjórðingar enn innan fyri 200 fjórðingar. Fjarstøða er grundarlagið fyri avmarking innan fyri 200 fjórðingar, meðan jarðfrøðislig og geomorfologisk kriteriu eru grundarlag fyri áseting av rættarstøðuni viðvíkjandi undirgrundini, ið fer út um 200 fjórðingar. Tískil kunnu meginreglurnar fyri avmarking í m.a. Rockall Hatton økinum metast at verða øðrvísi enn meginreglurnar at avmarka innan fyri 200 fjórðingar, og hevur hetta m.a. við sær, at útlitini hjá oyggjum til at fáa ognarrætt yvir undirgrundini ikki eru avmarkað á sama hátt sum í trætumálum innan fyri 200 fjórðingar.

Sum niðurstøða verður hildið uppá, at um Føroyar megna at prógva, at Rockall Hatton økið er eitt framhald av føroyska langrunninum, so skal Føroyska samráðingarnevndin ikki himprast við at seta stór krøv mótvegis samráðingarpørtunum, tí rættvísismát og mát fyri rættvísa avgerð í markaósemjum innan fyri 200 fjórðingar fara ikki at verða grundarlag undir avgerðum um ósemjur uttan fyri 200 fjórðingar.

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English Summary

This article is a prospective analysis of which legal arguments the Faroe Islands shall put emphasis on in its claims to the Rockall Hatton area. It can not be ruled out, on the basis of the established normative jurisprudence of delimitations within 200 NM, that the established equitable criteria and methods for finding an equitable solution delimitations were solely set to prevail in delimitations within 200 NM. Consequently it can be held that the established principles for delimitation of the continental shelf within 200 NM will not apply for delimitations of outer continental margins.

Title commands delimitation and the title for the zone beyond 200 NM differ the title within 200 NM. Wherein the distance criterion is the title for the zone within 200 NM, geologic and geomorphologic criteria are the basis of the title for the legal continental shelf that extends 200 NM. Accordingly the established normative principles in delimitation in inter alia the Rockall Hatton area are likely to differ from the established prevailing principles within 200 NM and will imply that the title of islands will not be diminished, in order to find an equitable solution, as in delimitations within 200 NM.

In conclusion it is held that if the Faroe Islands shall not be inhibited, if it is established that the Rockall Hatton area is a continuation of the Faroese continental shelf, to raise grand claims vis-à-vis the other coastal States, because equitable criteria and methods in order to find an equitable solution in delimitations within 200 NM will not apply mutatis mutandis for delimitations beyond 200 NM.

I – Introduction

A delineation or delimitation of the outer continental shelf is by its essence an act whose validity depends on international law as it has always an international feature and if not done in accordance with international law will not be opposable to other States.[1] In the words of the International Court of Justice (hereafter the ICJ or Court), albeit in another context, a unilateral establishment of the continental margin 'regardless of the legal position of other States is contrary to recognised principles of international law.'[2] Otherwise stated the validity of the act of delineation or delimitation depends on international law.[3] Needless to say that this principle also prevails in the Rockall Hatton dispute although the question is open with regard to applicable principles in that and other disputes

1 ICJ, *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine* Area (hereafter *Gulf of Maine*), ICJ Reports (1984), 292, para 87.

2 ICJ, *Tunisia* v. *Libyan Arab Jamahiriya* (hereafter *Tunisia* v. *Libya*), *ICJ Reports* (1982), (hereafter *Tunisia v Libya)*, ICJ Reports (1982) 66, para 87.

3 ICJ, *Fisheries case*, ICJ Reports (1951) 116, para 132.

beyond 200 nautical miles (hereafter NM). The Rockall is 25 metres wide at its base and rises sheer to a height of 22 metres.[4] The Rockall dispute is not a territorial one[5] but an outer continental margin dispute to the Hatton Rockall area where four coastal States claim sovereign rights, namely Great Britain, Ireland, Iceland and Denmark on behalf of the Faroe Islands.[6]

No international fora has yet ruled substantively on the question whether delimitation principles in disputes within 200 NM will apply *mutatis mutandis* to outer continental margin delimitations. This manuscript seeks accordingly prospectively to analyze, on the basis of theory of international law, whether delimitation principles in disputes within 200 NM will apply by way of analogy to outer continental margin disputes before determining whether the fact that the Faroe Islands is an archipelago can be considered to have prejudicial effects on its claim to the Hatton Rockall area. The underlying structure of the manuscript is based on the perception that the two modes of delimitation (i) the judicially decided and (ii) the negotiated and agreed ones must be distinguished as there is a „world of difference"[7] hence the reason for which this manuscript will not examine the impact of on-going negotiations in other disputes nor in the Rockall dispute.

All delimitations shall, in accordance with Article 83 of the United Nations Convention on the Law of the Sea[8] (hereafter Convention or UNCLOS), lead to an equitable solution.[9] The ICJ and various arbitral tribunals have nourished and edified a rich international case law of applicable principles to find an equitable solution in continental shelf delimitations. The obligation to find an equitable solution is in the words of the ICJ a „fundamental norm" of the law

4 Rockall is a small, isolated islet in the North Atlantic Ocean and is located at 57°35_48_N, 13°41_19_W.

5 Neither Ireland, Iceland nor the Faroes contest the British sovereignty of the islet itself. In accordance with Article 121(3) of the Convention islets as Rockall, which cannot sustain human habitation or economic life of their own, shall have no exclusive economic zone or continental shelf. The dispute concerns only the outer continental shelf rights in the Hatton Rockall area.

6 For a historical analysis of the claims of the different coastal States, see U.S.Wang, 'Who´ll get the Rockall', 1 *Faroese Law Review* (2001), pp. 113-148.

7 Sep. op. Judge Jimenez de Arechaga, Tunisia v. Lybia, ICJ Rep 1982, p. 117, para 61.

8 Concluded on 10 December 1982, entered into force on 16 November 1994, 1833 UNTS p. 396.

9 The relevant provision of Article 83(1) provides „The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

of delimitation.[10] It is on that basis that the Court has ruled that the obligation to find an equitable solution leads to the dismissal of the equidistance concept as the legally required point of arrival in a delimitation between States with opposite or adjacent coasts. Archipelagos and small islands have in delimitations within 200 NM been considered as relevant circumstances for departing from the equidistant line as they have been perceived as conferring a given State an unreasonable claim to the continental shelf. The question arises whether that solution will prevail in outer continental margin delimitations. Contrary to delimitations of continental shelves within 200 nautical miles (hereafter NM), whose title is based on a distance criterion from the coastal baselines, the title to the outer continental margin is based on geological and geomorphologic elements and this fact will influence outer continental margin delimitations because delimitation is linked to title. The title of the disputing States to the Rockall Hatton area are not *per se* concurrent but depend on geological and geomorphologic criteria. It is consequently held that should the Faroese hydrographic, geological and geomorphologic studies prove that the Rockall Hatton area is a natural extension of the Faroese continental shelf the Faroese government should not be inhibited in its outer continental margin claims by its insular status and small physical territory because delimitation is linked to title. The basis for that conclusion is that a prospective examination of legal aspects in outer continental margin delimitations leads us to the conclusion that the relevant circumstances for finding an equitable solution in delimitations within 200 NM will not apply by way of analogy to outer continental margin delimitations because the title to the Hatton Rockall area are not *per se* concurrent as it depends on geological and geomorphologic criteria.

II – The Court's conceptual method of delimitation

It occurs clearly in the established case law that, once the UNCLOS was signed, geomorphologic and geologic elements were deemed to be irrelevant for the matters of delimitation and it is on that conceptual basis that adjudicators ruled that geographical elements had a significant role to find an equitable solution.

A – The declaratory approach of the ICJ

The ICJ's initial conceptual approach to delimitations was influenced, and distinguished by the fact that it was developed before the opening of the Third United Nations Conference on the Law of the Sea. It is the landmarking *North Sea Continental Shelf Case*, in which the Court referred to the continental shelf as the *natural prolongation* of the land domain of a coastal State and held that this natural prolongation was a continuation of the land domain under the sea.

10 ICJ, *Gulf of Maine*, para 111.

Further, the Court held that the element that „confers the ipso jure title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion.“ the ICJ embraced a declaratory approach of delimitation of the continental shelf and in which [11] The embraced approached reflect a declarative concept of delimitation where great importance was conferred to the fact that the title to the disputed area was not perceived to be based on a distance criterion[12] but on pre-existing physical elements.[13] The natural prolongation element was the determinant factor for the Court to establish what territory coastal States already possess and hence influenced the Courts endorsed conception of which segments of the continental shelf belong to each State. In the words of the Courts: „whenever a given submarine area does not constitute a natural – or the most natural – extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of another State, it cannot be regarded as appertaining to that State.“[14] There is in the Court's view nothing to delimit, it is all about determining the extent of title of each State: *suum cuiqere tribuere*.[15] More concretely it can be held that the Court established the title of each party to each segment of the continental shelf before distributing to the parties what they were entitled to as the continental shelf of any State „must not encroach upon what is the natural prolongation of the territory of another State.“[16] It can be held that the Court put emphasis on the point to leave to each disputing party as much as possible of „all those parts of the continental Shelf that constitute a natural prolongation of its land territory into and under the sea.“[17] Hence it can be held that the Courts embraced conception in the *North Sea* case of delimita-

11 ICJ, *North Sea Continental Shelf* case (hereafter *North Sea*), *ICJ Reports* (1969), 31, para 43.

12 Article 6(1) of the 1958 Convention reads "[w]here the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.“ (emphasis added)

13 One of the Parties to the dispute was not a contracting party to the Geneva Convention (FRG) and after thorough examination the ICJ held that the equidistance and special circumstance rule in the 1958 Continental Shelf Convention in the 1958 Convention did not reflect customary international law.

14 ICJ, *North Sea*, ICJ Reports (1969) 31, para 43.

15 P Weil, *The Law of Maritime Delimitations – Reflections*, (Grotius Publications 1989), 23.

16 ICJ, *North Sea,* ICJ Reports (1969) 47, para 85(c).

17 Ibid, 62, para 101.

tion was constitutive of a declaratory conception of delimitation, being that is, an act of recognition.

B – The decline of the declarative concept

The constitutive concept of delimitation is clearly reflected in the Convention and was one of the main elements driving the Court to abandon its endorsed declarative approach in continental shelf delimitations.

The erosion of the declarative concept of delimitation started in *Tunisia v Libya* in which the Court was to decide whether geomorphologic elements should prevail over geological ones as Tunisia and Libya, in the light of the *North Sea* case law, argued that the geomorphologic features should prevail[18] whereas Libya held that the geology of the marine depths should triumph.[19] The Court ruled quite emphatically that the natural prolongation was not one solely based on physical features.[20] That first-step approach was followed up in the *Gulf of Maine* judgment where the Court was more explicit on its new approach in which the declaratory concept of delimitation was subject to an erosion. The Chamber held that „[l]egal title' to certain maritime or submarine areas is always and exclusively the effect of a legal operation. The same is true of the boundary of the extent of the title. That boundary results from a rule of law and not from any intrinsic merit in the purely physical fact."[21] In *Libya v Malta* the Court further developed the above-mentioned endorsed reasoning when taking into account the „new development in the law"[22] – implicitly referring to the UNCLOS. First the Court stressed that all coastal States possess an inherent right to a continental shelf solely based on a distance criterion. Following dialectically that statement the Court subsequently ruled that there is therefore no reason to confer „any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to delimitation as between their claims."[23] This statement of the Court represents a U-turn compared to its earlier rulings on the same substance but finds its origin in the fact that the new law gave no importance to natural prolongation of the land domain as each Contracting Party to the UNCLOS was vested a sovereign right to the continental shelf within 200 NM. The Court ruled that „title [within 200 NM] depends solely on the distance from the coasts of the claimant States of any areas of seabed claimed by way of continental shelf, and the geological or geomorphologic characteristics of those areas are completely immaterial."[24]

18 ICJ, *Tunisia v Libya*, 52-53, paras. 58-60.
19 Ibid, 50-52, paras 52-57.
20 Ibid, 46, para. 43.
21 ICJ, *Gulf of Maine*, para 103.
22 ICJ, *Libya v Malta*, 35, para. 39.
23 Ibid, 36, para 40 (emphasis added).
24 Ibid, 36, para 39 (emphasis added).

The fact that the entitlement to the continental shelf was based on a distance criterion implied, in the Court's view, that the geological or geomorphologic features were irrelevant. Accordingly the sectors of overlap within 200 NM had to be divided in an equitable manner, in order to find an equitable solution, in which geographical were given an important role to find the equitable solution.[25] It can be postulated that geomorphologic and geologic elements were in the aftermath of the *North Sea* case excluded any relevance for the outcome of continental shelf delimitations within 200 NM. It is of interest to note the Separate Opinion of Judge Mbaye which in the authors view reflects accurately the evolution of the law of delimitation in the aftermath of the *North Sea* case when holding that there has been a „tendency to extend the concept of continental shelf and to attach it increasingly to legal principles, and to detach it ever more surely from its physical origins."[26]

III – Legal implications of different title

All coastal States have an inherent right to the continental shelf within 200 NM regardless the structure of the soil as this right is solely based on a distance criterion whereas only some coastal States are vested a right to an outer continental margin. Otherwise stated and put in the current context only some States are vested a legal title to the Rockall Hatton area which implies that the titles are not per se concurrent.

The entitlement is founded on two principles: namely that (i) land dominates the sea by (ii) intermediary of the coast.[27] The ICJ is clear and unambiguous on this point when holding that „the land is the legal source of the power which a State may exercise over territorial extensions to seaward."[28] It can be deduced from that statement that the attributive rights of the title are not primary rights but derived rights.[29] The erosion of the declarative concept of delimitation was partially due to the fact that the ICJ was interpreting the UNCLOS, although in *status nascendi*, which established a new régime[30] for entitlement which differs considerably the provisions of the 1958 Geneva Convention on the Continental Shelf.[31] In the words of the Court: „the distance of 200 [NM] is in certain cir-

25 P Weil, op cit, n 15, 58.
26 Sep Op of Judge Mbaye in *Libya v Malta*, 94.
27 Ibid, 51.
28 ICJ, *North Sea*, 51, para 96.
29 ICJ, *Libya v Malta*, 41, para 49.
30 See Article 76(1) of the Convention.
31 Article 1 of the Geneva Convention provides that for the purposes of that Convention, the term continental shelf refers „(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond the limit, to where the depth of the superjacent waters admits

cumstances the basis of the title of a coastal State."[32] *A fortiori*, if the distance criterion is in certain circumstances the basis of the title it implies that the basis of the entitlement will in certain situations be based on something else than the distance from the coast.

At the outset it shall be stressed that scholars have already observed that the basis of the legal area beyond 200 NM is „based on something other than distance."[33] This difference implies that the methods of finding an equitable solution in those areas will be different compared to the embraced methods of delimitation in disputes within 200 NM because delimitation is linked to the title as the applicable methods of delimitation have to be consistent with the title. Hence the identification of the basis of the title is of great importance as that determination depends in the Court's case law the determination of the applicable law to find an equitable solution, ie. the determination of which factors should be utilized in arriving to the equitable solution. The latter occurs clearly in *Tunisia v Libya* where the Court held that „[i]t is only the legal basis of the title to continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having consequences for the claims of the Parties."[34] This approach was reiterated in the *Anglo-French* award, in which the Court of Arbitration rejected a method of delimitation suggested by France on the basis of the fact that it did not see it as compatible with the underlying basis of the title to continental shelf.[35] In *Tunisia v Libya* the Court was clear with regard to the fact that the applicable law in a delimitation is subjected to the title to that area as principles and rules of international law which may be applied for the delimitation of continental shelf areas must be derived from the concept of the continental shelf itself, as understood in international law.[36]

It follows of the abovementioned statements that having in mind that geological and geomorphologic elements are the source of the entitlement to the continental shelf beyond 200 NM the applicable law in order to find an equitable solution can be held to be ruled by principles other than the ones established for the

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of the exploitation of the natural resources of the said areas, and (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

32 ICJ, *Tunisia v Libya*, 48, para 47 (emphasis added).

33 DA Colson, 'Delimitation of the Outer Continental Shelf Between States with Opposite or Adjacent Coasts' in MH Nordquist, JN Moore, and TH Heidar (eds) *Legal and Scientific Apects of Continental Shelf Limits* (Martinus Nijhoff Publishers 2004) 291.

34 Ibid, 48, para 48 (emphasis added).

35 Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland, and the French Republic award (hereafter Anglo-French award), 30 June 1977, Reports of International Arbitration Awards, Vol. XVIII, para 246.

36 ICJ, Tunisa v Libya, para 36.

delimitation of the area within 200 NM in which the applicable methods were based on geographical elements.[37] This contention finds also support in the ICJ's ruling in *Libya v Malta* where the Court held that when the determination of a title is disputed „in so far as those areas are situated at a distance of under 200 miles from the coast in question, title depends solely on the distance from the coasts of the claimant States of any areas of seabed claimed by way of continental shelf, and the geological or geomorphologic characteristics of those areas are completely immaterial."[38] It can consequently be held that the Court distinguishes the applicable law in delimitation within 200 NM from the delimitation beyond 200 NM on the basis of the fact that the basis of a coastal State's entitlement to these areas is different.[39]

The postulate which the author argues finds support in the writing of scholars who contend that geological and geomorphologic criteria will reemerge but for the delimitation of the outer continental shelf and will „serve as specific facts deemed relevant for determining title."[40] This contention should, in the authors view, not be understood as meaning that geological and geomorphologic criteria will operate in exclusion of other relevant facts as it would be inconsistent with Article 83(1) of the Convention.[41] It is however an undisputable fact that the Court left open the debate on applicable law and the determination of which legal principles of delimitation shall apply in outer continental margin disputes[42] and having in mind the linkage of delimitation and title it can be concluded that the applicable methods of delimitation within 200 NM will not be transposed to outer continental margin delimitations and consequently not applicable to the Rockall dispute. In order to understand the impact of the abovementioned it is a prerequisite to describe to succinctly analyze the applicable principles for finding an equitable solution in continental shelf disputes within 200 NM.

IV – Established principles for equitable solution in delimitations within 200 NM

The Court has, as mentioned earlier, recurrently ruled that the obligation to find an equitable solution in a continental shelf dispute is the „fundamental norm" in delimitation.[43] It is in this context of interest to note that the Court itself has

37 B Kunoy, 'The Rise of the Sun: Legal Arguments in Outer Continental Margin Delimitations', 53 *Netherlands Internacional Law Review* (2006), pp. 245 – 272.
38 ICJ, *Libya v Malta*, 35, para 39 (emphasis added).
39 P Weil, op cit, n 15, 291.
40 DA Colson, 'The Delimitation of the Outer Continental Shelf Between Neighbouring States', 97 *American Journal of International Law* (2003), 107.
41 P Weil, op cit, n 15, 103.
42 See DA Colson, op cit, n 40, 100.
43 ICJ, *Gulf of Maine*, para 111.

held that the obligation to find an equitable solution leads to the dismissal of the equidistance concept as the „legally required point of arrival."[44]

A. Reshaping nature?

Delimitation of continental shelves in which the basis is the title is concurrent geographical elements has influence the Courts perception of applicable methods and has resulted in the edification of a method in which the equidistance method is the starting point for the delimitation.[45] This makes place for equity although the obligation to find an equitable solution shall not be understood as literal equity.

The Court has established a consistent reasoning which is based on the fact that the obligation to find an equitable solution shall not be understood as the case is decided under an *ex aequo et bono* basis.[46] These statements find their source in the legal fact that a „delimitation is a legal operation … which must … be based on consideration of law."[47] The continental shelf rights are the same for all States as „the derivate character of maritime rights stems from the fact of the coast and this introduces discrimination between States."[48] In its well known dictum the Court held that delimitation does not „seek to make equal what nature has made unequal"[49] and there cannot be „any question of completely refashioning nature or totally refashioning geography"[50] in order to find an equitable solution. It is though clear in the latter citation that the use of the term „completely" reveals clearly that the Court deems it adequate and necessary to diminish the effect of certain „unreasonable" geographical features in order to find an equitable solution.

Because the coastal States' entitlement to the continental shelf within 200 NM is generated by the coast it follows that the relevant geographical feature to take into account in delimitations within 200 NM is coastal geography.[51] In *Jan Mayen*, the Court held that a disparity in length of relevant coasts constituted a special circumstance under Article 6 of the Geneva Convention. In the words of the Court: „Special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle."[52] In

44 Article 83(1) of the Convention.
45 P Weil, op cit, n 15, 83.
46 ICJ, *North Sea*, 48, para 88; *Tunisia v Libya*, 60, para 71.
47 ICJ, *Guinea v Guinea Bissau*, (1988) 77 ILR, 656 para 120.
48 P Weil, op cit, n 15, 53 (emphasis added).
49 ICJ, *Libya v Malta*,) 40, para 46.
50 ICJ, *North Sea*, at 49-50, para 91 (emphasis added).
51 *Tunisia v Lybia*, 64, paras 73, 74; *Gulf of Maine*, 330, para. 205.
52 ICJ, *Case Concerning Maritime Delimitation Between Greenland and Jan Mayen*, (hereafter *Jan Mayen*) ICJ Reports (1993) 62, para 55.

Tunisia v Libya the Court gave only half-effect to Tunisia's Kerkennah Islands even though the main island of Kerkennah is 69 square miles in area and has a population of 15.000.[53] This line of thinking occurs also clearly in *Libya v Malta* where the Court ruled that the uninhabited island of Filfa, belonging to Malta, should be disregarded altogether and that the main island of Malta should be given only partial effect because of its small size in relation to Libya's broad coast.[54] In the *Anglo-French* award, the geographical situation of the Channel Islands, their size, population and political status influenced the position of the arbitrators.[55] The Arbitration Court ruled further on that the Scillies were despite being islands of a „certain size and population"[56] only attributed a reduced effect. The fact that they are situated twice as far to west from the landmass of the UK, as is the Isle of Ushant from the landmass of France, was in the eyes of the arbitrators a special geographical feature which could not be completely ignored and were hence only conferred an half effect.[57] Special or incidental geographical features which appear to be constitutive of inequity for the issue of delimitation shall be conceived as special circumstances, that is the thrust of delimitations within 200 NM. If that endorsed method of delimitation, in which an equitable solution is found, was to apply in the Rockall dispute it is not an extrapolation to state that the establishment of an equitable solution would be detrimental to the Faroes as the adjudicators would considerably depart from the equidistant line on the basis of the fact that the Faroes are a dependant and very small archipelago compared to the other disputing coastal States. It would hence be detrimental to the Faroese position if the applicable methods for finding an equitable solution in delimitations within 200 NM were transposed in order to find an equitable solution in the Rockall dispute. Before prospectively analyzing in depth the applicable law in that dispute we shall study other delimitation methods in disputes within 200 NM.

B. Corrective perception of equity

The Court's first approach to the equitable solution was based on a corrective perception of equity. The *North Sea* judgment and the *Anglo-French* award analyzed the content of equity on the basis of law in the form of equitable principles.[58] This normative approach with regard to equitable principles was in extended, in the *Anglo-French* award, to also comprise the methods utilised. Arbitrators were consequently considered to be bound to apply some kind of methods which in the *Anglo-French* award was reflected in a statement of the

53 ICJ, *Tunisia v Libya*, 89, para 129.
54 ICJ, *Libya v Malta*, 48, para 64.
55 *Anglo-French* award, paras 201-202.
56 Ibid, para 248.
57 Ibid, para 251.
58 P Weil, op cit, n 15, 171.

Tribunal in which it held that it did not have a „carte blanche to employ any method that it chooses in order to effect an equitable delimitation."[59] The Court held in *Tunisia v Libya* that the „equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution."[60] Accordingly the Court's conclusion was that all that matters is the equitable result as the methods utilised to reach this result are deprived of any normative character.[61] The Court therefore perceived it justified to approach the delimitation disputes on a casuistic basis, enabling it to take into account the particular circumstances and hence deviates the undertaken approach in the *Anglo-French* award. This approach of the Court was reiterated in the *Gulf of Maine* judgment and in *Guinea v Guinea-Bissau*.[62] The Courts sudden departure from the autonomous concept of equity was severely criticised by some judges.[63] Criticism and claims of lack of predictability in delimitation issues drove the Court to re-conceptualize its autonomous concept of equity.

The Court modified in *Libya v Malta* its conceptual perception of the notion of equity, from being a subjective one to an objective concept ruled by a legal content. The Court relied on the necessity of consistency and predictability in order to enrich the legal content of equity in delimitation matters and hence justified its new approach.[64] After having identified the uniqueness of each delimitation case the Court stated in *Libya v Malta* that „only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law, to be attained."[65]

On the basis of the abovementioned it can be contended that the ICJ edified in *Libya v Malta* a new corpus of legal rules in order to find an equitable solution

59 *Anglo-French* award, 114, para 245.
60 ICJ, *Tunisia v Libya*, 59, para 70.
61 Ibid, 79-80, para 111.
62 ICJ, *Gulf of Maine*, 300, para 37; *Guinea v Guinea Bissau*, 77 *International Law Reports*, 636, para 89.
63 The concept of equity with so little legal contents has been challenged by several judges. Judge Oda held that the delimitation line adopted by the Court „does not exemplify any principle or rule of international law … [the] equidistance method is … the equitable method par excellence, and for this reason alone should be tried before others." See Diss Op in *Tunisia v Libya*, 269-270, paras 180-181; Judge Gros held that by choosing to draw „lines of direction which no principles dictates … [the judgment has] strayed into subjectivism." See Diss Op Judge Gros in *Tunisia v Libya*, ibid, 152-153, paras 17-19.
64 ICJ, *Libya v Malta*, 38, para 45.
65 Ibid, 55, para 76 (emphasis added).

in continental shelf delimitations. The normative character of the equitable principles has been reiterated in the subsequent cases, *Jan Mayen*, *Qatar v. Bahrain*, *Guinea v. Guinea-Bissau*, *St. Pierre and Miquelon* and *Eritrea v. Yemen*.[66] The normative feature that has been conferred on the equitable principles was however not extended to comprise the applicable methods. In the words of the Court, UNCLOS „sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to the States themselves, or to the courts, to endow this standard with specific content."[67]

C. Equidistant line

In a recent arbitration case, *Eritrea v. Yemen* and the recent cases dealt with by the ICJ, *Jan Mayen*, *Qatar v. Bahrain* and *Cameroon v. Nigeria* the equidistant line has been relied on as a starting point to the resolution of the dispute.[68] Former judge Guillaume in his report to UN General Assembly in 2001 stated that the "equidistance – special circumstances rule" is to be relied on to achieve an equitable solution and that "such a result may be achieved by first identifying the equidistance line, then correcting that line to take into account special circumstances or relevant factors, which are both essentially geographical in nature."[69] Accordingly it can be held that the equidistance method in disputes within 200 NM is utilized as a provisory demarcation line susceptible to be modified, on the basis of geographical elements, in order to rectify nature's inequity.

It would be purely speculative and hypothetical to try and identify the applicable methods of delimitation in the Rockall dispute. However it can considering the abovementioned conceptual perceptions of the Court that adjudicators will be bound to confer a considerable importance to the fact that the title to that area differs the title to the continental shelf within 200 NM. The question that arises is whether the provisory equidistant line will be the starting point in a potential Rockall dispute. The underlying reason for which the Court has embraced the approach of drawing a provisory equidistant line is because of competing titles to all areas within 200 NM. If the Faroese government provides the proof that the Rockall Hatton area is a "natural prolongation" of the Faroese continental shelf then there is no competing title to that area and hence no overriding reason for starting the delimitation process with a provisory equidistant line. This is the thrust in the Rockall dispute. The provisory line should reflect the extent

66 DA Colson, op cit, n 40, 101.

67 ICJ, *Libya v Malta*, 30, para 28 (emphasis added).

68 DA Colson, op cit, n 40, 101.

69 Judge Guillaume, speech to the Sixth Committee of the General Assembly of the United Nations, 31 October 2001, summing up the contemporary state of delimitation case law, available at <www.icj-cij.org/icjwww/ipresscom/iprstats.htm> (last visited 15 September 2006).

of title of each State party to the dispute and it it is only hereafter that equity will play a role in the Rockall dispute. This postulate implies that the provisory line in that dispute should be drawn independent of geographical factors. This would have the evident effect that if geological and geomorphologic studies support the idea that if the area is a natural extension of the Faroese continental shelf the provisory line will be drawn in abstraction to the small land territory of the Faroe Islands.

V – Applicable law and principles by an international adjudicative body in a Rockall dispute

It follows in the Court's constitutive concept of delimitation that the applicable methods to find an equitable solution should be consistent with the basis of the entitlement.[70] Accordingly, if the Rockall dispute is brought to an international tribunal one of the features that will characterize the adjudicative body´s findings is that little or no legal importance will be conferred to the small Faroese coastline nor its small landmass.

A. Distinctive methods and equitable principles

The Court has stated that the „legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation."[71] In *Libya v Malta*, when holding that the geological elements were not to be taken into account, the Court argued that there was no reason why a factor „which has no part to play in the establishment of title should be taken into account as a relevant circumstance for the purposes of delimitation."[72] *A fortiori* a factor that is the basis of the title must, to paraphrase the Courts language, „play a role" in the determination of „relevant circumstances for the purposes of delimitation" as delimitation must be done in a „manner consistent with the concepts underlying the attribution of legal title."[73] To put it in the present context this means that if studies reveal that the Rockall Hatton area is irrefutably an extension, in the sense of Article 76 UNCLOS, of the Faroese continental shelf, it can not be excluded that instead of drawing a provisory equidistant line, as undertaken in delimitations within 200 NM, the provisory line will reflect the extent of the Faroese title to that area and possibly in detriment to the claims of the other disputing States.

It is not disputed that raw facts cannot coincidently bring forth a legal solution, like Venus rising from the waves. Facts can only produce law if there is a pre-

70 ICJ, *Libya v Malta*, 46-47, para 61.
71 ICJ, *Libya v Malta*, 30, para 27.
72 Ibid, 35, para 40.
73 ICJ, *Libya v Malta*, 46-47, para 61.

existing legal norm applied to them. By themselves, they are powerless to create law.[74] One can transpose that statement of Weil into ruling debate concerning applicable law and methods for finding equitable solutions in outer continental margin delimitations. It is not the scientific studies on geological and geomorphologic elements in the Rockall area that create the applicable law in that dispute. That contention is based on the fact that there is a pre-existing legal norm which applies to that specific case, namely Article 76, in conjunction with Article 83, of the UNCLOS which embraces a conception of the title to the area beyond 200 NM which is based on geological and geomorphologic elements. Hence the thrust of delimitation disputes settled to date, that is, partial or no effect shall be given to a special or unusual geographical feature which appears to lead to inequity cannot be blindly transposed to delimitations beyond 200 NM, including the Rockall dispute.

It can not be excluded that adjudicative bodies will endeavor a *suum cuiqere tribure* approach in outer continental margin delimitations. This postulate finds its legal basis in the Court's early case law as the continental shelf of any State must „not encroach upon what is the natural prolongation of the territory of another State."[75] Could elements such as the disparity in length of relevant coasts then be recognized as a special circumstance, so as to limit a coastal State title or should this be considered as immaterial for delimitation in the Rockall dispute? It shall be reiterated that it is „only the legal basis of the title to continental shelf rights … which can be taken into account as possibly having consequences" for the claims of States in continental shelf disputes.[76] Weil contends that given that geological and geomorphologic elements are the basis of the entitlement implies that adjudicators will be prevented from adopting the inner 200 NM approach for finding an equitable solution because title commands the delimitation and the „délimitation est fille du titre."[77] It can be held that the abovementioned reinforces the postulate that where other criteria than the distance criterion are the basis of the title, it is difficult to perceive how geographical elements will have an impact for the choice of equitable criteria and methods in order to find an equitable solution, hence the short coastline of the Faroe Islands nor its insular status will not be prejudicial to its claims if the Faroese government provides geological and geomorphologic studies that support the contention that the Rockall Hatton area is an extension of the Faroese continental shelf. Consequently the prognostic for a considerable extension of the Faroese continental

74 P Weil, op cit, n 15, 181.

75 ICJ, *North Sea*, 47, para 85(c).

76 ICJ, *Tunisia v Libya*, 48, para 48 (emphasis added).

77 P Weil *Ecrits de Droit International* (Presses Universitaires de France 2000) 258. Lucchini and Voeckel support the same view: *'[l]e titre est en effet, l'élément fondamental de base. La délimitation ne peut avoir lieu qu'à partir de lui et en s'appuyant sur lui.'* L Luchini and M Voeckel, *Droit de la mer*, t. 2, Délimitation (Pedone 1996) 211.

shelf to comprise important parts of the Rockall and Hatton area, regardless the small and remote situation of the Faroe Islands, could be likely. In other words the ICJ's death warrant in *Libya v Malta*[78] to geological and geomorphologic elements for matters of delimitation within 200 NM will not be applicable law in the Rockall dispute.

B. An equidistant line?

The function of relevant circumstances is to ascertain that the particular facts in a dispute do not render inequitable the line dictated by legal considerations related to title, and do not call for a correction of this line.[79] The role of relevant circumstances is to test the equity of equidistance and it is by taking these circumstances into consideration that the individualizing and corrective function of equity expresses itself.[80] Which principles shall adjudicators apply, in the event that the negotiations in the Rockall dispute are not fructuous and the matter is set to an international adjudicative body? Should the international fora embrace the provisory equidistant line and then alter it according to geographical features? The response to the latter question is, as enshrined in the above section, infirmative.

In *Libya v Malta*, when the Court abandoned the natural prolongation criterion, it thoroughly and recurrently distinguishes the delimitation régime within 200 NM from the delimitation régime beyond 200 NM.[81] Hence the applicable principles for finding an equitable solution will differ the ones utilized in delimitations within 200 NM as the relevance of geographical elements for finding an equitable solution in delimitations were utilized because the basis of the entitlement of the area within 200 NM was itself based on a geographical factor. The Court held in *Libya v Malta* that it is logical „that the choice of criterion and the method which it is to employ … should be made in a manner consistent with the concepts underlying the attribution of legal title."[82] Accordingly, it is „logical" that the methods and applicable equitable principles for finding an equitable solution in the Rockall dispute must be „consistent with the concepts underlying" the title for the area beyond 200 NM. Hence it can be argued, as already observed by certain scholars, that the criteria established in the *North Sea* judgment are regaining importance – though this time for the delimitation beyond 200 NM.[83]

78 This is an expression utilised by P Weil, op cit, n 15, 43.
79 P Weil, op cit, n 15, 209.
80 Anglo-French award, para 195; Diss. Op. Jimenez de Arechaga, Tunisia v Libya, 106, para 24.
81 DA Colson, op cit, n 33, 291.
82 ICJ, *Libya v Malta*, 46-47, para 61 (emphasis added).
83 DA Colson, op cit, n 40, 107.

It is of importance to highlight that the reason for which this paper has undertaken an empirical study on the implication title has for delimitation is that by transposing, by way of analogy, the ICJ's delimitation case law within 200 NM to a potential Rockall dispute would have prejudicial effects to the Faroese claims. The legal reasons which drove the Court to (i) solely confer a diminished effect in *Tunisia v Libya* to Tunisia's Kerkennah Islands despite the fact that the main island of Kerkennah is 69 square miles in area and has a population of 15.000, (ii) the fact that the Maltese island Filfa was disregarded altogether in the *Libya v Malta* case (iii) and that the main island of Malta was only given partial effect due to its small size is of no relevance for adjudicators in the Rockall dispute as the shape of the Faroese archipelago and its small size compared to the other disputing parties will not be a prejudice to find an equitable solution if viable studies reveal that the disputed area is most likely a continuation of the Faroese continental shelf.

The abovementioned statement does not neglect the importance that has to be conferred to the obligation for any adjudicator to find an equitable solution as a delimitation must fulfil two essential conditions in order to be founded in the law: (i) it must be carried out according to a schema connected with the legal nature of the title to the maritime area in question and (ii) it must establish an equitable line, for which purpose it must comply with principles of equity.[84] However it shall be reiterated that a delimitation is not „a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law"[85] and that statement of ICJ in the *Fisheries case* should be advanced by the Faroese government. It is on the basis of a well established case law that it can be contended that the length of a coastal has no independent role in determining the areas over which the coastal State has legal title within 200 NM and was hence not conferred a direct and independent role in determining the legal title to the continental shelf of coastal States. This however, did not exclude considerations of coastal lengths from having an importance in the second stage of the delimitation operation as being a factor related to the proportionality of a final line. In Gulf of Maine the Chamber of the Court held that the „difference in length… is a special circumstance of some weight … justifies a correction of the equidistance line, or of any other line".[86] The Rockall Hatton area is beyond 200 NM and beyond the delimitation principles established by the Court in delimitation disputes within 200 NM hence the reason for which the Faroese government shall not be inhibited in its claims by the small physical size of the archipelago.

84 P Weil, op cit, n 15, 202.
85 ICJ, *Fisheries case*, ICJ Rep, 1951, p. 133.
86 ICJ, *Gulf of Maine*, para 175.

CONCLUSION

It would indeed not be virtuous for the Faroese government if the delimitation principles that prevail in disputes within 200 NM were directly transposed to delimitations beyond 200 NM. In that event it could be deduced that regardless of whether or not the Rockall Hatton area is a natural prolongation of the Faroese continental shelf, the establishment of the Faroese outer continental margin would be reduced on the basis of the prevailing geographical situation, population and political status of the Faroe Islands.

No case law exists which could confirm or refute the undertaken postulate in this manuscript. It is hence almost a truism to state that the points that are set forward in this article are based and constructed on a prospective analysis. The author is however of the conviction that the ICJ has, deliberately, left the debate, concerning applicable law in outer continental margin delimitations, open and it is hence for all parties to argue in accordance with their own convictions and interests. Though it is unquestionable that even though the debate is open it can reasonably and objectively be deduced from the existing case law that the methods and principles for finding an equitable solution in the Rockall dispute will not be based on geographical factors. This opens the possibility for the introduction of a relative notion of equity in outer continental shelf delimitations, ie. one that takes into account, and has as its departing point, the fact that the titles are not concurrent and which implies for the Rockall dispute that as much as possible should be left to the coastal State which demonstrates the best proof that the Article 76 UNCLOS criteria are fulfilled to the Rockall Hatton area.