

DISSENTING OPINION OF JUDGE SCHWEBEL

While I am in agreement with many elements of the reasoning of the Judgment of the Court, I regret to dissent from the Judgment in two critical respects. In my view, the delimitation line which it lays down is unduly truncated to defer to the claims of Italy ; and the line is not a median line between the opposite coasts of Libya and Malta but a “corrected” median line which, as rendered, is incorrect, that is to say, is inadequately justified by the applicable principles of law and equity.

DEFERENCE TO ITALY’S CLAIMS

In its Judgment of 21 March 1984 on the Application by Italy for Permission to Intervene (*Continental Shelf (Libyan Arab Jamahiriya/ Malta), Application to Intervene, I.C.J. Reports 1984*, p. 12, para. 17), the Court quoted the object of Italy’s requested intervention, as stated by Italy, to be as follows :

“Italy is asking the Court, . . . to take into consideration the interests of a legal nature which Italy possesses in relation to various areas claimed by the main Parties, . . . and accordingly to provide the two Parties with every needful indication to ensure that they do not, when they conclude their delimitation agreement pursuant to the Court’s judgment, include any areas which, on account of the existence of rights possessed by Italy, ought to be the subject either of delimitation between Italy and Malta, or of delimitation between Italy and Libya, or of a delimitation agreement as between all three countries.”

The Court continued :

“counsel emphasized that Italy is not seeking to intervene solely to inform the Court of its claims, but so that the Court can give the Parties all the requisite guidance to ensure non-encroachment on areas over which Italy has rights”.

Furthermore, the Court interpreted Italy’s request to mean that :

“Italy is requesting the Court to pronounce only on what genuinely appertains to Malta and Libya, and to refrain from allocating to these States any areas of continental shelf over which Italy has rights. But for the Court to be able to carry out such an operation, it must first

determine the areas over which Italy has rights and those over which it has none. As regards the first areas, once they are identified, the Court will be able to refrain from declaring that they appertain either to Libya or to Malta. As regards the second areas the Court will then be able to carry out the operation requested by the Special Agreement between Malta and Libya. Thus in a decision given by the Court after Italy had been admitted to intervene and assert its rights, the juxtaposition between, on the one hand, the areas involved in the Court's operation under the Special Agreement and, on the other hand, the areas in regard to which the Court would refrain from carrying out such an operation, would be tantamount to the Court's having made findings, first as to the existence of Italian rights over certain areas, . . . and secondly as to the absence of such Italian rights in other areas . . .” (*I.C.J. Reports 1984*, pp. 19-20, para. 30.)

Having regard to the aforesaid stated, and to what it saw as the actual, objects of Italy's request to intervene, the Court denied the request. Nevertheless, in today's Judgment, the Court virtually grants to Italy what Italy would have achieved if its request to intervene had been granted and, once granted, if Italy had established to the Court's satisfaction “the areas over which Italy has rights and those over which it has none”. The Court – while distinguishing between Italian claims and Italian rights – acknowledges this result when it states that :

“The Court, having been informed of Italy's claims, and having refused to permit that State to protect its interests through the procedure of intervention, thus ensures Italy the protection it sought.” (Para. 21.)

That result seems to me to be inappropriate if not irregular.

As I stated in my dissenting opinion to the Court's Judgment of 21 March 1984 (p. 135, para. 12), the Court could :

“limit the scope of its judgment by refraining from indicating the practical application of principles of delimitation to those areas of continental shelf which Italy claims, holding that, as to these areas, delimitation must follow from negotiation or adjudication between or among Italy, Malta and Libya. Such a judgment might satisfy Italy, but would it not constitute a measure of endorsement by the Court of Italy's claims without troubling Italy either to justify those claims or to place them at stake in the current proceedings between the principal Parties ? Indeed, such a judgment would in effect acknowledge that Italy ‘has an interest of a legal nature which may be affected by the decision in the case’ were it not for that element of the decision which exempts from its reach the areas which are the object of Italian claims. Thus the more reasonable approach – given the fact that these areas are already in issue between the principal Parties – would be to grant Italy's request to intervene and oblige it to defend its claims. That would do justice not only to Italy but to Malta and Libya, which

otherwise could find that the judgment they seek has been truncated to accommodate claims which they would have forgone the opportunity to refute.”

For the reasons stated in that opinion, I remain convinced that the Court's decision to deny Italy's request to intervene was in error. I am confirmed in that conclusion by the terms of today's Judgment. For my part, I do not believe that the error of the earlier Judgment should be corrected by according Italy all that it sought to achieve had its request to intervene been granted and had Italy then made out its claims – and this without even giving those claims (and the views of Malta and Libya upon them) a hearing.

How does the Court justify arriving at so improbable a conclusion ?

First, the Court observes that the terms of the Special Agreement provide that the Court shall decide questions of the delimitation of the area of the continental shelf “which appertains” to Malta and the area of continental shelf “which appertains” to Libya. It concludes that the Court accordingly lacks jurisdiction to pass upon an area where claims of a third State exist. This is a possible, even plausible, construction of the meaning of the Special Agreement between Malta and Libya. But it is not the only possible and plausible construction nor is it necessarily the correct construction. The Special Agreement does not speak of areas which exclusively appertain to a Party. More than that, as the Court itself acknowledged in its Judgment of 21 March 1984 :

“The future judgment will not merely be limited in its effects by Article 59 of the Statute : it will be expressed, upon its face, to be without prejudice to the rights and titles of third States. Under a Special Agreement concerning only the rights of the Parties, ‘the Court has to determine which of the Parties has produced the more convincing proof of title’ (*Minquiers and Ecrehos, I.C.J. Reports 1953*, p. 52), and not to decide in the absolute ; similarly the Court will, so far as it may find it necessary to do so, make it clear that it is deciding only between the competing claims of Libya and Malta.” (*I.C.J. Reports 1984*, pp. 26-27, para. 43.)

That is to say, the Court could – if this approach of its Judgment of 21 March 1984 were to be followed – not treat itself as debarred by Italian claims but rather give judgment in areas subject to those claims as long as it were “not to decide in the absolute”.

That this interpretation of the scope of jurisdiction afforded the Court by the Special Agreement is the better interpretation is indicated by the fact that both Libya and Malta espoused it. Where one party to a special agreement disputes with another about the extent of the jurisdiction that the agreement confers upon the Court, it falls to the Court to settle the matter, under Article 36, paragraph 6, of its Statute. But where, as in this case, both the Parties to the Special Agreement essentially agree on the

measure of jurisdiction that it affords to the Court, then the Court, in determining whether it has jurisdiction, shall take into account, as Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties provides, "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions . . .". But in fact the Court has treated the views of the Parties on this question as of no account, despite its acknowledging that, "The Parties agree . . . in contending that the Court should not feel inhibited from extending its decision to all areas which, independently of third party claims, are claimed by the Parties to this case . . ." (Judgment, para. 20), and that "the Parties have in effect invited the Court . . . not to limit its judgment to the area in which theirs are the sole competing claims . . ." (para. 21). And in law, the Court's construing its jurisdiction so narrowly as to defer absolutely to Italy's claims runs counter to what it described, in its Judgment of 21 March 1984, as "its duty, to give the fullest decision it may in the circumstances of each case . . ." (*I.C.J. Reports 1984*, p. 25, para. 40), and its recognition in today's Judgment that the Court "must exercise" the jurisdiction conferred upon it by the Parties "to its full extent" (para. 19).

The second justification which the Court advances for its conclusion that it may not pass upon areas to which Italy had laid claim is that this conclusion was foreshadowed by the terms of its Judgment of 21 March 1984 rejecting Italy's Application to Intervene. The Court quotes, in paragraph 21 of today's Judgment, passages of its Judgment of 21 March 1984 which can be so interpreted. But those very passages follow directly upon the Court's recalling that it need "not to decide in the absolute". They can as easily be cited to support a conclusion contrary to that which the Court now advances, namely, a judgment which, while extending into areas to which Italy lays claim, is, by reason of being reached in Italy's absence, "subject to more caveats and reservations in favour of third States, than it might otherwise have been had Italy been present . . ." (*I.C.J. Reports 1984*, p. 27, para. 43.)

The two foregoing reasons are the only reasons which the Court finds itself able positively to proffer in favour of its conclusion that it must "confine itself to areas where no claims by a third State exist" (Judgment, para. 22). But the Court also seeks to respond to a criticism of its conclusion. That criticism is that, for the Court to conclude that its jurisdiction to decide between two States is ousted to the extent of the claims of a third is a dangerous conclusion, for it appears to place in the hands of a third State, not party to the proceedings, the authority to delimit the jurisdiction of the Court, and this despite the terms of Article 36, paragraph 6, of the Court's Statute, and despite the Parties' contentions as to the scope of the jurisdiction with which they have jointly endowed the Court. Indeed, to accord this power to a third party risks ousting the jurisdiction of the Court in a case altogether, if that third party were to make claims sufficiently ambitious. The Court endeavours to meet this criticism by saying that Italy's claims in this case are not that ambitious, and that is true. It goes on

to say that neither of the Parties characterized Italy's claims as "obviously unreasonable" (para. 23).

The Court concludes that "the probability" of the Court's judgment being restricted in scope because of Italy's claims did not persuade Malta and Libya to abandon their negative approach to Italy's application to intervene (*ibid.*). It indeed reiterates that, in opposing Italy's application, the two countries had shown their preference for a limitation in the scope of the judgment which the Court was to give.

In my view, these arguments are unpersuasive. In the first place, neither Libya nor Malta has ever expressed or indicated such a preference ; in fact, they are on record to the contrary. In the second place, it is hard to see how, at the time Libya and Malta opposed Italy's request, they could have known of the "probability" of the restricted scope of a judgment on the merits which had yet to be written ; indeed, at that time, even the Court's Judgment of 21 March 1984 on Italy's intervention had not been written. In the third place, if Libya and Malta were to be charged with such forecasting, the most plausible basis of it would have been the Judgment of the Court in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*I.C.J. Reports 1982*, pp. 93, 94). There the Court described an area relevant to the delimitation, "the rights of third States being reserved". It provided that "the extension" of the line it indicated "northeastwards is a matter falling outside the jurisdiction of the Court in the present case, as it will depend on the delimitation to be agreed with third States". But the map it provides in its Judgment (at p. 90) is not delimited by the line of claims of a third State (in that case, evidently the claims of Malta). On the contrary, "the rights of third States being reserved", the line ends with an arrow pointed in Malta's direction. Why should Malta and Libya have expected any less with respect to Italian claims ? Indeed, as noted above, in its Judgment of 21 March 1984, the Court declared that it is "its duty, to give the fullest decision it may in the circumstances of each case" unless the legal interests of the third State form the very subject-matter of the decision, "which is not the case here" (*I.C.J. Reports 1984*, p. 25, para. 40). The Court there further declared that, in this case, in respect of Italy's claims, it should proceed "in the same way as was done for example in the Judgment of 24 February 1982" between Libya and Tunisia. But in fact the Court now does not proceed in the same way ; rather than indicating the direction of the line with an arrow, it simply cuts off the line at the limit of Italian claims.

It may be added that, while it is quite true that, in the current case, neither Malta nor Libya have characterized Italy's claims as "obviously unreasonable", if Italy had adopted the rationale for the claims made in the current case by Libya against Malta, and if the Court had treated Libya's rationale for its claims in the current case as reasonable, then application of the Court's jurisdictional approach in this case apparently might well have sufficed to oust the Court's jurisdiction entirely for, while Italy's claims do leave substantial areas of continental shelf to Malta, Libya's

claims do not. That is to say, in the current case, if Italy had made out arguments similar to Libya's and said that, in view of its very extensive coasts not only north but northeast and northwest of Malta, and Malta's very minor coasts, Italy's shelf by application of proportionality to lengths of coastlines and shelf areas enclaves that of Malta, which is confined to a narrow area round its shores, would the Court have concluded that it had no jurisdiction to give judgment as between Malta and Libya? Both the Court's justifications of today's Judgment and the extent of Libya's claims in the current case suggest that such a result cannot be dismissed as unimaginable. It may not be foreclosed simply by asserting that the Court will defer to reasonable but not unreasonable claims of third parties.

If precedent is to be taken into account, there may further be cited the delimitation agreement between Italy and Tunisia, which extends a line into areas claimed by Malta (see Map No. 1 to today's Judgment). Should Italy enjoy an immunity it has not extended to Malta?

In sum, I have serious doubt about the Court's Judgment deferring so absolutely to Italy's claims for these reasons:

- it is an unhappy precedent, of questionable consistency with the Court's Statute, to appear to place in the hands of a third party the determination of the extent of the Court's jurisdiction which two other Parties to a case have conferred upon the Court;
- this result does not comport with the interpretation of their Special Agreement which both Parties to it maintain, and it does not comport with the Court's asserted duty to give the fullest decision it may in the circumstances of the case;
- given the fact that the Court, however erroneously, rejected Italy's request to intervene, a Judgment which gives Italy as much as it sought to achieve by being accorded permission to intervene is, on its face, implausible;
- this result does not appear to follow the precedent set by the Court in its Judgment of 1982 between Libya and Tunisia.

A better course, in my view, would have been to indicate a line – dashed or otherwise distinguished from the line dividing areas not subject to claims of a third State – or, at least, the directions of a line shown by arrows at each end, running into the areas of Italy's claims, east and west, while coupling that indication with full reservation of any rights of Italy or any other third State in these areas.

The facts of geography do manifest obvious Italian claims, and, in some of the areas in question, there may be other third State claims as well. What is critical are not claims but the facts of geography. Those facts must

operate in favour of Malta and Libya as well as Italy and, as appropriate, in favour of other States, to the extent that the facts exist. Geography demonstrates that colourable claims in the areas, or some of the areas, to which Italy lays claim may be made not only by Italy, a conclusion which the Court's Judgment accepts. In particular, any implication that Malta faces only that portion of the coast of Libya that lies between Ras Ajdir and Ras Zarruq, and does not face a portion of Cyrenaica including Benghazi, is obviously groundless, as a glance at the map shows.

A virtue of this better course – in addition to doing justice to Libya and Malta and giving full effect to the jurisdiction conferred upon the Court by their Special Agreement – would have been that, while Italy's claims would of course remain, Italy would know with which other claimant to negotiate or adjudicate them. This is not to say that such a course would have resulted in no effect whatsoever upon Italy's position ; its interests in some measure would be practically, as well as legally, affected, even by such a relative and provisional delimitation between Malta and Libya running into areas of its claims. That is why the Court's rejection of Italy's Application to Intervene remains so regrettable, a rejection with which the Court rather than Malta and Libya must be charged. At the same time, I recognize that today's Judgment in a practical sense does serve to mitigate the error of rejection of Italy's intervention. While insufficient, that perhaps is the Judgment's best defence, even if it is a defence the Court omits to make.

THE LINE OF DELIMITATION INDICATED BY THE COURT

While there is much in the succeeding sections of the Court's Judgment with which I agree, I cannot subscribe either to the line of delimitation which the Court has selected or to such reasons in support of it as the Court offers.

The Court begins by drawing a median line between the opposite coasts of Malta and Libya. In this situation of purely opposite States, that clearly is the correct point of departure – if one that is subject to correction. As the Court held in the cases of the *North Sea Continental Shelf* (*Judgment, I.C.J. Reports 1969*, p. 36, para. 57) :

“The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line ; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionately dis-

torting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved.”

More recently, in respect of those segments of the coasts of Massachusetts and Nova Scotia which are opposite each other, the Chamber of the Court in the *Gulf of Maine* case – after holding, as does the Court in the current case, that the equidistance method is not a mandatory rule of customary international law – took as its “starting point” the equal division of the convergent and overlapping maritime projections of the coastlines of the States concerned in the delimitation, “a criterion which need be only stated to be seen as intrinsically equitable” (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 328, para. 197). The Chamber continued that the adoption of this starting-point must be combined with the parallel and partial adoption of the appropriate auxiliary criteria “in so far as it is apparent that this combination is necessitated by the relevant circumstances of the area concerned, and provided they are used only to the extent actually dictated by this necessity” (*ibid.*).

In pursuit of these precedents, the crucial question in the current case’s choice of a line which starts from the median line then becomes : are there relevant circumstances of the area which necessitate the parallel and partial adoption of appropriate auxiliary criteria, and, if there are such circumstances, are they used only to the extent actually dictated by such necessity ? It is in answering this question that I cannot agree with the Court. In my view, the Court shows no such relevant circumstances ; moreover, it does not use the circumstances on which it relies only to the extent actually dictated by them. Rather, the Court’s Judgment conspicuously fails to invoke and objectively apply relevant circumstances which specifically or measurably justify, still less require, correction of the median line. It demonstrates not the slightest correspondence between the considerations which it characterizes as relevant and the line which it claims to derive from these circumstances. How in fact does the Court proceed ?

It initially excludes from its calculation of the median line the islet of Filfla, an exclusion which, in view of its minuscule size and uninhabited character, is reasonable. The effect on the median line of this exclusion, which operates to Libya’s advantage, is substantial and justified. For the reasons set forth in the prior section of this opinion, the Court, without satisfactory justification, chooses to confine the median line by the claims of Italy ; that is, from the Maltese perspective, the Court cuts off the radial projection which an island naturally enjoys, or, at least until today’s Judgment, has been assumed to enjoy, and so foreshortens the course of the median line. The Court takes this truncated median line between Malta and Libya as the southern limit of a possible delimitation.

The Court then posits as a notional "extreme limit" of a possible shift of the median line northwards the median line between the resultant restricted segments of the littoral of the Continents of Europe and Africa. Reliance upon that littoral seems to be a new if literal twist to the term "continental shelf", for heretofore the shelf has been legally calculated between States, not continents. This northern limit, the Court acknowledges, gives no weight whatsoever to the presence of the islands of Malta ; it is drawn as if Malta were not there. Since the Court is charged with a delimitation between the independent State of the Republic of Malta, on the one hand, and the independent State of the Libyan Arab Jamahiriyah, on the other, the merit is not apparent of taking, even notionally, as one extreme of a possible delimitation between them, a limit which affords no weight to Malta, while taking as the other extreme a limit which gives Libya full weight up to the median line between it and Malta. Nevertheless, the Court assumes this approach to be a point of equitable departure and proceeds to define its task as finding a line between the median line and this extreme northern line. At the same time, the Court recognizes – in terms hardly more evocative of the principle of sovereign equality of States – that,

"At least some account would be taken of the islands of Malta ; and even if the minimum account were taken, the continental shelf boundary between Italy and Libya would be somewhat south of the median line between the Sicilian and Libyan coasts." (Judgment, para. 72.)

The Court continues :

"Since Malta is not part of Italy, but is an independent State, it cannot be the case that, as regards continental shelf rights, it will be in a worse position because of its independence. Therefore, it is reasonable to assume that an equitable boundary between Libya and Malta must be to the south of a notional median line between Libya and Sicily ; for that is the line, as we have seen, which allows no effect at all to the islands of Malta." (*Ibid.*)

This reasoning, it will be observed, will, in the view of the Court, lead to "an equitable result".

The Court has thus defined its task as finding a line between the median line between Sicily and Libya – which latter line is at 24' of latitude north of the median line between Malta and Libya – and the median line between Malta and Libya. In the light of its reference to what it sees as "relevant circumstances", of which more below, the Court then concludes :

"Weighing up these several considerations in the present kind of situation is not a process that can infallibly be reduced to a formula expressed in actual figures. Nevertheless, such an assessment has to be made, and the Court has concluded that a boundary line that repre-

sents a shift of around three-quarters of the distance between the two outer parameters – that is to say between the median line and the line 24' north of it, achieves an equitable result in all the circumstances. It has therefore decided that the equitable boundary line is a line produced by transposing the median line northwards through 18' of latitude." (Para. 73.)

The Court goes on to verify the equity of what it has so economically concluded by reference to the test of proportionality. It concedes the "practical difficulties" of conducting that test in this case, where identification of relevant coasts and areas is variable, and where the area to which the Judgment will in fact apply is defined not by geography but by the claims of Italy. It nevertheless concludes that, there is

"certainly no evident disproportion in the areas of shelf attributed to each of the Parties respectively such that it could be said that the requirements of the test of proportionality as an aspect of equity were not satisfied" (para. 75).

Thus the Court finds itself confirmed in its transposition of the median line northwards through 18' of latitude.

It is difficult to criticize the Court's reasoning at any length, since there is so little of it. The Court does invoke as justification for its conclusion certain "relevant circumstances", by which it appears to mean, primarily,

- (a) the "considerable" or "great" disparity in the lengths of the relevant coasts of the two Parties, i.e., the much longer length of Libya's coasts relative to Malta's ; and, secondarily,
- (b) "the considerable distance" between the coasts of Malta and Libya ;
- (c) the sparsity of basepoints which control the course of a median line ; and
- (d) "the general geographical context . . . the Maltese islands appear as a minor feature of the northern seaboard of the region in question, located substantially to the south of the general direction of that seaboard, and themselves comprising a very limited coastal segment" (para. 69) ; situated south of a median line between the segments of continental littoral formed by Sicily and Libya, ". . . the islands of Malta appear as a relatively small feature in a semi-enclosed sea" (para. 73).

The relevance of these circumstances is not demonstrated. Authority for them in conventional or customary international law, in judicial or arbitral decisions, or in State practice, is not shown. If the Court concludes that certain designated circumstances are relevant, it has the burden of showing why and of sustaining its reasoning by appropriate authority. What is clear is that the attenuated allusions supplied by the Court do not suffice.

As to circumstance (*d*), it has been suggested above that the fact that the median line between Malta and Libya is south of a continental median line is a creative consideration, of no obvious probative value, which is not easily reconcilable with principles of the sovereign equality of States. Nature must be taken as it is ; the fact that Malta lies south of the general direction of the northern seaboard of the region is no intrusion. It is in no way instructive. It is perfectly true that the islands of Malta, in their general geographical context, appear as a relatively small feature in a semi-enclosed sea. But that is no reason for affording Malta less of a continental shelf than its coasts – minor as they are – generate. It is no reason for discounting the whole of the islands of Malta – which together constitute that independent State – as if they were the anomalous dependent islands of a large mainland State. Naturally, Malta cannot be treated as if it lay unapproached in a large ocean, with no other territory within 200 miles round its shores. But neither can Libya (or any other Mediterranean State) in that semi-enclosed sea be treated as if its entitlement to a 200-mile shelf did not overlap the entitlements of other States. Thus the general geographical context operates neither for nor against either Malta or Libya ; rather, what operates for each of them is the extent, configuration and situation of its coastal fronts – relative, however, to those of opposite and adjacent States. Moreover, while the Court invokes the general geographical context, in fact it sharply and unjustifiably narrows that context by confining the area of its consideration to the limits of Italian claims.

As to circumstance (*c*), it is far from clear that the validity or equity of a median line depends upon the number of basepoints which determine its construction. As to circumstance (*b*), the Court, if it maintains, does not explain, why “the considerable distance” between the coasts of Malta and Libya is “an obviously important consideration” when deciding whether and by how much the median line can be shifted in Libya’s favour, presumably because the probative force of that consideration cannot actually be demonstrated.

What of the primary consideration invoked by the Court to justify adjusting the median line, namely, the much longer length of Libya’s coasts relative to Malta’s (circumstance (*a*)) ? It is geometrically demonstrable, and indisputable, that straight longer coastlines generate more continental shelf than shorter coastlines. It has always been accepted that the base of a triangle is longer than the apex, and that, correspondingly, there is a larger area lying off the base than is embraced by the apex. That is recognized by Libya, Malta and the Court. It is a truth which delimitation by the method of drawing a median line demonstrates. When a median line is drawn between the short coastline of Malta (the apex) and the much longer coastline of Libya (however calculated, the base), the area of continental shelf allocated to Libya is many times that allocated to Malta. But neither

Libya nor the Court are content with that result. Rather, the Court accepts – though only in some geographical measure – the Libyan contention that, because Libya's coasts are so very major, and Malta's so very minor, Libya must be given a special bonus in recognition of that fact. That bonus materializes, in today's Judgment, in the form of awarding Libya some 6,000 square kilometres of continental shelf which, by application of a pure median line, would be allocated to Malta. Why does the Court give Libya this bonus in response to the fact that its coasts are longer? The Court denies that it does so because of resort to proportionality as a principle of distribution. That disclaimer is prudent, since it is so emphatically accepted, in the jurisprudence of the Court and in international arbitral awards, and in the opinions of States and scholars, that, as today's Judgment so well puts it :

“to use the ratio of coastal lengths as of itself determinative of the seaward reach and area of continental shelf proper to each party, is to go 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. If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration ; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence. It is not possible for the Court to endorse a proposal at once so far reaching and so novel.” (Para. 58.)

Nevertheless, since proportionality is disclaimed as the motivating spring of the Court's removal of the line of delimitation northwards, the question remains, what is? The Court does not squarely answer that question. It rather seems essentially to base its Judgment on some intuitive instinct to give Libya a bonus because its coastlines are so very much longer than Malta's.

Moreover, what the Court fails to explain, or even imply, is how it proceeds from its allegedly relevant circumstances to the particular line which is 18' north of the Maltese/Libyan median line. That is to say, the Court offers no objective, verifiable link between the circumstances it regards as relevant and the determination of the line which it regards as equitable. Presumably that is because no such link exists. The Court simply does not begin to show that the circumstances which it does see as relevant dictate the adjustment it makes to the extent of that adjustment.

It is true, as the Court much earlier observes, that the southern limit of

Italy's claims extends to the line of 34° 30' of latitude. But this circumstance is not given by the Court as an element of the justification for the selection of this very latitude of line of delimitation between Malta and Libya. It appears merely to be a symmetrical stroke of coincidence that, not only is the extent of the Court's line of delimitation between Malta and Libya to be determined by Italy's claims : the very location of the line of delimitation between Malta and Libya also coincidentally if approximately conjoins with the southern line of Italy's claims.

In sum, the Court finds it equitable to choose a line for reasons only vaguely voiced, whose relevance to the law, and still less to the line, is not articulated, still less demonstrated. As for the Court's testing this line against considerations of proportionality, the following may be said.

It is doubtful whether the test of proportionality has any place in a delimitation between purely opposite States. As the Court rightly observes in today's Judgment, this is "in fact a delimitation exclusively between opposite coasts that the Court is, for the first time, asked to deal with" (para. 62). In previous cases, the test of proportionality has been applied to situations where the States concerned were wholly or partially in an adjacent geographical relationship and where, in the absence of a line which took account of proportionality, a cut-off of the prolongation of one State's continental shelf would ensue.

Thus the Court in its Judgment in the cases of the *North Sea Continental Shelf* held :

"A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines – these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions." (*I.C.J. Reports 1969*, p. 52, para. 98.)

The Court further indicated that it had adjacent States in mind when it referred, in the *dispositif* of its Judgment, to a factor to be taken into account in negotiations between the Parties to those cases on a delimitation between them to be :

"(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region." (*Ibid.*, p. 54, para. 101 D.)

The Court so held in these cases in which it took pains to mitigate any cut-off effect which application of strict equidistance would entail as between adjacent States having concave and convex coasts.

The Court of Arbitration on the Continental Shelf between the United Kingdom and the French Republic interpreted the foregoing holding of this Court in these terms :

“99. In particular, this Court does not consider that the adoption in the *North Sea Continental Shelf* cases of the criterion of a reasonable degree of proportionality between the areas of continental shelf and the lengths of the coastlines means that this criterion is one for application in all cases. On the contrary, it was the particular geographical situation of three adjoining States situated on a concave coast which gave relevance to that criterion in those cases.”

In the case of the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, (*Judgment, I.C.J. Reports 1982*, p. 91), the Court also invoked the test of proportionality, in a case where Libya and Tunisia were largely adjacent but at some points in an opposite relationship.

Finally, in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, the Chamber of the Court called up considerations of proportionality, manifested in the inequalities in the length of the Parties' coastlines abutting on the delimitation area, as a key factor in its adjustment of the line of delimitation. But it did so in a situation where the United States and Canada were in an adjacent as well as opposite relationship and where integral importance was attached to correction of the position of the median line in order to abate the cut-off effect to which its unadjusted application would have given rise (*I.C.J. Reports 1984*, pp. 327-328, para. 196, and pp. 334-335, paras. 217-220).

That distinguished scholar and advocate, Professor Derek W. Bowett, in his book, *The Legal Régime of Islands in International Law* (1979), in interpreting the Court's Judgment in the cases of the *North Sea Continental Shelf*, concluded – in my view, rightly – that :

“Indeed, it would seem that the proportionality factor might only be applied, or be meaningful, in the case of adjacent States (not ‘opposite’) where the existence of a markedly concave or convex coastline will produce a cut-off effect if the equidistance principle is applied : that is to say, will allocate to one State shelf areas which in fact lie in front of, and are a prolongation of, the land territory of another.” (P. 164.)

But in the current case before the Court, Malta and Libya are in no way adjacent ; they are purely opposite ; and there is no question of a cut-off effect arising if delimitation by a median line were to be applied.

This is a cardinal reason for not testing – still less motivating – the Judgment in the current case by considerations of proportionality. A second reason is that, on the facts of the case, it is in practice impractical to apply proportionality in a way which is genuinely responsive to the extreme disparities in the lengths of the Maltese and Libyan coastlines. The Court apparently arrives at a proportion of 8 for Libya to 1 for Malta (see Judgment, para. 68, in which the Court calculates the extent of what it sees as the relevant coast of Libya to be 192 miles long, and the relevant coast of Malta to be 24 miles long). It does so by excluding, largely for extraneous reasons of the claims of Italy, extensive areas of continental shelf claimed by the Parties and substantial stretches of the coasts of Libya which actually are opposite to portions of Malta's coasts (as well as to the coasts of Italy and Greece). If these lengths were to be included in a calculation of proportionality (as they should be), the disproportion between Libya's and Malta's coasts would be so extreme that, if proportionality were to be taken as a method of delimitation – a course which the Court's Judgment in any event disclaims – Malta might have no continental shelf at all. But even if one overlooks the fact that the Court's concepts of proportionality in this case are constructed, for this as well as other reasons, upon insupportable geographical bases, and accepting, *arguendo*, the Court's apparent ratio of 8 to 1, what does the Court conclude? That the ratio of the lengths of coasts and the areas of continental shelf which its line accords to the Parties (which appears at most to be of the order of 3.8 for Libya to 1 for Malta) is a reasonable proportion. It does not say why a ratio of 8 to 1 is proportionately represented by a ratio of less than 4 to 1. To be sure, the Court makes no express calculations of proportionality at all. It contents itself with looking at the coasts and shelf areas in question and concluding, in the large, by way of "broad assessment", that the line of delimitation indicated would result in no obvious disproportion. One may ask whether the Court is so general because the particulars do not withstand analysis.

In the *Gulf of Maine* case, the Chamber adjusted a median line so as to abate a cut-off effect by taking account of the fact that the greater part of the coasts of the Parties encircling a common body of water belonged to one of the States concerned. The majority of the Chamber agreed upon the making of such an adjustment on these grounds; the sole difference among the majority was the precise extent of the coasts of the Parties which fronted on the Gulf of Maine. But there was no question of taking as a factor of proportionality a figure quite unrelated to the actual length of those coasts, however calculated. Still less was there question of taking a look at the coasts and the shelf areas to be allocated, and deciding, in the round, that there appeared to be no evident disproportion.

The process which the Court follows in today's Judgment is so far from that followed in the *Gulf of Maine* case or other adjudications as to be unconvincing. The Court declares in today's Judgment that the application

of justice of which equity is an emanation "should display consistency and a degree of predictability . . ." I fully agree. Equally, I recognize that, as I put it in an opinion in the *Gulf of Maine* case, there is "considerable room for differences of opinion in the application of equitable principles to problems of maritime delimitation" (*I.C.J. Reports 1984*, p. 358). But in my view, in today's Judgment, the Court goes beyond those ample bounds. The Court is of course correct in holding that any median line is subject to correction so as to take account of special circumstances. But I cannot agree that the Court's cryptic references to the length of coasts, the distance between coasts, the sparsity of basepoints, and the general geographical context, suffice to justify the selection of the line of delimitation which it has chosen in this case. Nor do these arrested allusions conduce towards building the sense of consistency and predictability at which the Court and the law so rightly aim.

(Signed) Stephen M. SCHWEBEL.
