SEPARATE OPINION OF JUDGE ROBINSON

1. An interesting and not esoteric question has been raised in this case. It was not necessary for the Court to pronounce on it in explicit terms. However, the question may have implications for the functioning of what the Preamble to the United Nations Convention on the Law of the Sea (hereinafter "the UNCLOS" or "the Convention") calls "a legal order for the seas and oceans"[1], the establishment of which was the primary goal of the Convention.

2. Nicaragua argued that there is a "convergence in maritime delimitation methodology"[2] in respect of the territorial sea, the exclusive economic zone (hereinafter the "EEZ") and the continental shelf. In effect, Nicaragua espouses an approach whereby the principles set out in Articles 74 and 83 of the Convention, for the delimitation of the EEZ and continental shelf would apply equally to delimitation of the territorial sea under Article 15 of the Convention. Indeed, Costa Rica argued that the effect of Nicaragua's submission on this point is that delimitation of the territorial sea under Article 15 of the Convention "must be undertaken in such a manner as not to prevent or undermine the achievement of an equitable solution to the delimitation of the EEZ and continental shelf under Articles 74 and 83"[3]. I understand Nicaragua's submission to mean that the law under the UNCLOS calls for a convergence in maritime delimitation methodology.

3. This opinion argues that there is no such convergence for the three zones, although, it is possible for States by agreement to use a single methodology for all three zones. The opinion maintains that a proper interpretation of the Convention shows that it calls for a dichotomous approach, whereby the territorial sea is delimited on the basis of the median line/special circumstances approach and the EEZ and continental shelf are delimited on the basis of any method that would result in an equitable solution.

4. The decision to convene the Third United Nations Conference on the Law of the Sea was, in part, a response to the claims of many countries, in particular developing countries from Latin America, Asia and Africa, to an extensive zone of jurisdiction beyond the territorial sea. The precise nature of this zone, which came to be called the exclusive eco-

[1] Preamble, United Nations Convention on the Law of the Sea of 10 December 1982.

[2] CR 2017/11 (Lowe), p. 12, para. 15.

[3] CR 2017/07 (Ugalde), p. 23, para. 16.

nomic zone, (although in Latin America it was originally called the patrimonial sea) was among the most difficult issues faced by the Conference, and the issue of delimitation of the EEZ between neighbouring States was perhaps the most intractable problem in the Conference. In 1980, six years after the Conference commenced and just two years before it concluded, no agreement had been reached on the delimitation of the EEZ and continental shelf. There was however, at that time, broad agreement on the régime for the delimitation of the territorial sea, which generally followed Article 12 (1) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

5. It will be recalled that the equidistance/special circumstances rule[4] in the 1958 Convention on the Territorial Sea and Contiguous Zone, which was employed for the delimitation of the territorial sea, also applied to the delimitation of the continental shelf under the 1958 Convention on the Continental Shelf. However, UNCLOS' drafting history[5] shows that, owing to the potential for natural geographical overlap between the continental shelf and the newly created EEZ, the provisions for delimitation of the continental shelf moved closer to those for the delimitation of the EEZ, the two sets of provisions becoming congruent with each other to the extent that Articles 74 and 83 have identical formulations. No doubt this congruence is one explanation for the practice that has developed of a single maritime boundary being used to delimit these two zones.

6. During the Conference, States exhibited a preference for equity to play a greater role in the delimitation of maritime boundaries as one moved further seaward. An explanation for this preference is that the potential distorting effects of the equidistance line are more magnified in the more distant EEZ and continental shelf than in the territorial sea. In the *North Sea Continental Shelf* cases[6], the Court said that the distorting effect of equidistance lines are "comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the continental shelf areas lie further out".[7]

7. During the Conference, some countries favoured the use of the median line in the delimitation of the EEZ; others, taking their cue from the *North Sea Continental Shelf* cases, favoured the use of equitable principles. Obviously any framework for delimitation of the EEZ had to take account of the differences between the legal régime of the territorial sea

[4] See Article 6 (1) of the 1958 Convention on the Continental Shelf and Article 12 (1) of the 1958 Convention on the Territorial Sea and Contiguous Zone.

[5] See generally, Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, Martinus Nijhoff Publishers, 1985, pp. 132-143, pp. 796-821 and pp. 948-962; *Third United Nations Conference on the Law of the Sea, Official Records*, Vol. XIII, (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Ninth Session), A/CONF.62/SR.126, 126th Plenary Meeting (1980).

[6] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3.

[7] *Ibid.*, p. 37, para. 59.

and that of the EEZ, described in Article 55 of the Convention as "an area beyond and adjacent to the territorial sea". For some States, including the strongest supporters of an extensive maritime zone of jurisdiction for the coastal State, the rights of the coastal State in that zone should be emphasized, while for others, the high seas freedoms of all States in the zone should receive maximum protection. Articles 56 and 58 of the Convention reflect the compromise that was reached between both groups of States.

8. This tug between States was reflected in a proposal by Venezuela in 1980 that the concept of equity should govern delimitation in the territorial sea, EEZ and continental shelf[8]. In the result, that approach was not accepted. Article 15 of the Convention reads as follows:

> "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

Articles 74 and 83 of the Convention read as follows:

> "The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

9. The main difference between the legal régime of the territorial sea and that of the EEZ is that whereas, in accordance with Article 2 (1) of the Convention "[t]he sovereignty of a coastal State extends . . . to . . . the 'territorial sea'", in the EEZ the coastal State only has, in accordance with Article 56 (1), sovereign rights and jurisdiction in respect of certain functions. Moreover, Article 56 (2) provides that a coastal State in carrying out its functions in the EEZ, "shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention".

10. In the territorial sea, therefore, the rights of the coastal State, based as they are on that State's sovereignty, are clearly different from the sov-

[8] *Third United Nations Conference on the Law of the Sea, Official Records*, Vol. XIII (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Ninth Session), A/CONF.62/SR.126, 126th Plenary Meeting (1980), paras. 137 (statements by Venezuela) and 88 (statement by Argentina).

ereign but functional rights and jurisdiction that the coastal State enjoys in the EEZ. The rights of the coastal State receive their greatest recognition and deference in the territorial sea. This difference between the territorial sea and the EEZ is reflected in the drafting of Article 15 on the one hand, and that of Articles 74 and 83 on the other. While Article 15 prescribes a specific methodology of delimitation, the median line/special circumstances method, Articles 74 and 83 do not prescribe a particular method, but point to the achievement of an equitable solution as the goal of the delimitation. Over the years the equidistance/relevant circumstances method, which has evolved through this Court's judicial interpretation of Articles 74 and 83, has become applicable for delimitation of the EEZ and continental shelf. In any event, as a practical matter, delimitation — whether of the territorial sea or the EEZ and continental shelf — begins with a provisional median/equidistance line. The different methods of delimiting the various zones derive from the differences in their legal régimes. Another distinction between the two régimes is that Articles 74 and 83 have an explicit reference not only to the dispute settlement procedures in Part XV of the Convention, but also directs the parties in the interim period, pending agreement on delimitation, to conduct themselves in a manner that would not jeopardize or hamper the reaching of a final agreement. This indicates a greater sensitivity to the potential for disputes on a provision which does not identify a specific method, but places its focus on the search for an equitable solution.

11. The first rule of interpretation is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[9]. A plain reading of the relevant articles shows that Article 15 sets out more definitive and objective criteria for the delimitation of the territorial sea than do Articles 74 and 83 for the delimitation of the EEZ and continental shelf. Article 15 requires that if States cannot agree on the delimitation of their territorial sea, absent special circumstances, "neither of the two States is entitled . . . to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured"[10]. Thus, a departure from the median line is envisaged only in situations where "special circumstances" exist. Article 15, by prescribing the method for delimitation, identifies the median line as the specific basis for delimitation of the territorial sea. In *Guyana/Suriname*[11], the Tribunal affirmed the primacy of the median line in the

[9] Article 31, Vienna Convention on the Law of Treaties of 23 May 1969.

[10] Article 15, United Nations Convention on the Law of the Sea of 10 December 1982.

[11] *Award in the Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award of 17 September 2007, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXX (Part One), p. 93, para. 296.

delimitation of the territorial sea. On the other hand, Articles 74 and 83 are wholly result-oriented; no specific method is identified, although in practice, the judicially developed equidistance line/relevant circumstances approach prevails. After the *Black Sea* case[12] (described in more detail in paragraph 16), one must add to that approach, the element of disproportionality.

12. The explicit reference to the median line as a method to delimit the territorial sea in Article 15 can be contrasted with the silence of Articles 74 and 83 on the method of delimitation. Absent special circumstances, the elements of predictability and certainty resulting from the requirement to employ the more objective criterion of the median line in the territorial sea are not present in the delimitation of the EEZ and continental shelf, which may be seen as offering greater flexibility in methodology, the aim of which is to find an equitable solution.

13. Given the differences between the legal régime of the territorial sea and that of the EEZ and continental shelf, an interpretation of the Convention, as requiring a single method for delimiting all three zones would indeed be difficult to understand. This is so because a single method may not reflect, or reflect sufficiently, the varying rights of the coastal State in the territorial sea on the one hand, and in the EEZ and continental shelf on the other.

14. The Court also commented on this difference in the *Nicaragua* v. *Honduras*[13] case when it stated that,

> "The methods governing territorial sea delimitations *have needed to be*, and are, more clearly articulated in international law than those used for the other, more functional maritime areas. Article 15 of UNCLOS, like Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and Contiguous Zone before it, refers specifically and expressly to the equidistance/special circumstances approach for delimiting the territorial sea." (Emphasis added.)

This unequivocal statement of what the Court obviously sees as an imperative requirement to have more clearly articulated delimitation methods for the territorial sea than in the EEZ and continental shelf is a telling judicial comment supporting the need for a dichotomous approach. The dictum means that there is something in the territorial sea, or more specifically, in the nature of the territorial sea that calls for greater clarity in the methods for delimiting that zone — that "something" is the territorial

[12] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61.

[13] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 740, para. 269.

rights enjoyed by the coastal State in the territorial sea. The basis of that analysis by the Court must be the marked difference in the legal régime of the various zones. For it is this difference that will generally call for different methodologies if the basic law governing the zones is not to be controverted. Thus, the provisional median line in the territorial sea has a different value from the provisional median line in the EEZ and continental shelf, and while special circumstances and relevant circumstances are both modifiers, they too, will have different values. This was one of the reasons why the Arbitral Tribunal in *Bangladesh/Myanmar*[14] in delimiting the territorial sea gave full effect to St. Martin's Island, a Bangladeshi island, even though it is located on Myanmar's side of the equidistance line, but gave it no effect in the EEZ and continental shelf. Another example comes from the instant case in which the Court refused to modify the median line on account of the Santa Elena peninsula, giving it full effect in the territorial sea. But the peninsula was given half-effect in the EEZ and continental shelf.

15. However, since under Articles 74 and 83 it is open to States to choose any method for delimitation (in order to arrive at an equitable solution) and under Article 15, States may agree not to use the median line, it is possible for States under UNCLOS to agree to utilize a uniform methodology for delimiting the three zones. In *Ghana/Côte d'Ivoire*[15], a Special Chamber of the ITLOS, although acknowledging that different rules apply to the delimitation of the territorial sea and the EEZ, having heard the submissions of the parties, determined that there was an implicit agreement that a single methodology should be used for the various zones.

16. The Court's case law as well as the decisions of arbitral tribunals have consistently followed a dichotomous approach to the delimitation of the territorial sea and the delimitation of the EEZ and continental shelf. When the ICJ cases are carefully examined, it will be found that the Court has never applied a single delimitation methodology for all three zones. (I do not consider *Nicaragua* v. *Honduras*[16] to be a case in which the Court applied a single methodology, since the Court used the angle-bisector method for drawing of the single maritime boundary and the equidistance method to delimit the overlapping territorial seas generated by

[14] *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 47, para. 152; p. 86, paras. 316-319.

[15] *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No. 23, judgment of 23 September 2017, p. 78, paras. 259-260.

[16] *Supra* note 13, *I.C.J. Reports 2007 (II)*, p. 746, para. 286; p. 752, paras. 304-305.

some islands situated in the territorial sea.) *Cameroon* v. *Nigeria*[17] does not indicate otherwise. It will be recalled that, in *Cameroon* v. *Nigeria*, this Court had said,

> "The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for an adjustment or shifting of that line in order to achieve an 'equitable result'."[18]

Three comments are appropriate. First, it follows from the position that I have taken, in particular on the question of differing values (see paragraph 14) that I would have some difficulty with the last sentence in that dictum, if by it the Court meant that in substance the equitable principles/relevant circumstances method is similar to the equidistance/special circumstances method. For there are clearly substantial differences between the two methods. One such a difference may be found at the end of the third sentence in the reference to adjustments of the equidistance line in order to achieve an equitable result, a goal that has no application to the median line/special circumstances method. If however, the Court was merely referring to a procedural similarity between the two methods — that is, in both cases one begins with a provisional median/equidistance line, followed by consideration as to whether it should be adjusted — I would have less difficulty with that analysis. Second, this was not a case where the Court delimited all three maritime zones, as the Court was not called upon to delimit the territorial sea in light of its finding that that zone had already been delimited by previous agreements[19]. Third, at the time of this decision in *Cameroon* v. *Nigeria*, the Court had not yet developed the three-stage approach in *Black Sea*. In the *Black Sea* case[20] the Court outlined the three-stage methodology for the delimitation of the EEZ and continental shelf. In the first stage, a provisional equidistance line is drawn; in the second stage, an examination is carried out to determine whether there are any relevant circumstances requiring an adjustment or shifting of that line; in the third stage, a check is carried out to ensure that there is no disproportionality between the relevant coasts and relevant areas to be delimited.

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[17] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303.

[18] *Ibid.*, p. 441, para. 288.

[19] *Ibid.*, p. 440, para. 285; p. 431, para. 268.

[20] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61.

17. The *Black Sea* approach, in particular, the third stage in which the Court checks that there is no disproportionality, confirms the difference alluded to before, between the median line/special circumstances approach under Article 15 and the equitable solution approach of Articles 74 and 83. The addition of the disproportionality test at the third stage in the delimitation ensures that the focus of a delimitation under Articles 74 and 83 remains the achievement of "an equitable solution". Under Article 15, disproportionality, itself an element of equitableness, plays no role in the delimitation of the territorial sea. Therefore, *Cameroon* v. *Nigeria*, is not an authority for the proposition that the Court's case law supports a uniform methodology for delimiting all three maritime zones.

18. Another case that might appear to show the Court's use of a uniform methodology for delimiting the three maritime zones is *Peru* v. *Chile*[21]. However, examination of that case shows that there is no basis for that conclusion. It will be recalled that in *Peru* v. *Chile* the Court had found that the Parties had agreed on their maritime boundary up to 80 nautical miles and therefore, began the delimitation at that endpoint[22]. The question of delimitation of the territorial sea, therefore, did not arise. Since the Court did not delimit all three maritime zones, that case can hardly provide support for the proposition that the Court favours a single method of delimitation for all three zones.

19. Therefore, Articles 15, 74 and 83 properly interpreted, as well as the case law of the Court, do not support the proposition that there is a "convergence in maritime delimitation methodology"[23] for the delimitation of the territorial sea, EEZ and the continental shelf. A case such as *Croatia* v. *Slovenia*[24], which posits that there is such a convergence, must be treated cautiously[25]. In light of the fact that in that case the delimitation of all three zones did not arise, the following statement at paragraph 1000 is difficult to understand:

> "In relation to the delimitation both of the territorial sea and of the maritime zones beyond the territorial sea, international law thus calls for the application of an equidistance line, unless another line is required by special circumstances. That is reflected in the practice of the ICJ, which has applied the 'equidistance/special circumstances'

[21] *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 3.
[22] *Ibid.*, p. 65, para. 177; p. 66, para. 183.
[23] CR 2017/11 (Lowe), p. 12, para. 15.
[24] *Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009 (Croatia* v. *Slovenia)*, PCA Case No. 2012-04, Final Award of 29 June 2017.
[25] For discussion of this case, see Massimo Lando, "The Croatia/Slovenia Arbitral Award of 29 June 2017: Is there a Common Method for Delimiting all Maritime Zones under International Law?", *Rivista Di Diritto Internazionale*, Vol. 100 (4), p. 1184.

> approach in the drawing of single maritime boundaries without distinguishing between its application to the territorial sea and its application beyond the territorial sea."[26]

In support of its finding that the Court's practice favours a single methodology for delimitation of the territorial sea and the maritime zones beyond it, the Tribunal cites *Cameroon* v. *Nigeria* and *Peru* v. *Chile*. However, as the analysis in paragraphs 16 to 18 of this opinion shows, this is not the case.

20. In the instant case, the Court drew a single maritime boundary, but was explicit in applying the median line/special circumstances approach in respect of the territorial sea, and the *Black Sea* three-stage approach, incorporating the equidistance line/relevant circumstances and disproportionality tests, for the EEZ and continental shelf.

21. Moreover, in accordance with Article 32 of the Vienna Convention on the Law of Treaties, recourse may be had to the *travaux préparatoires* for the purpose of confirming the meaning resulting from the general rule of interpretation. In that regard, reference has already been made to the Venezuelan proposal in 1980 that the concept of equity should apply to delimitation of the territorial sea, the EEZ and the continental shelf. The rejection of that proposal supports the conclusion that unless the parties have agreed otherwise, for the purposes of delimitation, the territorial sea is treated differently from the EEZ and continental shelf, that is, there is no convergence in maritime delimitation methodology in respect of the three zones intended by the drafters of the Convention.

22. The Venezuelan proposal is also relevant for another reason. In order to substantiate its proposition of a convergence in maritime delimitation methodology, Nicaragua attempted to show that Article 15 of UNCLOS was simply transposed from the 1958 Convention on the Territorial Sea and Contiguous Zone, thereby suggesting that the topic of the territorial sea was somewhat uncontroversial. However, during the ninth session of the Third Conference, Venezuela indicated that it could not accept the wording of Article 15 because, in its view, the concept of equity should influence the delimitation of all maritime spaces; for that reason it proposed that Article 15 should be brought into line with Articles 74 and 83, which at that time included references to equitable considerations. The introduction of the Venezuelan proposal shows that, at that time, some countries had difficulties with the régime for delimitation of the territorial sea; in particular, they did not accept the absence of a reference to equitable principles in Article 15.

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[26] *Supra* note 24, p. 311, para. 1000.

23. I turn now to address an argument that may be said to favour Nicaragua's approach.

24. Over the years, State practice in maritime delimitation has shown a marked preference for a single maritime boundary delimiting the various maritime areas. The Court itself has on some occasions been requested to draw a single maritime boundary for the EEZ and the continental shelf as well as the territorial sea, the EEZ and the continental shelf.

25. Nicaragua interprets this practice as supporting its theory of convergence in maritime delimitation methodologies. In the oral proceedings it made several submissions in support of this proposition; for example, it submitted that "UNCLOS Articles 15, 74 and 83 apply to the drawing of different segments of one continuous line"[27]. It also submitted that when the Court is asked to draw a territorial sea boundary, it is "a reasonable presumption that it will draw it so that the part in the territorial sea joins up with the part beyond the territorial sea"[28].

26. A single delimitation line does not necessarily mean a single delimitation method, as the instant case and several others have shown. The point is that even when a single delimitation line is employed, the segment of the line delimiting the territorial sea will have an entirely different legal significance from the segment of the line reflecting delimiting the EEZ and continental shelf. For those segments would have been arrived at on entirely different legal bases: the first on the basis of a median line, that because it relates to an area where the rights of the coastal State are territorial, remains virtually unassailable, and the second on the basis of a median line, which because it relates to an area in which the rights of the coastal State are only functional, is more susceptible to adjustment in the search for an equitable solution. The best explanation for the advent of the single delimitation line as an emerging practice in delimitation agreements between States is the element of simplicity and convenience that it offers. Thus, the question whether this practice in any way supports the claims for a single delimitation methodology must be answered in the negative.

27. The Court has employed the single line approach, but has always distinguished between delimitation methods for the territorial sea on the one hand, and those for the EEZ and continental shelf on the other[29]. It follows from the position I have taken in paragraphs 16 to 18 that I do not treat as true examples of a uniform approach, *Cameroon* v. *Nigeria* and *Peru* v. *Chile*, since in those cases the Court did not have to delimit all three maritime areas.

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[27] CR 2017/11 (Lowe), p. 12, para. 16.

[28] *Ibid.*, p. 13, para. 16.

[29] See for example, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, pp. 94-110, paras. 178-223.

28. In *Nicaragua* v. *Honduras*, despite the exceptional circumstances of the case, the Court was careful to stress that the median line remains "the general rule"[30]. In *Qatar* v. *Bahrain,* where the Court was asked to determine the course of a single maritime boundary for the territorial sea, EEZ and continental shelf, it stated that delimitation of the EEZ and the continental shelf "does not present comparable problems [to delimitation of the territorial sea] since the rights of the coastal State in the area concerned, [territorial sea] are not functional but territorial, and entail sovereignty over the sea-bed and the super adjacent waters and air column"[31].

29. No development after 1982 has changed the marked distinction made by the Convention and affirmed by the Court between delimitation of the territorial sea on the one hand, and that of the EEZ and continental shelf on the other. At the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958, Sir Gerald Fitzmaurice, the United Kingdom's Representative said, in respect of the territorial sea: "for reasons of equity . . . special circumstances may exist which could make it difficult to accept the true median line as the actual line of delimitation"[32]. However, as is patent, that comment was made long before the adoption of the Convention in 1982, which effected a bifurcation between the delimitation of the territorial sea on the one hand, and delimitation of the continental shelf and EEZ on the other. Today, as a result of the UNCLOS, it will not avail a disgruntled State (party to the Convention) to aver that the delimitation of its territorial sea has not produced an equitable solution, if that term is used synonymously with "equitable solution" in Article 74 and 83 of UNCLOS.

30. Today there is certainly less leeway for departing from the median line in the territorial sea on the basis of special circumstances than there is for departing from the equidistance line in the EEZ and continental shelf on the basis of relevant circumstances in the search for an equitable solution. The special circumstances must indeed be very special to warrant adjustment to or departure from the median line in the territorial sea; for example, in the *Nicaragua* v. *Honduras* case, due to geomorphological conditions at the mouth of the River Coco, it was not possible to identify suitable base points for the drawing of the median line and the Court therefore used the angle-bisector method[33].

31. Prior to 1982, in view of the similarity in the provisions for delimitation relating to the territorial sea and the continental shelf, it may have been correct to speak of a unity of delimitation methods for both zones.

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[30] *Supra* note 13, *I.C.J. Reports 2007 (II)*, p. 745, para. 281.

[31] *Supra* note 29, *I.C.J. Reports 2001*, p. 94, para. 174.

[32] Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, Martinus Nijhoff Publishers, 1985, p. 135, para. 15.2.

[33] *Supra* note 13, *I.C.J. Reports 2007 (II)*, pp. 742-743, paras. 277-280.

However, today it is not correct to say that equity or equitable principles apply to the territorial sea, if those terms are used synonymously with the term "equitable solution" in Articles 74 and 83. Such a conclusion is contradicted by the plain reading of the relevant articles, and the drafting history of the Conference, in which — after eight years of negotiations that expressly considered the use of the median line or equitable principles for the delimitation of the EEZ — 158 countries decided on a formulation for the EEZ that focused on an equitable solution. The phrase "equitable solution" has therefore become a term of art and its usage should be confined to the situations covered by Articles 74 and 83.

CONCLUSIONS

I. Properly interpreted, Articles 15, 74 and 83 of the UNCLOS call for a dichotomous approach in the delimitation methodology for the territorial sea on the one hand, and the EEZ and continental shelf on the other.
II. However, it is possible under the Convention for States to agree to utilize a uniform method.
III. It is the difference in the legal régime for the territorial sea on the one hand and the EEZ and continental shelf on the other, that explains why the Convention calls for a dichotomous approach in maritime delimitation methodology.
IV. Different values are attached to the various elements relevant to the delimitation in the various zones. Thus, the provisional median line in the territorial sea has a different value from the provisional equidistance line in the EEZ and continental shelf and similarly, special circumstances in the territorial sea will have a different value from relevant circumstances in the EEZ and continental shelf. If one were to apply the territorial sea-median line/special circumstances method to the EEZ and continental shelf, one would have to do so fully sensitive to the fact that the provisional equidistance line in the EEZ and continental shelf will be more susceptible to adjustment than the provisional median line in the territorial sea.

V. The Court has used the dichotomous approach consistently in its work, and generally, so have arbitral tribunals.
VI. The three-stage approach set out in the *Black Sea* case is a major development in the Court's case law, but it has in no way affected the dichotomous approach employed by the Court. In fact, it has served to confirm that approach.

(Signed) Patrick L. ROBINSON.