

DISSENTING OPINION OF JUDGE MOSLER

Having voted against the delimitation as determined in the Judgment, I feel bound to state the reasons which, to my regret, prevented me from joining the majority of my colleagues. My doubts relate not only to the result reached by the Court, but equally to the method used in arriving at it. Since it cannot be the legitimate purpose of a separate opinion of a judge being in the minority to offer an alternative decision, but rather to explain why he is not able to follow the reasoning and result of the Judgment, my remarks will concentrate only on the principal points of divergence of views.

I

Forty years of development of international law regarding the delimitation of maritime areas – sea-bed and subsoil, water column and surface – have not yet brought about more concrete legal principles and rules on this matter than the maxim that delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances, so as to arrive at an equitable result. It is well known that the Law of the Sea Convention has not provided detailed criteria. I welcome the explanations given by the Court on equity and equitable principles (Judgment, paras. 45-47). These furnish a convincing description of the legal framework, but further detailed developments must be left to the case-law, of which the present Judgment is the fourth example in the Court's jurisprudence – not forgetting the arbitrations between France and Great Britain in 1977 and, in a different geographical situation, between Guinea-Bissau and Guinea in 1985. The judicial task is to make the law more determinable by objective criteria, and thus more predictable to potential parties. This goal can only be achieved by selecting, in each case, such facts and circumstances as are relevant to the solution because they possess a close relationship to the area concerned, for the purpose of the delimitation and in the respective interests of the parties involved. Reasons derived from geographical situations and relationships characterizing the relevant region are clearly to be taken account of. Facts and circumstances taken into consideration must be as objective and intelligible as possible. It is certainly not easy to define a precise criterion for this objectivity and intelligibility. The nearest approximation to such a definition seems to be that the evaluation of facts and circumstances as relevant must be likely to persuade a neutral observer of the relationship I have referred to. It is admitted that certain subjective elements in evaluating and balancing facts and circumstances can hardly be excluded. But it is the duty of the Court, if

it is not explicitly authorized by the parties to judge *ex aequo et bono*, to reduce these elements to a minimum.

The method chosen to pursue the task and achieve a solution is of decisive importance, if one aims at developing in each concrete case more precise criteria relevant to a delimitation.

II

My view differs considerably from the approach chosen by the Court. The Court starts with a general description of the geographical context of the dispute. It emphasizes, however, that in doing so it does not intend to define in geographical terms the area which is relevant to the delimitation and the area in dispute between the Parties. Nor is such a definition found in any later part of the Judgment. The Court thus departs, without giving the reasons for that omission, from the previous jurisprudence in similar cases where an analogous situation existed, and where the determination of the area relevant to the litigation was considered indispensable (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 60-62, in connection with the examination of "equitable principles"; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, pp. 268-278, in connection with the geographical description of the area in which the delimitation was to be carried out). The question as to which areas of the Central Mediterranean are subject to the delimitation between the Parties is explicitly left open. It could have been answered – and, in my view, the Court should have answered it – by an assessment of the geographical relationship between the coasts of the Parties. According to this criterion, the relevant area would extend to all maritime zones lying between coasts facing each other, including those zones in which the coasts of third States are also situated in an opposite position.

However, I do not think that in all cases of maritime delimitation the relevant area must be determined by notional geographic lines drawn between the coasts the seaward extensions of which overlap each other. In geographical conditions where the coasts of two laterally neighbouring States are not in a concave situation no definition of relevant maritime areas is possible. In the *Gulf of Maine* case the determination of the relevant area was only partly made, namely for the Gulf region in the narrower sense as far as the closing line of the Gulf. In the outer area extending to the open Atlantic Ocean, no such precision was needed for the fulfilment of the judicial task nor was it even geographically possible. The Arbitral Judgment between Guinea and Guinea-Bissau is another example of a coastal relationship where the determination of a relevant area was not required.

In the present case however, where the relatively small maritime region of the Central Mediterranean is surrounded by several bordering States

being in an opposite position to each other, any attribution of areas to one of these States presupposes that the extension of its coast toward any other State of the region is determined. In this particular situation coastal extensions overlap in many places, and not only with respect to the extension of only one neighbouring State lying on the other shore. It is obvious that difficulties arise therefrom if, as in the present case, the Court's jurisdiction is confined to the delimitation between two States only, while third States have claims which extend to areas which would otherwise appertain to the parties to the dispute alone. The shortest lines connecting the extreme points on the Maltese islands (Ras il-Wardija and Delimara Point) with the Libyan coast are those to Ras Ajdir in the west and the region of Benghazi in the east. In reply to a judge's question put in the debates on the *Application by Italy for Permission to Intervene* given after the hearings had been closed, Italy has specified, by geographical co-ordinates, its claims to jurisdictional maritime rights in areas mainly east of Malta but also, to a smaller extent, west of the island of Gozo, which extend to regions lying between opposite coasts of Libya and Malta. As far as the more important eastern part is concerned, the 15° 10' meridian, which runs from Cape Passero on Sicily southward to a point east of Ras Zarruq, establishes up to the parallel of 34° 30' N the western limit of the Italian claim in this part of the region disputed in the present case. On the western side of the Maltese islands Italy defined its claims by reference to the 13° 50' meridian. The Court, which received official notice of these claims in the proceedings just mentioned, is debarred from pronouncing on them. According to Article 59 of the Statute, referred to by the Judgment, decisions are binding only on the parties. Furthermore, in its Judgment rejecting the permission to intervene the Court explicitly pointed out that

“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.” (*I.C.J. Reports 1984*, pp. 26-27, para. 43).

The consideration that the Court, as a consequence of having denied the intervention, is without competence to deal with the Italian claims does not, however, dispense the Court from examining the geographical relationship of the Libyan and Maltese coasts in the whole region. Without determining this area, it is hardly possible to attribute parts of it to one or the other Party. The Court circumvents the problem by taking the Italian claims relating to the 13° 50' meridian in the west and to the 15° 10' meridian in the east as barriers where the Judgment has to stop. In doing so, it does not – strictly speaking – involve itself with the rights of Italy but, on the other hand, it restricts to the area between these two meridians suggested by Italy the jurisdiction conferred upon it by Libya and Malta in the Special Agreement. Moreover, the Court refers, even in the operative part of the Judgment, to a point on the 15° 10' meridian from which the delimitation line is measured.

I fail to see for what reason the information given by a third State to the Court on its claims regarding maritime zones also claimed by one or both parties to a pending dispute is taken as a fact restricting the Court's jurisdiction and as a technical means to indicate the direction of the delimitation line. It does not matter whether the claim of the third State is *prima facie* not unreasonable, or that the parties did not comment on the claims. These points were not among the factual and legal questions involved in the dispute. The competence of the Court to decide on the delimitation of the area lying between the coasts of the parties cannot depend on the pretensions of a third State brought to the Court's notice. On the contrary, the Court, in my view, has no power to take into account a line which it is not even entitled to examine. The legitimate goal of not prejudicing Italy's rights must not have the effect that not the whole of the case of the Parties is decided. The actual difficulties originate in the rejection of the Italian request to intervene. I do not criticize that Judgment (in which I did not take part), but take it as a fact. However, I think that its consequences cannot be – if not in law but in fact – corrected in the present phase of the proceedings.

III

Based on the uncertain ground of a non-defined area, the Judgment cannot avoid defining any area whatever of relevance to the decision. A definition was needed when the Judgment arrived at the point where the proportion between the areas attributed to Libya and Malta, respectively, had to be taken into account. The area established for this purpose is defined by the coastlines of the Maltese islands – from Ras il-Wardija on the island of Gozo to Delimara Point on the island of Malta – and those of Libya, from the Tunisian frontier at Ras Ajdir to Ras Zarruq, a point near the 15° 10' meridian. The purpose is to have points of reference on Malta and Libya in order to measure – at least in a very global manner – the proportion of the areas north and south of the delimitation line. These coastlines do not, however, dominate even the whole of the area delimited by the Judgment ; this area includes, east of the line Delimara Point-Ras Zarruq, a zone extending on its eastern side to the 15° 10' meridian, which the Court considers as the eastern limit of the delimitation. This zone is not confined by any plausible northern boundary – the reason being that the Court made no attempt to define the entirety of the relevant coasts, which comprise, in my view, *all* the coastlines of the Parties facing each other (see IV below). For this reason, the Judgment cannot take account of this zone in considering the circumstances relevant to proportionality. The proposal of Libya to draw a line due east from Delimara Point, which at its intersection with the 15° 10' meridian could form the northern closing boundary of this zone, has no justification in law and, moreover, is not mentioned in the Judgment. If one maintains, as does the Court, that the

lengths of the coasts are a relevant circumstance for the calculation of proportionality, one must take account of more than merely a part of Libya's coast lying opposite to Malta.

IV

In seeking to determine the whole area involved, including those parts which may be claimed by third States, one must begin with the definition contained in the Judgment in the *Tunisia/Libya* case, when the Court said :

“The coast of each of the Parties, therefore, constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position.” (*I.C.J. Reports 1982*, p. 61, para. 74.)

While one can follow the concurring views of the Parties as far as the western limit is concerned (Ras il-Wardija to Ras Ajdir), another solution must be found in the east, which does not correspond to the proposals of either Party. The Libyan proposal includes certain regions in the Escarpment-Fault Zone which certainly fall outside any opposite situation of the coasts of the Parties, while the Maltese geometric construction of a trapezium (Fig. 7 of Malta's oral presentation) also includes regions not lying between coasts facing each other. However, Malta is right in arguing that it follows from its geographical situation as an island State that submarine areas adjacent to its coast extend in all directions and are, therefore, relevant to the delimitation of these areas with regard to any opposite State. Consequently, the whole coast of Malta from Ras il-Wardija to Delimara Point is to be taken into account with regard to the Libyan coast. The final eastern stretch of the Libyan coast facing the southeastern coast of Malta is the region of the city of Benghazi. Obviously, this large area is, to a considerable extent, overlapped by justifiable claims of Italy.

In order to exercise its jurisdiction to the fullest extent possible and, at the same time, not to prejudice rights which may be claimed by third States, the Court can define the principles, rules and methods for drawing the delimitation line between Libya and Malta. In doing so it must make a reservation that the definitive attribution of areas in which claims of third States overlap with those of the Parties must await either an agreement between the interested States or a judicial decision according to law. It can either content itself with the precise indication of principles, rules and methods to be applied or, in addition, draw a delimiting line in the safe area, where it is known that no other claims are to be expected, and mark both ends with arrows in the direction in which the line should continue. This is the method followed by the Court in the *Tunisia/Libya* case, when it

reserved the rights which Malta may have in the area relevant to the delimitation between Libya and Tunisia.

V

I share the conclusions of the Court that no fundamental discontinuity – as alleged by Libya – interrupts the sea-bed between the Parties and that, even were it to exist, it would be irrelevant because the principle enunciated in the second part of Article 76, paragraph 1, of the Law of the Sea Convention, according to which a coastal State is entitled to continental shelf rights within a distance of 200 nautical miles, forms part of general international law binding on the Parties.

As the Court emphasizes, in accordance with its previous jurisprudence, there is no single method to be applied in the delimitation of submarine areas. For the purpose of applying the law in a given situation, the appropriate method will vary according to the particular features of each case. Although the law applicable to delimitations does not give preference, *in abstracto*, to one method or another, a relationship certainly exists between the principles and rules applicable in a given dispute and the method or choice of methods resulting from the determination of the principles and rules applicable in a concrete case. The determination of the method is therefore indicated by the applicable principles and rules, even when the choice of one method does not logically or necessarily follow from the definition of the principles and rules. If the principles and rules can be carried into effect by more than one method, the choice between them is a matter of judicial propriety.

The rule of equity requires equal treatment of the Parties. In disputes concerning territorial boundaries, including submarine areas, equal treatment does not necessarily mean the attribution of equal shares. A delimitation according to equal areas on either side is in conformity with the rule of equity only in so far as the relevant criteria and circumstances in their totality in fact indicate this result. If this is the situation in a given case, the equidistance method suggests itself as the technical means which is first to be applied. If this method fails in the particular facts and circumstances of the case, it must be supplemented or even replaced by another method.

The Parties agree that, in accordance with the continuous jurisprudence of the Court since the *North Sea Continental Shelf* Judgment, equidistance is not a principle imposed by law, but a method to be applied if called for by the particular facts of the case. The equitable character of an equidistance line is, however, more manifest between opposite States than between laterally adjacent States.

When the Court stated in 1969 that equidistance was not a principle, it

drew attention to the different situation of lateral and opposite delimitations ; recalling the difficulties experienced in the International Law Commission in drafting the Convention on the Continental Shelf, it observed :

“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 distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved.” (*I.C.J. Reports 1969*, p. 36, para. 57.)

According to this Judgment, the areas in which the conflicting claims of coastal States overlap shall be equally divided. Since in the present case the distance from the opposite coasts generates the title, a median line between the coasts of the Parties suggests itself as the principal consideration for arriving at an equitable result. The first step of the delimitation process is therefore to draw a median line between the baselines of the Parties. With regard to this point I am able to agree with the delimitation method of the Judgment.

VI

The question remains, however, whether this line is equitable without further adjustment or whether a transposition is needed because of facts or circumstances which have to be taken into account. Since the median line is the normal method of arriving at an equitable result in the division of areas between opposite coasts, this line should be considered not only as the first step in the delimitation process but also, as a rule, as its final result. Admittedly, there may be particular circumstances requiring a correction. Anomalies in one or the other coastline may exercise such an influence on the course of the line that an adjustment is needed. If one discards, with the Judgment, the Rock of Filfla in front of the Maltese coast, there is no other factor which, by reason of an unusual configuration of the coasts, calls for a correction of the median line.

I do not exclude the possibility that, in certain cases, there may be particular geographical circumstances which make a median line inequitable. But such circumstances must be eligible to be taken into account on the basis of calculable criteria, not on the basis of unspecified impressions of equitableness.

The Judgment arrives at an overall shift of 18' northwards from the median line, which surprisingly – as I have already emphasized – is calculated on the 15° 10' meridian. This transposition is justified by a comparison of the lengths of the respective coasts and by the general macro-geographic situation and the special position of the Maltese islands in the Central Mediterranean.

I fail to see how either of these circumstances can provide criteria which can be used to calculate results.

Taking first the comparison of the lengths of the coasts, one has to bear in mind that the respective lengths are already reflected by the proportions between the two zones separated by the median line. The northern part of the delimited area is considerably smaller than the southern part because of the much shorter coast of the Maltese islands and the much longer extension of the Libyan coast. This whole area forms almost a triangle, its vertex formed by the Maltese islands and its baseline by the Libyan coast. The disproportion between the coastlines is even greater than Libya asserts, and the Judgment confirms, because the coast east of Ras Zarruq to the point near Benghazi – which lies in an opposite position to Delimara Point – is excluded from consideration as part of the relevant area, contrary to my view expressed in IV above. On the other hand, in making a comparison of all the coastlines as a relevant circumstance requiring correction of the median line in favour of Libya, one must take account of the fact that the larger part of the entire relevant area (including the seaward extension of the Libyan coast east of Ras Zarruq) is subject to a delimitation to be effected later with Italy. For this reason I do not think that the lengths of the coasts of the Parties may be treated as a relevant circumstance in the sense in which the Court in 1982, and its Chamber in 1984, used this criterion as a qualifying element for the final determination of the delimiting line.

The second circumstance which has been examined to justify the result of the Judgment is the geographic position of the small Maltese islands in the relatively limited, semi-enclosed area of the Central Mediterranean, which is surrounded by a number of States with opposite coasts and consequent conflicting claims. It is however hardly possible to find a reasonable method of evaluating this circumstance in the present case, deriving from it some method of calculation to reduce, on the basis of this geographical relationship, the area attributed to Malta. To my regret, I cannot agree with the Court's assessment of this circumstance as one which is relevant in the present case.

The Judgment rightly rejects the idea that a comparison of the landmass of States can form any criterion to be respected in arriving at an equitable delimitation. This statement certainly reflects the development of the law of the sea in this respect ; its consequences should not be diminished, as they are to some extent, by a reference to the geographic position of a small group of islands in the midst of surrounding coastal States. This is certainly not the Court's intention, but I am afraid that the extent of the 18'

northward transposition of the median line can be misunderstood in that sense.

My conclusion is therefore that there is no convincing reason to depart from the median line, which I think is the equitable solution of the dispute in the circumstances of the case.

(Signed) Hermann MOSLER.
