

SEPARATE OPINION OF JUDGE VALTICOS

[Translation]

1. Although concurring with the above Judgment as a whole, I wish to make my position clear, in regard not only to certain points with which I fully agree but also to some serious reservations which I wish to express as to part of the reasoning and the ultimate findings.

THE INTERESTS OF THIRD STATES

2. To begin with the task of the Court, I can understand its position on the question of third States, particularly on account of the Court's remarks in its decision of 21 March 1984, rejecting Italy's application for permission to intervene. Here due emphasis should be placed, on the one hand, on the special circumstances of this decision, and on the other hand, on the fact that in the present Judgment, the Court has made it clear that the "limited" decision which it has made in order to take account of Italy's interests does not signify

"that the claims of either Party to expanses of continental shelf outside that area have been found to be unjustified" (para. 21).

These are therefore matters which Malta and Libya can examine together with Italy with a view to arriving at a delimitation of their respective potential areas, beyond the "limited" area to which the present decision relates.

ROLE OF GEOLOGICAL AND GEOMORPHOLOGICAL FEATURES

3. Coming to the heart of the problem, I wish to emphasize my full concurrence with the Court's view that :

"since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims" (para. 39).

This finding is particularly important ; it marks the culmination of the development of the law of the sea on this point in recent times. There is no need to repeat here the arguments which have been invoked in its support. It is enough to recall the criterion enshrined in the last sentence of Article 76, paragraph 1, of the 1982 Convention on the Law of the Sea, which, as the Court says, "is of major importance" (para. 27). The decline in the physical characteristics of the continental shelf caused by the aforementioned 200-mile rule, and the increased importance attributed to geometric factors (distance or adjacency to the sea) have brought about a corresponding alteration in the concept of "natural prolongation", at least where areas within the 200-mile limit from each coast are concerned. Moreover, both the Court and arbitral tribunals had already grown aloof from geological and geomorphological criteria, and the practice of States (with the one frequently cited exception of the Strait of Timor) has consistently been to ignore the physical features of the submarine terrain when concluding bilateral delimitation agreements.

Furthermore, since delimitation is to be carried out according to equitable principles, there could hardly be a less equitable criterion than one which would subject relations among States, and sometimes their very well-being, to chance configurations of the sea-bed and to the often-disputed significance of troughs or other physical features formed millions of years ago and lying at depths of hundreds or thousands of metres. Natural boundaries may often indeed derive from significant causes on land, where they have sometimes imprinted, moulded and circumscribed the lives of nations ; but what true meaning can they have at the bottom of the sea, where they can only lead to uncertainty, injustice and disputation ? No, there is every warrant for the rules that have now developed for excluding geophysical criteria when effecting delimitations within 200-mile limits, especially when the need to preserve the equality of coastal States is borne in mind.

4. Thus the Court was quite right to take the view (para. 39) that the "rift zone" cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf, as if it were some natural boundary. Rejection of the Libyan "rift zone" argument was the more justified in that, apart from its being insufficiently grounded in law, it had not been convincingly established that a fundamental discontinuity of this nature actually existed, since the contradictory scientific evidence which the Court heard on this point had left, to say the least, a serious degree of doubt on the matter (see Judgment, para. 41).

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5. I now come to two fundamental points on which I can only partially endorse the Court's position. The first concerns the criterion of the median

line, to which the Court has seen fit to make a substantial "correction". The second relates to the "proportionality" factor. I shall also make some brief comments regarding certain "relevant circumstances", and clarify my position with respect to the delimitation area.

THE CRITERION OF THE "MEDIAN LINE"

6. If it is fully agreed that delimitation of continental shelf areas must be carried out in accordance with equitable principles and in such a manner as to achieve an equitable result, having regard to the relevant circumstances, I entirely support the first part of the Court's reasoning whereby, in order to arrive at a more precise criterion, the Court takes the view that in the present case, where it is dealing for the first time with a delimitation exclusively between opposite coasts, without any element of adjacency between them and without complicating features, to draw a median line between those coasts, by way of a provisional step, is "the most judicious manner of proceeding with a view to the eventual achievement of an equitable solution" (para. 62). The Court has rightly noted that "the equitable nature of the equidistance method is particularly pronounced" in cases of States with opposite coasts (*ibid.*).

7. This approach is particularly worthy of note because, in recent years, equidistance has often seemed to be the "Cinderella" among delimitation methods. Its virtues have readily been pointed out, but its actual use has been put off to a more favourable moment. In the present case, it seems to me that there were a number of reasons for choosing the median line as a delimitation line, not merely on a provisional basis, as the Court has decided, but also on a final basis. I shall summarize them briefly.

8. The first reason, as the Court itself has pointed out, is *the geographical situation of the coasts of Malta and Libya*, which face each other in the most obvious manner and present no difficult or complicating features, whereas in previous cases (especially *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*), the coasts concerned were adjacent coasts which tended in certain places to become opposite coasts or indeed did face each other, but only over a certain distance; this complicated the problem and rendered it less amenable to comparison, leading the Court (as well as the Court of Arbitration in the Anglo-French case) not to adopt the equidistance solution.

9. A second reason for choosing the median line arises from the new trends in the matter of title to the continental shelf. As pointed out above, the 1982 Convention on the Law of the Sea established the principle whereby every State is entitled, without further condition and irrespective of the configuration of the sea-bed, to a continental shelf of 200 nautical miles. If adjacency or distance becomes the sole criterion of title to the

continental shelf up to a distance of 200 nautical miles, representing the domination of land sovereignty over the sea, the method of the median line acquires increased importance as a delimitation method between opposite coasts. In fact, each seaboard projects towards the other an area with a theoretical potential breadth of 200 miles, and if these areas meet before that point is reached, the most equitable method and the one most in conformity with the principle of the equality of States should logically consist in delimiting these areas in the middle of the distance which separates them, unless special conditions apply. Admittedly, the Court does not follow this line of reasoning automatically, and does not consider that the equidistance method *must* necessarily be used, even as a preliminary and provisional step before a delimitation line is drawn (see Judgment, paras. 42-43). However, while the "distance" criterion does not imply that equidistance is the sole appropriate method of delimitation in the case of opposite coasts, the aptness of this method is all the greater when there are no special circumstances to hinder its use.

10. In the third place, the choice of the median line is borne out by the practice of the great majority of States. Notwithstanding the disagreements between the Parties on this point, the detailed statements and the evidence they have submitted have clearly shown that, although the numerous delimitations concluded by agreement among States present some variations arising from the particular features of individual cases, the overwhelming majority of opposite-coast delimitations (whether in the case of islands or of continents, of coasts of different lengths, or of coasts in varying degrees of proximity to or distance from each other) are indisputably derived from the median line, even where this is not explicitly stated in the text of the agreement concerned. Adjustments or partial corrections of the line are sometimes made in the light of relevant circumstances but, in general, alterations to the median line are slight and occur rarely. This was pointed out by the 1977 Court of Arbitration (para. 85) and in the facts and figures contained in a 1979 document quoted in a recent publication¹. Moreover, where Malta itself is concerned, it should be noted that the delimitation line drawn northward of the island, between Malta and Sicily, is a median line, and it is difficult to see why the line to the south of the island, between Malta and Libya, should not be likewise. (At no time has the length of the coast of Sicily been taken into consideration in order to introduce a "proportionality" factor, as Libya would wish in the case of its own coast.)

11. The Court gives a subtle version of this argument derived from State practice (see Judgment, para. 44). Admittedly, the Court says, it :

"has no doubt about the importance of State practice in this matter. Yet that practice . . . falls short of proving the existence of a rule

¹ V. L. Caffisch, "Les zones maritimes sous juridiction nationale, leurs limites et leur délimitation" in *Le nouveau droit international de la mer*, edited by Bardonnet and Virally, Paris, Pedone, 1983, p. 60, n. 67.

prescribing the use of equidistance, or indeed of any method, as obligatory.”

Like the Court, I tend to the view that the States which concluded those bilateral agreements to which reference has been made did not have the impression that they were following a binding rule of law, and were not guided by any *opinio juris*. But, at the very least, they did conclude these agreements in the light of the legal background, and in the belief that the median line was the most widespread and convenient method and that it reflected what might be called an *opinio aequitatis*. It would at all events be highly unfortunate if, on a point of such importance, a divorce were to set in between the treaty practice of States, to which Article 38 of the Statute of the Court refers, and the Court’s jurisprudence.

12. Furthermore, since its 1969 Judgment in the *North Sea Continental Shelf* case, the Court itself has often referred to the advantages offered by equidistance, and, as I said above, if it had not previously judged it appropriate to use this method, that was because the cases with which it has had to deal have all related, at least in part, to adjacent coasts. The present case offered ideal conditions for using this method, and to reject it once more, even partially, is to reduce its scope considerably.

13. Finally, it seems to me that the actual vocation of the Court is a consideration of a more general nature which cannot be ignored. If I may make an observation on a point of principle, due account should be taken of the fact that the Court’s vocation is to resolve disputes by means of legal solutions and, in so doing, to elicit, state and exemplify the relevant rule of international law. In the present field, where the legal rule (the equitable solution) is a guideline framed in deliberately broad terms, it is by means of a gradual refinement of its scope, through the resolution of particular questions, that the Court will eventually be able to elicit objective principles capable of guiding States which encounter similar problems (and there are many such States, apparently). In so doing, it will also be able to contribute to that clarity, certainty, predictability and stability which are so essential in international law. Moreover, the Court has itself emphasized in the present Judgment (para. 45), that the application of justice, of which equity is an emanation,

“should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it [the Court] also looks beyond it to principles of more general application”.

This affirmation seems to me fundamental for any court, and especially for an international court, which must play a particularly important role in the development of rules of law. In the present case, which is a classic and straightforward situation of opposite coasts without complications of any kind, a solution based on the median line pure and simple would have had a more general relevance.

THE CORRECTION MADE TO THE MEDIAN LINE

14. Having established a provisional median line, the Court takes the view that other considerations should prompt it to adjust this line. In this connection, it has examined a number of factors, especially “relevant circumstances”, and has included among the latter the difference in lengths between the coasts. I shall now deal with this matter, turning first to the “proportionality” factor.

THE “PROPORTIONALITY” FACTOR AND THE CIRCUMSTANCES OF THE “LENGTH OF THE COASTS”

15. It is indisputable that the Maltese coasts are much shorter than the coasts of Libya which lie opposite them. Should account be taken of this from the viewpoint of the delimitation? If so, at what stage, on what grounds and to what degree? These are the questions which have been put to the Court, and which have carried weight in the discussions. Indeed, this was the crux of the debate.

16. The most extreme position in this respect was the one maintained by Libya. Libya raised the objection of “proportionality” in the sense that the proportion of areas of continental shelf attributed respectively to Libya and to Malta should be comparable to the proportionality between the lengths of the coasts and the size of the landmass of Libya, on the one hand, and Malta, on the other. The effect of Libya’s arguments was also to make proportionality an essential and primordial principle of delimitation, contrary to the established jurisprudence in this field.

17. On this point, I fully endorse the Court’s position in rejecting the thrust of this contention. The question of the landmass behind the coast need not detain us here, since it has been unambiguously rejected by the Court in terms which require no comment (para. 49). As regards the criterion of the length of the coasts, I also share the Court’s view that “proportionality” has nowhere been mentioned amongst “the principles and rules of international law applicable to . . . delimitation”, but is simply one possibly relevant “factor” among others (para. 57). The Court does not therefore endorse the Libyan proposal, described as “so far reaching and so novel” which, by treating “the ratio of coastal lengths as of itself determinative of the seaward reach and area of continental shelf proper to each party”, went “far beyond the use of proportionality as a test of equity, and as a corrective of the unjustifiable difference of treatment resulting from some method of drawing the boundary line”, and would represent “at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation” (para. 58).

18. I think it is unnecessary to recall here the precedents which amply justify the Court’s position. The Court quotes the classic case of the *North*

Sea Continental Shelf Judgment of 1969, as well as the Decision of the Anglo-French Court of Arbitration in 1977. The Judgment in the case of the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*I.C.J. Reports 1982*, p. 93, para. 133 B. 5), also treated proportionality not as a problem in the definition of the shelf, but as a “function of equity” (*ibid.*, paras. 103-104). More recently, the Chamber of the Court in 1984, in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, mentioned this factor as an *auxiliary* criterion serving merely to check whether a provisional delimitation established on the basis of other criteria could or could not be considered satisfactory in the light of certain geographical features of the specific case, and whether it was or was not reasonable to correct it accordingly (*I.C.J. Reports 1984*, p. 323, para. 185).

19. However, there is an essential point here which must be emphasized. The great difference between the present case and the various past cases in which the Court – and the Anglo-French Court of Arbitration – referred to the proportionality factor (within the limited context which I have just described) is that in those cases the coasts concerned belonged to adjacent States, and their configurations were such as to carry a risk of encroachment or curtailment. The Court has itself pointed out that, in matters of delimitation, the position of opposite coasts is radically different from that of adjacent States, the equidistance line being much more appropriate, generally, in the former case than in the latter (see for example *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 36, para. 57, etc.). The aim of proportionality, where *adjacent coasts* are concerned, is to avoid solutions which, in some instances, owing to the particular configuration of the coasts in question, may seem contrary to equity. Here, in my opinion, there are neither adjacent coasts nor any abnormal configuration, and no part should be played by proportionality.

20. However, in the present case, the Court takes the view that the median line should be corrected by virtue of a number of relevant circumstances, including principally the difference in the lengths of the coasts of the two Parties. The foregoing comments explain the reservations which I find myself compelled to make in this respect. To introduce the coast-length factor, which in my view has no rightful place here, is to bring a subjective element into the delimitation process (why adopt one particular “correction” factor – here a certain number of minutes – rather than any other?). Subjective elements may well be unavoidable in matters of equity, but they should be kept within strict limits. Another consequence is to introduce an element of inequality and diversity, since the practical effect of this formula is to locate the delimitation line closer to the shorter coast, thus banishing any hope of achieving a minimum degree of harmony and comparability in the establishment of the various delimitation lines in the seas. Admittedly, this disadvantage is palliated by the fact that the verification based on the respective lengths of the coasts does not constitute the delimitation method itself. However, it can lead to a substantial correction, and I must therefore express a reservation on this matter, especially in the

light of the fact that here the difference in the length of the coasts is taken into consideration both as a relevant circumstance and as a final check in the verification of the result.

21. The proportionality calculation seems, moreover, to be particularly difficult to make with any degree of accuracy in the present case, since the Court's decision to reserve the Italian claims reduces the areas of continental shelf actually apportioned to the expanse located between the $13^{\circ} 50'$ and the $15^{\circ} 10'$ meridians, which consequently makes it impossible, for the purposes of such a calculation, to take full account of the rough triangle of which Malta forms the apex and the Libyan coast, from Ras Ajdir to Ras Zarruq, the base.

22. The correction which the Court has made to the median line in order to establish the final delimitation line is a substantial one, since it totals $18'$, extending from $34^{\circ} 12'$ (the median line) to $34^{\circ} 30'$. There are two reasons which ultimately induced me not to dissociate myself, in this respect, from this Judgment as a whole. The first reason is that the delimitation line which has ultimately been chosen remains some minutes southward of the delimitation line which would have divided Italy (Sicily) from Libya if Malta did not exist, and thus a certain effect, though an inadequate one in my view, has been given to the island of Malta. The second reason is that I felt it was important for the Court to be able to agree on a basis which I ultimately found more acceptable than others, although only in the last resort and in the face of certain drawbacks which I am bound to deplore.

THE DISTANCE BETWEEN THE COASTS

23. In deciding in favour of a correction of the median line, the Court has also pointed to an additional relevant circumstance, the distance between the coasts of the Parties. Once the Court had chosen the respective lengths of the coasts as a relevant circumstance, the element of the distance between the coast became a kind of necessary corrective of this circumstance. It is apparent that the circumstance of the respective lengths of the coasts acquires greater significance when the coasts are distant from each other, and tends to be reduced to vanishing point the closer the coasts become. To cite an illustration, it is self-evident that if two coasts are separated only by a seaway 24 miles wide, no other delimitation line can be contemplated than the median line. It is only when the distance between the two coasts becomes greater that – subject to the objections of principle described above – a correction of the median line can be contemplated. It is this element of a greater or lesser distance between the coasts which explains why equidistance pure and simple was used between the north of Malta and Sicily (see above, para. 10). This aspect reduces the scale of the problem to some extent, without going so far as to remove the basic objection mentioned above.

THE ROLE OF CERTAIN OTHER "RELEVANT CIRCUMSTANCES"

24. Among the "relevant circumstances" mentioned during the oral proceedings, there were two which call for brief comment ; these relate to the economic and security factors.

25. In dealing with the *economic factors*, the Court, in paragraph 50, does not consider that the delimitation to be made should be influenced by the relative economic position of the two States in question. However, it expresses the opinion that the natural resources of the continental shelf "so far as readily ascertainable", might constitute relevant circumstances to be taken into account in a delimitation, quoting its previous statement in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 54, para. 101 (D) 2). Those resources, the Court says, are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them. The Court had expressed a similar view regarding the existence of oil in an area to be delimited, in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*I.C.J. Reports 1982*, p. 77, para. 107). For its part, the Chamber formed to deal with the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case devoted considerable attention to economic considerations, particularly the potential resources of the sub-soil, although these were less significant than in the present case (*I.C.J. Reports 1984*, p. 340, para. 232).

26. However, in the case now before us, the Court points out that the Parties have not furnished any indications on the resources contained in the sea-bed. It may nevertheless be noted that for many years Libya has been enjoying substantial revenues from oil, whereas Malta, whose revenues are much lower (from a third to a half of Libya's per head of population¹), has no resources deriving from the sea-bed, although it has granted a number of concessions which have not yet been developed, notably for reasons related to the current dispute. It is thus reasonable to assume that an equitable area of shelf, such as would have resulted from the median line, would have increased its opportunities of developing its economic resources in this oil-bearing region within which, as I have said, it has granted concessions.

27. Another relevant circumstance which Malta has asked to have taken into consideration is *security*. This question is linked to the fact that Malta is a State entirely concentrated within the narrow boundaries of the island which contains its capital. The Court observes (Judgment, para. 51) that this factor might have played a part if the delimitation line were so close to the coasts of Malta as to make questions of security a particular consi-

¹ See World Bank, *World Tables*, 3rd ed., Vol. I, The Johns Hopkins University Press, Baltimore and London, 1983, p. 560, which gives a gross national product *per capita* for 1981 of US\$ 3,603 for Malta and US\$ 8,454 for Libya.

deration. The risk is admittedly less with the solution chosen by the Court. It would have been even further reduced if the median line pure and simple had been adopted.

THE DELIMITATION AREA

28. Before concluding this opinion, a few words must be added on the question of the delimitation area. Generally speaking, in every delimitation, as the Court pointed out in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, account should be taken of every part of the coast of one party the extension of which would overlap with part of the coast of the other party (*I.C.J. Reports 1982*, p. 61, para. 75). In this respect, the formula proposed by Malta, which would extend the island's coasts in all directions in which they may overlap with the extensions of Libya's coasts has logic on its side, and is in broad conformity with recent trends in international law, especially the 200-mile rule. However, in the present case this idea cannot be taken to its logical conclusion ; unarguable as it may be in the middle of the ocean where a full extension is possible, in the confines of the Mediterranean it encounters an evident obstacle : the interests of third States. In the present delimitation between Malta and Libya however, it is not possible to confine the area wholly within the expanse defined on the west by a straight line joining Ras il-Wardija, on the island of Gozo, to Ras Ajdir, and, on the east, by a straight line joining the Delimara Point, on the island of Malta, to Ras Zarruq, close to the intersection of the 15° 10' meridian (the limit of Italy's claims) with the Libyan coast. Account must also be taken of an expanse situated eastwards of the line from Delimara Point to Ras Zarruq and westwards of the 15° 10' meridian (and northwards of the delimitation line). This area, forming a prolongation of the southeastern coast of Malta in the direction of Benghazi, is located within a region outside the reach of Italy's claims, and it was therefore to be expected that it should also belong to Malta's area of continental shelf on the basis of the Court's delimitation. To say this does not, of course, exclude any future delimitation with Italy and Libya as regards the expanses outside the restricted area to which the Court has decided to limit the scope of the present Judgment.

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29. Being thus fully in agreement with the Court's views on a certain number of points, although I must regretfully dissociate myself from it in regard to others, I felt that in the final analysis, and notwithstanding the significance of some of these points, not least the question of the median line, I could vote for the Judgment as a whole for the reasons already given.

(Signed) Nicolas VALTICOS.