

SEPARATE OPINION OF JUDGE RANJEVA

[Translation]

Special circumstances and delimitation of the territorial sea — Rule-making or corrective function — Geomorphology and course of the provisional equidistance line — Notion of necessity and alternative course of the provisional line — Bisector and equidistance line — History of Article 15 of the 1982 United Nations Convention on the Law of the Sea — Development of jurisprudence — A largely settled debate — Reversal of jurisprudence — “Particular circumstances”.

1. I regret that I am unable to subscribe to the decision of the majority of the Court with respect to the third paragraph of the operative clause of the Judgment concerning the azimuth of the boundary segment starting from the point with the co-ordinates 15° 00' 52" N and 83° 05' 58" W, which follows the azimuth 70° 14' 25" until its intersection at point A (with co-ordinates 15° 05' 25" N and 82° 52' 54" W) with the 12-nautical-mile arc of the territorial sea of Bobel Cay. For this first section of the single delimitation line the Judgment challenges the law and method of delimitation of the territorial sea. In a vote on the other sections of the boundary, I would have voted in favour.

2. My disagreement centres on the way in which the Judgment treats the special circumstances under Article 15 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) in its construction of the delimitation line. Contrary to the view of the majority of the Members of the Court, for delimitation of the territorial sea between States with adjacent or opposite coastlines, special circumstances possess not a rule-making but a corrective and adjusting function in respect of the provisional equidistance line. In paragraph 272 of the present Judgment, the Court justifies its abandonment of the provisional equidistance line in the following terms:

“However, the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.”

In support of its decision it invokes arguments of fact — the geomorphology resulting in the instability of the coastlines of both Parties, particularly at the mouth of the River Coco and around Cape Gracias a Dios — and arguments of law based on the interpretation of the last sentence of Article 15 of UNCLOS:

“The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to

delimit the territorial seas of the two States in a way which is at variance therewith.”

The divisive issue concerns the point of law alone, as geomorphological features can, in certain instances, constitute special circumstances within the meaning of Article 15.

3. The role of special circumstances in delimitation of the territorial sea is one of the classic issues of maritime delimitation law. A historical review of the various stages of that debate is perhaps useful in the present case, which has challenged the creative action of jurisprudence in settling maritime delimitation law, *inter alia*, that of the territorial sea.

4. The literal interpretation of Article 15 of UNCLOS advocates the equidistance or median line for territorial sea delimitations when the coasts of the States are adjacent or opposite. Exceptions can be made to that rule of principle if special circumstances exist and if it is necessary to delimit the territorial sea in another manner. The use of the adjective “necessary”, which implies a notion of inescapable constraint, prescribes a very strict and restrictive interpretation of the conditions which may, exceptionally, justify abandoning the general rule. Paragraphs 268 and 269 of the present Judgment follow the path laid down by Article 15 of the Montego Bay Convention, but the difficulty in subscribing to the majority view derives from its conclusion that it is impossible to construct a provisional equidistance line, and from the normative equipollence attributed by the majority to the equidistance line and the provisional equidistance line in the second subparagraph of paragraph 280.

5. In paragraph 282, the Judgment notes that the Parties have each envisaged delimitation methods that did not systematically advocate the use of the median line; in other words, the conduct of the Parties has been interpreted as an exception to the general rule. On closer analysis, a distinction must be drawn between the content of the rule, whether or not accepted by the two Parties, and the interpretation of that rule, given the factual situation resulting from the geomorphology. In the present case, the Parties acknowledge both the unstable nature of the coastline in the area to be delimited and the difficulties of the exercise itself. Are these considerations such as to justify in law the “necessary” nature of a different method of territorial sea delimitation? The technical arguments must not be overlooked, but must, in any event, fall within the scope of the applicable law.

6. The general scheme of the geometric method adopted in the Judgment in paragraph 281 takes as its foundations the “special circumstances in which it [the Court] cannot apply the equidistance principle”; those circumstances are set forth in paragraph 280 in the following terms:

“because of the changing conditions of the area the Court has made no finding as to sovereignty over these islands (see paragraph 145 [of the Judgment]). Moreover, whatever base points would be used for

the drawing of an equidistance line, the configuration and unstable nature of the relevant coasts, including the disputed islands formed in the mouth of the River Coco, would make these base points (whether at Cape Gracias a Dios or elsewhere) uncertain within a short period of time.”

Regardless of the correctness of that technical assertion, it raises a point of law: is the condition of necessity required by the 1982 Convention fulfilled?

7. In absolute terms, the notion of necessity involves an absence of solution such that no alternative can be envisaged. The difficulties encountered are not of themselves sufficient to justify the necessity of abandoning the general rule. The impossibility must be appraised from a legal standpoint. In the present case, the Judgment focuses upon the unstable geomorphological nature of the coastlines. But the restrictive approach adopted in the Judgment is regrettable, since it takes account of the geomorphological element alone. Unlike the Court, the 1982 Convention did not overlook the potential for extremely unstable coastlines, a possibility which had not been envisaged by the Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958. Thus, the objection raised by the Judgment is irrelevant as to the principles. A very different matter is that of the applicability of Article 7, paragraph 2, of UNCLOS, which states the following:

“Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.”

The question is thus whether that provision of the Convention concerning the progressive development of the law relative to customary law is relevant. The status of the two litigant States with respect to the Convention renders the question devoid of purpose: the unstable nature of the coastlines does not, in itself, constitute a situation of impossibility giving rise to a legal vacuum such as to exclude the application of the general rule of the equidistance line. The reasoning would have been credible if this provision of UNCLOS on unstable coasts had been taken into account.

8. Given the consequences drawn by the Judgment from the importance it attributes to the geomorphological aspect, application of the provisional median line would result in an impasse and the Judgment justifies its solution by attributing a rule-making function to the special circumstances referred to in Article 15 of UNCLOS. In so doing, the Judgment reopens the debate that sank the diplomatic negotiations on maritime delimitation, whereas a rule-making provision concerning territorial sea delimitation has existed since 1958 in Article 12 of the Conven-

tion on the Territorial Sea, and the jurisprudence of the Court, particularly since the *Jan Mayen* case, has settled that debate. The current Judgment represents a reversal of jurisprudence sanctioned by an *obiter dictum*:

“[h]owever, the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate”.

9. The geometric figure that the line of delimitation represents is surprising. The text of Article 15 of UNCLOS refers to “the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured”. (The difference in terminology between equidistance and median lines relates not to the delimitation method but to the different geographic situations to which that method is applied: equidistance line in reference to adjacent coasts and median line for those opposite one another (cf. A. L. Shalowitz, *Shore and Sea Boundaries*, Washington, D.C., United States Department of Commerce, 1962-1964, Vol. I, pp. 232-235)). The Judgment, however, uses the bisector line to effect the delimitation of the territorial sea. Beyond a straightforward question of terminology, we are confronted with an operation of a completely different nature. The bisector is a line segment which *divides the angle of a sector*, that is to say a plane or area sector, by isometry and thus equally. The bisector is used in apportionment or division of the area concerned, in the present case the polygon formed by the adjacent maritime frontages. A reminder of this technical definition is necessary inasmuch as the Court was requested to carry out a maritime delimitation and not an apportionment or division. That consideration explains the omission of the bisector method in 1953, during the working session of the International Law Commission and the group of experts on the technical implications of delimitation methods. In its 1956 report, when listing the possible methods, the International Law Commission also made no mention of the bisector approach.

10. With the lack of textual support in the applicable Convention for the bisector technique, the issue next at hand concerns the relegation of the provisional equidistance line. The Judgment abandons it in view of the difficulties described in paragraphs 277 to 280. It concludes that

“because of the changing conditions of the area the Court has made no finding as to sovereignty over these islands (see paragraph 145 [of the Judgment]). Moreover, whatever base points would be used for the drawing of an equidistance line, the configuration and unstable nature of the relevant coasts, including the disputed islands formed in the mouth of the River Coco, would make these base points

(whether at Cape Gracias a Dios or elsewhere) uncertain within a short period of time.”

On the legal level, there is no obstacle preventing the identification of base points from which the pairs of points equidistant from the boundary point would be fixed. In practice, drawing the equidistance line provides a reminder of the relationship between nature and law in maritime delimitation, the *pons asinorum* of international law: the law inevitably transcends the natural features to which it attributes particular effects. The law, like the jurisprudence, aims to prevent outcomes in which “pronounced” configurations are ignored (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J. Reports 1969*, p. 51, para. 96), and also an overly basic interpretation of nature. Gidel mentioned as a possible justification for abandoning the equidistance line “cases in which it would involve real drawbacks [and] . . . lead to serious inequity between the two coastal States” (G. Gidel, *Le droit international de la mer*, 3 vols., 1932-1934, p. 771). The plotting of the provisional line must add to the element of stability and permanence which characterizes a boundary delimitation exercise. The Court has not denied itself its discretionary powers to determine an abstract point from which the required linear geometrical figure is constructed (see paragraph 280 of the Judgment). Figure 7 (b) appended to the work by L. Lucchini and M. Voelckel (*Droit de la mer*, tome 2, Vol. 1, 1996) could have been of help in drawing such a provisional line. In the present instance, the choice of endpoints for the two States’ coastal fronts and of the point established by the Mixed Commission of 1962 has been clearly identified on sketch-map No. 3 on page 750 of the present Judgment. An equidistance line can then be constructed from pairs of points equidistant from the point determined by the Mixed Commission in 1962. Those pairs of points will be selected in such a way as to take account of the salient features of the coastal fronts of each State.

11. The genesis of Article 15 was mentioned in justification of the rule-making function, even by default, of special circumstances. The median line rule lies at the heart of the operative provisions of Article 15, the wording of which was practically settled, at the Third United Nations Conference on the Law of the Sea, in the 7 May 1975 draft of the single negotiating text. In such a situation, on that particular point of the substantial links between equidistance line and special circumstances, the Third Conference did not challenge the fundamental basis of the general scheme of Article 12 of the Geneva Convention on the Territorial Sea and the Contiguous Zone. In support of its interpretation, the Judgment takes refuge behind the commentaries in the *Yearbook of the International Law Commission*, 1952, Vol. II, p. 38. But the Judgment neglects to take account of the opinion of the Special Rapporteur in 1956:

“The Yugoslav Government had proposed the deletion of . . . the phrase ‘unless another boundary line is justified by special circumstances’. He did not believe that the Commission was prepared to

delete the latter phrase, because it attached considerable weight to it and its deletion would make the article too rigid.” (United Nations, *Summary Record of the 366th Meeting*, doc. A/CN.4/SR.366.)

It was on the basis of that proposed interpretation that a vote was held the same day on a text combining draft Articles 12 and 14 drawn up by the Special Rapporteur. The Special Rapporteur’s view was that the role of special circumstances was to correct the effects of strict application of a median or equidistance line. At the 61st meeting of the First Committee of the United Nations Conference on the Law of the Sea (Geneva, 24 February-27 April 1958), “[t]he phrase ‘special circumstances’ in the second sentence was adopted by 38 votes to 7, with 22 abstentions” (A/CONF.13/L.28/Rev.1, Plenary Meetings, Vol. II, p. 119). That prescription does not mean that the median line is obligatory, for that would destroy the consubstantial relationship between the median line and special circumstances, and thus the median line has only a provisional status in the delimitation of the territorial sea.

12. The jurisprudence relied upon by the Judgment to justify the abandonment of the provisional equidistance line is not decisive either. Among arbitral proceedings, the *Guinea/Guinea-Bissau* case is well known, in that the Arbitration Tribunal sought an equitable delimitation taking account of a broader geographic area to avoid prejudicing subsequent delimitations concerning third States (see case concerning the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, *International Law Reports*, decision of 14 February 1985, para. 109). In that case, the capricious character of the configuration of the coastal geography was decisive for the Tribunal because of the effect of the coastal configuration on the equidistance line. The Tribunal ruled out the equidistance line after assessing whether the delimitation would be of an equitable nature using the provisional equidistance line. In fact, the adoption of the equidistance approach would have had the

“drawback of resulting in the middle country [Guinea in that instance] being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits” (*ibid.*, para. 104).

The short concave coastline was thus left aside in favour of a convex configuration covering the maritime front of West Africa as a whole. The overall orientation of the coasts constitutes a special circumstance, account of which had to be taken in adjusting or even ruling out the equidistance line. The Judgment effects an amalgamation by taking into consideration only the final outcome and making the provisional line an intermediate stage.

13. The plotting of a single maritime boundary does not, from the standpoint of the jurisprudence, call into question the principles governing special circumstances. The debates at the Third United Nations Con-

ference on the Law of the Sea highlighted, on the one hand, the general adherence to a unitary conception of the basis of the law of maritime delimitation and, on the other, with respect to special circumstances, the fact that the rule is “consubstantial” with equidistance, in that the two notions complement and support each other. The evolution of the Court’s jurisprudence over the period from 1969 to 1985 reflected the often tentative efforts to that end, before the advent of a solution of principle in 1993. The Court recalls in paragraph 271 of the present Judgment its own findings in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*:

“The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’.” (*Judgment, I.C.J. Reports 2002*, p. 441, para. 288.)

14. In 1969, the Court established the principle that the pursuit of an equitable outcome was the objective of all maritime delimitations:

“it is necessary to seek not one method of delimitation but one goal” (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, *Judgment, I.C.J. Reports 1969*, p. 50, para. 92).

The median line was at the time at the centre of a controversy which, in retrospect, gives rise to some amusement. The *Libya/Malta* Judgment constitutes a significant stage in the development of the law with its declaration that

“[t]he Court is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is the one which *must* be used” (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment, I.C.J. Reports 1985*, p. 37, para. 43).

The use of the emphasized verb “*must*” reflects, initially, the Court’s rejection of compulsory and systematic application of the equidistance line on a preliminary and provisional basis; but, subsequently, such a line, previously condemned, could be taken into consideration. After all, the 1985 Judgment applied the equidistance line to the case, proceeding by stages.

15. In 1993, the entry into force of the Montego Bay Convention was

regarded as probable in the near future, as that instrument was interpreted as an expression of positive law and the Court accepted it and regarded it as such. Thus the Judgment in the *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* case put the finishing touches to that development when it adopted the method of delimitation by stages, but without the reservations still expressed in the 1985 decision. When the Court straightforwardly applied the delimitation by stages method, it was mindful of coherence and predictability, two concerns already expressed in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case Judgment. Article 6 of the Geneva Convention on the Continental Shelf, in the Court's view, provided for an approach

“taking provisionally the median line . . . and then enquiring whether ‘special circumstances’ require ‘another boundary line’” (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *I.C.J. Reports 1993*, pp. 59-60, para. 49).

Later in the same Judgment, the Court places its judicial policy approach within a unitary framework by stating that “[j]udicial decisions on the basis of the customary law governing continental shelf delimitation between opposite coasts have likewise regarded the median line as a provisional line” (*ibid.*, p. 60, para. 50). Unity of method, if not of régime, was thenceforth regarded as the rule, whether for territorial seas, the continental shelf, exclusive economic zones or fishing zones. The pursuit of an equitable result did not rule out a simple and readily understandable solution. The traditional and apparently parallel pairs, that is to say, on the one hand, equidistance/special circumstances and, on the other, relevant circumstances/equitable principles, have since 1993 formed part of the same dynamic process: both seek to obtain an equitable result in maritime delimitation. There are two consequences, the first establishing that the specific terminology relating to areas does not affect the coherence of the rules and the second that the plotting, on a preliminary and provisional basis, of an equidistance line is indispensable. The Judgments in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* and the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* cases, in 2001 and 2002 respectively, consolidated the development represented by the step-by-step approach based on the provisional median line.

16. In paragraph 272, the present Judgment refers to “particular circumstances”. The Court thus invents a third category of circumstances alongside the special circumstances and the relevant circumstances of the Convention on the Law of the Sea. That new category is thus of an unspecified nature and corresponds to what the Franco-British arbitral award called “a wholly different criterion of delimitation” (case concern-

ing the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, decision of 30 June 1997, United Nations, *RIAA*, Vol. XVIII, p. 116, para. 249). The major problem is that the majority of the Members of the Court base themselves upon those “particular circumstances” to depart from the application of the provisional median line rule and justify the use of a different rule, that of the bisector. Those circumstances, as distinct from the circumstances known as “special or relevant”, are no longer assigned the merely corrective function prescribed by the law and all jurisprudence to date, but instead a rule-making function. The Court has directly endorsed the analyses concerning the geomorphology of the coasts in order to construct a bisector line. Contrary to the Court’s jurisprudence, which excludes from the field of directly applicable rules any principle other than that of preliminary and provisional equidistance, the present Judgment challenges the creative exercise progressively undertaken by the Court. It opens up the way for new uncertainties which may lead to a direct normativity of equitable principles at the expense of the rule of positive law.

17. To conclude, the present Judgment, in so far as it concerns the azimuth in the area of the territorial sea between the point fixed by the Mixed Commission in 1962 and the intersection with the outer limit of Bobel Cay, constitutes a repudiation of the law and the Court’s jurisprudence in matters of territorial sea delimitation.

(Signed) Raymond RANJEVA.