SEPARATE OPINION OF JUDGES RUDA, BEDJAOUI AND JIMÉNEZ DE ARÉCHAGA

1. We have voted in favour of the Court's Judgment because we agree with many of its findings and conclusions. Among them we may mention : (i) the way the Court has conceived of the specificity of its task in the present case, which is to indicate a delimitation line, and not a delimitation zone ; (ii) the Court's determination of the area relevant to the dispute, which, under the terms of the Special Agreement, must be confined to that area where there is direct opposition between the relevant coasts of Malta and Libya ; (iii) the exposition the Court makes of the principles and rules of international law applicable to this continental shelf delimitation ; (iv) the rejection by the Court of the alleged natural boundary of the Rift Zone invoked by Libya ; and, finally, (v) the reasoning leading to the establishment of the delimitation line and the need to make a correction to the median line in order to take account of the considerable disproportion in the length of coasts of the Parties.

2. There are, however, certain aspects of the case, and of the Court's decision, which compel us to make some observations in this separate opinion. The first of them is inspired by the complete absence in the Judgment of any reaction in respect of the most emphasized of Malta's claims based on the principle of a radial projection of its coasts in all directions, which would have the shape of a trapezium extending towards Benghazi on the Libyan coast of Cyrenaica. The Court has avoided any pronouncement on this claim on the ground that it extends beyond the area where the Court has found to have jurisdiction. However, when confronted with such an excessive claim, insistently advanced by Malta, the Court should, in our view have found a way to state its opinion on that contention. Due to the wide differences between the Parties on this point, which results in a substantial extension or reduction of the relevant area to be delimited by the Court, it would have been of the utmost importance, not only logically speaking, but as a practical matter, to analyse this point with some care. This was, for us, one of the most important points which had to be decided by the Court, because the area subject to delimitation would have taken a completely different dimension according to which of the two viewpoints was adopted. The complete silence of the Judgment with respect to this important issue could be interpreted as signifying that such a claim, since it has been heard, but not rejected by the Court, might be maintained in future negotiations concerning the area beyond the one relevant in this case. Thus, the total silence of the Court with respect to what seems to us to be an excessive and unjustified claim might become a

source of future difficulties and disputes. There is even a phrase in the Judgment that might be interpreted as having the effect opposite to that of rejection and as encouraging the insistence upon this claim. We refer to the passage where the Court states that its Judgment does not signify that "the claims of either Party to expanses of continental shelf outside that area have been found to be unjustified" (para. 21).

3. The second reason which has impelled us to file the present separate opinion is the need to deal with an argument which was advanced by Malta towards the end of the oral proceedings. This argument made a strong impression on several of our colleagues, and it has been taken up by the Court, thus influencing the somewhat limited effect assigned by the Court's decision to the considerable disproportion in the length of coasts of the Parties. The argument has been presented by the Agent of Malta in the following terms :

> "If Malta did not exist Libya could not reasonably claim a continental shelf extending beyond a line equidistant between its coasts and those of Italy . . . should the presence of Malta operate in such a way as to give Libya the advantage of pushing its claim very substantially to the north of that line ?"

The same Agent added that

> "if Malta would have been given half effect . . . the line of delimitation would have been drawn practically at equal distance between the Italy-Libya and the Malta-Libya equidistance lines" (sitting of 13 February 1985).

It is an argument entirely based on two hypotheses or, to be more precise, on two hazardous conjectures, namely, that Malta did not exist, and that in such a case the delimitation line between Italy and Libya in the relevant area would necessarily be a median line. It is then postulated that such a line represents a *nec plus ultra* for Libya, which it cannot reach if some effect is to be recognized to Malta. This whole construction is based on a premise which cannot be proved : to consider as rigorously unavoidable a median line between Libya and Italy, in an area where there is no opposition nor adjacency between those two States and where Italy has officially communicated to the Court that it has no claims. According to this reasoning, a notional median line is to be assumed without having heard the interested Parties, namely, Italy and Libya ; without knowing if they would invoke or accept equidistance, and, above all ignoring the great disproportion between the opposite coasts of Sicily and Libya – the only pertinent ones – which have a ratio in Libya's favour roughly of 3.5 to 1. This compels us, in Part II, to deal with this argument, and in Part III, to examine the criterion, partially accepted by the Court, which takes account, as a relevant circumstance, of the considerable disproportion in the length of coasts. Finally, in this connection, we will add, in Part IV, some observations as to the correct way to apply the proportionality test in

order to conform to the basic rule requiring the comparison of like with like, so as to ensure an equitable result.

I. The Reasoning of the Trapezium

4. Malta has argued that the maritime projections of a coastal State stretch out radially in all directions and that, in particular, all the coasts of Malta can and should be projected seawards in all directions, including one towards Cyrenaica on the Libyan eastern coast.

5. Such a radial projection may, undoubtedly, exist in the case of islands in the open ocean not facing other States' coasts, but it does not correspond to the practice of States in enclosed or semi-enclosed seas, where more than two States may advance conflicting claims in respect of a given maritime area.

6. Furthermore, if radial projection is valid for one State, it must obviously be valid for any other, given the principle of equality between States. In the present instance, if it is to be applied for Malta's benefit, it must also be applied for that of Libya, not to mention the third States of the region (Italy and Greece). Malta is not entitled to assert its multi-directional maritime projection to the exclusion and detriment of that of any other State equally concerned. In that connection the Agent of Malta stated that his country had no delimitation problem with Greece, whereas, manifestly, the application of radial projection would be bound to give rise to such a problem not only with Greece but also, surely, with Italy (Malta having unilaterally given the median line between it and Sicily an eastward extension) and even Albania.

7. In the case of opposite coasts in closed or semi-enclosed seas, such as the Caribbean, the Gulf or the North Sea (all of which present a situation comparable to that of the present case, of a series of States opposite one State or several), there is a considerable State practice which demonstrates that States, in their bilateral agreements, end their agreed lines of delimitation exactly at the point in which the opposition ceases to exist between the directly facing coasts of the parties, and a different opposition commences vis-à-vis the coasts of a third State. And such a respect for the rights of other opposite States occurs regardless of the greater distance or closer proximity of the coasts of that third State. In geographical situations of this nature a lateral "cut-off" of the adjacent opposite coast by allowing an equidistance line to swing out laterally across another State's coastal front is carefully avoided. Counsel for Malta has recognized that

"in areas where the claims of several States meet and converge, the

legal approach is to reflect that convergence and to reject a method of delimitation which leads to an occlusion of coastal fronts" (sitting of 8 February 1985).

8. To take up first the examples in the Caribbean, it is instructive, first of all, to examine the maps furnished by the Parties. According to them, the delimitation line between Venezuela and the Netherlands (on account of Aruba, Curaçao and Bonaire) narrows and converges in order not to "cut-off" the oppositeness between Venezuela and the Dominican Republic. A radial projection from these islands, on the basis of proximity, as claimed by Malta, would cut off entirely any oppositeness between Venezuela and the Dominican Republic. Yet one finds in this case, so similar to the present one, something completely different from the Maltese trapezium exercise. The agreed lines, instead of spreading towards the west and the east, converge so as to make room for the oppositeness between Venezuela and the Dominican Republic both towards the east and the west of Aruba, Curaçao and Bonaire.

9. Likewise, the line between Haiti and Colombia stops at the point where the opposition begins between Colombia and the Dominican Republic ; the line between the latter two States stops at the point where opposition arises between the Dominican Republic and Venezuela ; the line between these two States stops precisely at the point where the opposition exists between Curaçao, Aruba and Bonaire and Venezuela (Sector A). This latter line stops at the point where opposition begins again between the Dominican Republic and Venezuela (Sector B). This line stops at the point where opposition arises between Venezuela and the United States on account of Puerto Rico. And this line stops at the point where there is a second delimitation line between Venezuela and the Netherlands on account of their islands in the area. Always in the Caribbean Sea, the delimitation line between Cuba and the United States stops towards the east at the point where opposition appears between the coasts of the United States and Mexico and towards the west at the point where the opposition of coasts is established between the Bahamas Islands vis-à-vis the United States and Cuba, respectively. Another map shows that the delimitation line between Mexico and the United States commences at the point where the oppositeness between the United States and Cuba is replaced by that of Mexico and the United States. Also, it may be seen that the line of delimitation between Haiti and Cuba stops at the point where the opposite coasts are those of Jamaica vis-à-vis the two contracting States.

10. In the Arab Persian Gulf, a geographical situation similar to that of the Central Mediterranean is to be found. Counsel for Malta stated that "the presence of other States on the southern side of the Gulf to some extent mirrors the fact that Malta also has other States in her vicinity" (sitting of 8 February 1985). The maps show clearly that in the delimitation

agreements between Iran, on one side, and Saudi Arabia, Bahrain, Qatar and Abu-Dhabi on the other side, the lines of delimitation in each case stop at the point where opposition is established between Iran and the coast of each one of the other parties. There is no lateral projection nor "cut-off" effect. Thus, the line of delimitation between Iran and Qatar stops at the point where opposition is established between the coasts of Iran and those of the United Arab Emirates.

11. In the North Sea, the delimitation line between the United Kingdom and Norway stops at the precise point where opposition begins between the coasts of the United Kingdom and Denmark ; then with the Federal Republic of Germany and the Netherlands successively. Likewise, the line between Norway and Denmark (on account of the Faroes) begins at the point where the opposition between Norway and the United Kingdom ceases to exist, and there is no question of a radial projection from the Faroes.

12. And this same self-restraint shown by States in their bilateral agreements, and occasionally in fixing tripoints, may be seen in other delimitation treaties in different parts of the world where more than two States are involved. For instance, the line between India (Nicobar) and Indonesia (Sumatra) stops at the point where opposition of coasts is established between Nicobar and Thailand on one side, and on the other between Indonesia and Thailand. The delimitation line between Australia and Indonesia shows a significant gap at the points where opposition is established, not between the coasts of the contracting parties but between those of Timor and Australia.

13. In the light of this State practice, it seems possible to conclude that States, in their bilateral agreements, have shown a marked self-restraint in order not to invade the opposition which exists between other States. It is remarkable that this general attitude has been adopted regardless of the proximity or remoteness of the third State opposite coasts or islands and despite the fact that bilateral agreements can never prejudice the rights of third States. In view of this widespread State practice, it would have been appropriate for the Court to declare unacceptable the Maltese trapezium claim, since it manifestly invades the opposition which exists in this case between the coasts of Libya and those of third States, such as Italy and Greece. If that claim is accepted a most serious "cut-off effect" would be produced with respect to the geographical natural prolongation of the extensive Italian coastline.

14. In other terms, the opposition between the coasts of two States is not defined by a visual test nor by a geometrical one, expressed in angle degrees. It depends on the presence or not of an intermediate third State. The oppositeness between the coasts of States A and B disappears when that oppositeness is replaced by that of a third State C, adjacent to A : then and there the oppositeness between the coasts of C and B begins. This is what happens in this case between Libya and Sicily and the Italian boot.

15. In our view, the limitation of the relevant area where the Court has

jurisdiction, as far as the meridian 15° 10′, results, not just from the fact that in such an area there are no claims of third States, but chiefly from the fact that at this point the oppositeness between Malta and Libya has ceased to exist and has been replaced, in accordance with the extensive practice of States in enclosed or semi-enclosed seas, by the oppositeness between the coasts of Sicily and Libya, and those between Calabria and Apulia and Libya. The disappearance of that opposition is final, and cannot be artificially resurrected, by an alleged opposition between the coast of Benghazi in Cyrenaica and Malta's eastern coast. That alleged opposition cannot cut off the one which had already been established between Italy and Libya. As the Court of Arbitration between the United Kingdom and France stated :

> "It cannot be open to two States, by ignoring the existence of the continental shelf claims of an intermediate third State, to divide up areas appertaining to the third State." (Para. 92.)

II. The Fictitious Line between Italy and Libya

16. The argument which derives certain consequences from the drawing of an imaginary line between Italy and Libya is not based on a correct premise. It is hazardous to assert that the claims of Libya should not extend northwards beyond a notional median line between Italy and Libya, but rather, should be limited below that imaginary line, in order to recognize some effect to the existence of Malta.

17. This premise fails to take into account that the only coast of Italy which is really opposite to that of Libya in the relevant area (and supposing Malta did not exist) is a short segment of the Sicilian coast. This is the one going from Gela to Cape Passero, or more appropriately a limited stretch between Marina di Ragusa and Cape Passero. The Sicilian coast west of these points is opposite to Tunisia, as it results not only from the Italian-Tunisian delimitation agreement, but also from the 1982 Judgment of the Court which established the delimitation line between Tunisia and Libya. To prolong the arrow indicated by the Court in this case shows conclusively that the Sicilian coast west of Gela or even of Marina di Ragusa is opposite to Tunisia and consequently cannot be opposite to Libya ; this is what results from the practice of States in enclosed and semi-enclosed seas, which we have described in Part I of this opinion.

18. The stretch of Sicilian coast between Marina di Ragusa and Cape Passero has an extent which is roughly in the ratio 1 to 3.5 to the length of coast between Ras Ajdir and Ras Zarruq. If one takes Gela instead of Marina di Ragusa the ratio is 1 to 1.55. Thus a strict median line between the two relevant coasts of Libya and Sicily, ignoring entirely the disparity in their length, would not have been equitable. While the rest of the Italian

coast is a long one, the coast of the Italian boot to the east of meridian 15° 10′ is not opposite to the Libyan coast between Ras Ajdir and Ras Zarruq and besides it has a marked northeast inclination, so that the notional equidistant line would have to go northwards, unless it were entirely controlled by the salient coastal point of the promontory at Cape Passero. Since this method would also be inequitable, it is clear that the fictitious median line between Sicily and Libya on which this argument is based would have in turn to be corrected on several grounds, particularly to take properly into account the disparity in the breadth of contact of the relevant segments of coast with the sea, which is, after all, the source of continental shelf rights.

19. The difficult problem the Court had to solve was to determine how a median line between Malta and Libya could be corrected for the purposes of achieving an equitable result. To that end, the Court has thought fit to imagine a hypothetical median line (between Italy and Libya) which itself necessarily requires correction on account of the disparity in the lengths of the relevant coastlines. As will be apparent, this line of reasoning implies that, in tackling the problem or correcting the median line between Malta and Libya, one is inevitably faced with exactly the same type of problem where the correction of the imaginary line between Italy and Libya is concerned. But to solve one unknown with another unknown is, mathematically speaking, a formidable, not to say impossible, exercise. A problem cannot be solved by creating another one of a wholly identical character.

III. The Comparison in the Length of Coasts

20. Counsel for Malta have contended that "proportionality" should not be applied as an equitable criterion, because it is only a test to be applied *a posteriori*. It is true that proportionality is a test to be applied *a posteriori* in order to appreciate the equity of the final result. But the comparison in the length of the pertinent coasts of the Parties has always been a part of the intellectual process leading to an equitable delimitation, and not something which comes into play after a line is established. When that comparison shows, as in this case, a considerable difference in the extent of coasts of the Parties (and also between the relevant Sicilian stretch of coast and that of Libya), then such a disparity constitutes, by itself, a most relevant geographical circumstance, which must be taken into account, among the other relevant circumstances, in effecting an equitable delimitation. To assert, as Malta has done, that the equidistance method should be applied, even if it produces a delimitation which is grossly disproportionate to the length of the relevant coasts, is an attempt to subordinate the equitable result to be achieved, to the method adopted. This is precisely the opposite of the fundamental rule of delimitation, namely, that the method to be adopted should be justified by the equity of

the result. We do not think that in the present case, one should take the method of equidistance to be the major, decisive and absolute element, and proportionality to be a secondary test, no more than a means of checking the result obtained by the equidistance method. To our way of thinking, both elements are equally important in the present case, and both should have been fully applied ; the first, equidistance, to give a precise indication of the contours and characteristics of the delimitation line ; the second, proportionality, in order to correct the line by shifting it northwards to the requisite latitude, so as to achieve a reasonable relationship between the areas with a view to an equitable result.

21. To provide an additional vindication of the need to take account of the length of coast, one should begin with the straightforward idea – not contested by either Party – that as each coastal State has equal entitlement to continental shelf, its coasts are presumed to possess an equal capacity to generate an area of maritime jurisdiction. It is in this sense (and only in this sense) that one can effectively speak of equality of States. But the capacity of generating continental shelf, which every State possesses to an equal degree of "intensity", depends *in concreto* upon physical factors with which States are not equally endowed. As the Court has said, it is the coast which "is the decisive factor for title to submarine areas adjacent to it" (*I.C.J. Reports 1982,* p. 61, para. 73). It is certainly not the physical fact of adjacency which gives rise to the legal entitlement to the continental shelf (*Gulf of Maine* case, *I.C.J. Reports 1984,* p. 296, para. 103). It is rather the existence of a rule of law, establishing a link between territorial sovereignty and continental shelf rights, which gives rise to the legal entitlement. It is therefore correct that, as Malta's counsel have said, the continental shelf is not the extension of a physical coast, but of territorial sovereignty – or in other words, that it is an emanation of statehood. However, one should not spend too much time juggling with abstractions, merely so as to be able to refuse to recognize the part played by length of coast. Territorial sovereignty enables continental shelf rights to be generated, but it can in no way suffice to "give concrete expression" to these rights, to quantify the areas affected or to arrive at a delimitation. It merely confers "eligibility" to possess continental shelf. The extent and limits of that shelf are given concrete form by the coastal front, and as a function of its geography, which comprises all its physical characteristics, length included. The seaboard is a parameter which enables use to be made of the sea ; it is a more or less important, more or less extensive, means of access to the sea. For that purpose it is expressed in units of measurement. Territorial sovereignty generates continental shelf rights by way of the coastal front (as is proved by the fact that it cannot engender them in the case of landlocked States). This coastal front generates a certain area of continental shelf, because of its length, among other things ; this seems a statement of the obvious. Given that sovereignty creates the legal entitlement but can only give it effect by way of the coast as "medium", it is this medium which

becomes decisive for the concretization of the area of shelf attributed. The medium is defined by all its component elements, including length.

22. No delimitation process between two opposite States can be carried out without taking account of the "coastal geography" and the "coastal relationship". Every coast has an individual appearance derived from its specific characteristics, and every "coastal relationship" between the coasts of two opposite States has its own individual character. In order to establish the "coastal geography" and the "coastal relationship" applying in a given case, account must be taken of all the factors which may lend their particular stamp to these coasts. In practice, what we look at is their configuration, their curvature, their general direction, their projection (whether radial or frontal) any change in direction in particular sections, their indentations, projections and irregularities, their "ordinary" or "special" or "unusual" features, their "non-essential" characteristics, and the "coastal relationship" which they create, depending on whether adjacent or opposite States are involved. Thus all the physical data relating to these coasts must be taken into consideration. Consequently, it would appear striking and unusual, unjustifiable and unwarranted, not to deal likewise with the length of the coasts. It is incomprehensible that a characteristic which might prove essential should be ignored, while all the other characteristics are treated as identification marks of a particular coast.

23. It is out of the question to dissimulate the concept of proportionality, and publicists have taken care not to do so. Thus Professor Paul Reuter has correctly stated :

> "from ancient times it has been consistently taught by philosophers, moralists and, subsequently, theologians that justice does not mean arithmetical equality but equality in ratios and proportions, and the distinction between commutative and distributive justice has accentuated that aspect" ("Quelques réflexions sur l'équité en droit international", *Revue belge de droit international,* 1980, p. 173 *[translation by the Registry]*).

In the writer's eyes, there can be no equity without proportionality. The principle of proportionality, with that of equivalence and finality, is one of the three principles on which equity is built. Professor D. P. O'Connell has likewise written :

> "Although there is no reference in Article 6 to the proportions of the continental shelf to be attributed respectively to neighbours, *the notion of proportionality is inherent in that of equitable delimitation."* (*The International Law of the Sea,* Vol. II, Oxford, 1984, p. 724 ; emphasis added.)

Writers on law have not found the Court's 1982 Judgment in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case very satisfying. One of the grounds for their dissatisfaction lay, precisely, in the way the Court had handled the proportionality question (cf. Monique Chemillier-Gendreau, "Le droit de la mer, mythes et réalités", *Hérodote,* 1984/1, No. 32, p. 51, and Elisabeth Zoller, "Recherche sur les méthodes de délimitation du plateau continental : à propos de l'affaire *Tunisie/Libye* (arrêt du 24 février 1982)", *Revue générale de droit international public,* 1982, pp. 645-678, *passim*). In the present case it was all the more desirable that special care be devoted to this question, the importance of which was greatly enhanced by the wholly unusual disparity in the lengths of the Parties' coastlines.

24. At the Third Conference on the Law of the Sea, the Moroccan delegation had proposed making an actual rule out of proportionality :

> " *(c)* The reasonable relationship which, after consideration of the criteria indicated under sub-paragraph *(a)*, should result from a delimitation effected in accordance with principles of equitable proportionality between the extent of the zones to be delimited and the respective length of the coastlines measured following the general direction thereof." (Doc. NG 7/3, 21 April 1978.)

The fact that the Third Conference neither adopted nor even discussed this proposal does not mean that it was against taking the proportionality factor into consideration. At that juncture, however, its preoccupation was simply to devise a general formula likely to achieve a broad consensus and bridge the gap between the partisans of equidistance and those of equitable principles. In confining itself to enunciating the "fundamental rule" of maritime delimitation law, namely that of striving towards an "equitable result", the Third Conference, for the sake of the general consensus, had to abandon the idea of spelling out the "means" of achieving that result, since no agreement upon them could have been reached. Thus no equitable principle was specifically mentioned, any more than equidistance, so it is not surprising that proportionality was not mentioned either.

25. In this case, the considerable difference in the length of the respective coasts represents a striking physical fact which is a particularly "relevant circumstance". The Court has been given some noteworthy comparative figures regarding the respective lengths of the coasts of the two States. The disparity between the respective lengths of the coasts of the two States, in the ratio 1 to 8, is particularly striking : it is completely "unusual" and unique in delimitation processes. This is surely a particularly relevant factor in this case.

26. A comparison in the length of coasts of the parties, of their "breadth of contact with the sea" has invariably been made in the process of reaching judicial decisions concerning maritime delimitation and such a comparison has always determined the final result. In the 1969 Judgment

the Court made such a comparison ; it found that the extent of coast of the three Parties was similar and, in consequence, declared that equidistance would not be equitable in that case. In the 1977 award between France and the United Kingdom the comparison in the length of coast of the parties was made by the Court of Arbitration in the process of reaching its decision, and not *ex post facto.* The Court of Arbitration's main conclusion was that there was no appreciable difference in the extent of the coasts of both parties. This was the only, the decisive, and the explicit ground upon which the Court based its correction of the median line by disregarding the Channel Islands and by assigning half effect to the Isles of Scilly (paras. 181, 195, 199, 202, 234, 244, of the decision).

27. A reading of the above-referred paragraphs of the award demonstrates that the Court of Arbitration began the process of reaching its decisions by a comparison in the length of the coasts of the parties. It found that they were comparable in their extent and therefore it concluded that equity required to recognize broadly comparable areas to each party. It did not have to apply the test of proportionality *a posteriori.* After finding that the ratio of coasts was 1 to 1, it decided to avoid disproportion by adjudicating broadly comparable areas, and this was achieved by appropriate corrections of the median line. So it is unjustified to invoke the authority of this tribunal in order to minimize the factor consisting in the comparison of the length of coasts of the parties. On the contrary, it was the leitmotiv of its reasoning and its conclusions. If, in order to achieve an equitable result, the Court of Arbitration corrected the strict median line for the reason that the length of coasts of the parties was 1 to 1, it is difficult to avoid the conclusion that a median line should *a fortiori* be corrected when the ratio is 1 to 8, as in this case, or 1 to 3.5, as between the Sicilian and Libyan relevant coasts.

28. In the *Tunisia/Libya* case the Court, in paragraph 131 of the Judgment, made a detailed study of the proportion of the relevant adjacent coasts, which had a ratio of 1 for Libya and 1.63 for Tunisia, and reached the conclusion that the result "taking into account all the relevant circumstances, seems to the Court to meet the requirements of the test of proportionality as an aspect of equity" (*I.C.J. Reports 1982,* p. 91). And paragraph 133 B. (5) mentioned among the relevant circumstances to be taken into account to achieve an equitable result :

> "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 the relevant part of its coast, measured in the general direction of the coastlines, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitation between States in the same region" (*ibid.,* p. 93).

In that case a more limited area was adjudicated to Libya. It would have been obviously unfair not to make here a similar comparison in the length of coasts, when it operates to the advantage of Libya in the ratio of 1 to 8.

29. In the recent case of the *Delimitation of the Maritime Boundary in the Gulf of Maine Area,* the Chamber was faced with the problem of coasts having different lengths, and it said in various passages of its Judgment :

> "This difference in length is a special circumstance of some weight, which, in the Chamber's view, justifies a correction of the equidistance line, or of any other line. In several specific cases the respective lengths of the coasts of the two Parties in the delimitation area have been taken into consideration as a ground for correcting a line basically derived from the application of a given method. Some cases involved settlement by agreement (e.g., that of the shelf boundary between France and Spain in the Bay of Biscay) while others were submitted to judicial decision (e.g., that of the delimitation of the continental shelf between Tunisia and Libya). Yet, in comparison with these various cases, in the present case the difference in the length of the coasts of the two States within the delimitation area is particularly notable." (*I.C.J. Reports 1984,* pp. 322-323, para. 184.)

It is to be remarked that in this case the rather modest ratio of 1 to 1.34 was deemed "particularly notable". Then the Judgment added :

> "a fair measure of weight should be given to a by no means negligible difference within the delimitation area between the lengths of the respective coastlines of the countries concerned" (*ibid.*, p. 328, para. 196).

And later the Chamber stated :

> "it is in the Chamber's view impossible to disregard the circumstance, which is of undeniable importance in the present case, that there is a difference in length between the respective coastlines of the two neighbouring States which border on the delimitation area. Not to recognize this fact would be a denial of the obvious. The Chamber therefore reaffirms the necessity of applying to the median line as initially drawn a correction which, though limited, will pay due heed to the actual situation. In Section VI, paragraph 157, the Chamber has recognized in principle the equitable character of the criterion whereby appropriate consequences may be deduced from any inequalities in the lengths of the two States respective coastlines abutting on the delimitation area. As the Chamber has expressly emphasized it in no way intends to make an autonomous criterion or method of delimitation out of the concept of 'proportionality', even if it be limited to

> the aspect of lengths of coastline. However, this does not preclude the justified use of an auxiliary criterion serving only to meet the need to correct appropriately, on the basis of the inequalities noted, the untoward consequences of applying a different main criterion." (*I.C.J. Reports 1984,* pp. 334-335, para. 218.)

Thus the Chamber did not apply the comparison in the length of coasts as a test *a posteriori* but as an auxiliary criterion, a special circumstance which led to a correction of equidistance. The description of this factor as an "auxiliary" criterion should be interpreted, in our view, as signifying that the comparison of the length of coasts is a criterion like any other, but it is not an autonomous one, in the sense that the delimitation operation should not be guided by it as a criterion independent of any other, whereas it should in fact be combined with other criteria.

30. The arbitral award delivered on 14 February 1985 by a tribunal composed of three Members of the Court also compared the length of the coasts of the Parties, and found that they had the same length and on that ground concluded that none of the Parties could claim a supplementary advantage. The arbitral tribunal stated that proportionality "between the length of coast and the extent of areas attributed to each State" (para. 120) is "another circumstance which the Tribunal has to consider" (para. 118). It added that : "Proportionality must intervene in the evaluation of factors which are to be taken into account in order to reach an equitable result" *(ibid.)*. The equal length of the coastlines was such a determinative factor in that case (along with the general direction of those coastlines) that the Tribunal introduced the notions of the *"short coast"* (confined to the coastal fronts of the two States) and the *"long coast"* (also including part of the coastal fronts of the neighbouring States, Senegal to the north and Sierra Leone to the south, the delimitation with which remained to be effected and could thus be facilitated).

31. What is deduced from the jurisprudence is that the proportionality of the lengths of coasts is a factor most relevant in testing the equity of a given line of delimitation ; but the proportionality of the coasts should not be considered as a strict mathematical exercise ; what has to be taken into account is just a general comparison of the length of coast. These are two related but different concepts, which also play a different role in establishing the line. One is a mathematical comparison, the other is an auxiliary criterion or a special circumstance to be balanced with other criteria. If the difference in the length of coasts is to be encapsulated in an "equitable principle", care must be taken not to express it blindly as a mechanical arithmetical ratio. The attempt to find an equitable result requires account to be taken of the difference in lengths within a flexible, readily applicable formula, which expresses a reasonable degree of correspondence between the ratio of these lengths and that of the areas adjudicated to each party.

32. In the present case, it is undeniable that there is a notable difference between the relevant coasts of the Parties. It is clear that the equidistance line proposed by Malta is completely out of proportion to the lengths of the respective coasts ; it really disregards the difference of the lengths of coasts as a factor to be taken into account. This does not mean that the Court has to apply the strict proportionality proposed by Libya as a line of delimitation in 1973 ; this approach is also unreasonable in the circumstances of the case. This rigorous mathematical calculation would lead to an inequitable result since it would have caused an undue encroachment on the Maltese coast. In conclusion, the difference in the coasts of the two States is a factor, a most important circumstance that had to be taken into account in this case, not just in the decision of the case, but also in postulating that fictional line between Sicily and Libya.

33. An attempt has been made to distinguish the above-referred jurisprudence on the ground that it did not refer to delimitations between opposite coasts. But this is not exact. The Court of Arbitration between France and the United Kingdom compared the length of coasts of the parties, in the Channel area, where they are clearly opposite, and also in the Atlantic region where, in the final analysis, the Court found that the coasts were also opposite (para. 242). In the light of these findings, it is not entirely correct to assert that the present is the first case where a delimitation is to be made betweeen exclusively opposite coasts. Also in 1982 the Court extended the comparison to a sector which was "very close to a directly opposite relationship". The Bay of Biscay agreement between France and Spain, where the ratio was 1 to 1.541 in favour of France, is also an example of applying the correlation based on the extent of coasts precisely in the outer area of the Bay, where opposition between the coasts begins. Finally, the Chamber in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case applied this criterion in relation to the sector where the coastlines of Massachusetts and Nova Scotia presented an opposite relationship.

34. It has also been stated that the comparison of length of coast has only been taken into account as a means to counteract or avoid a cut-off effect. This may have been the case in the 1969 Judgment, although the Court compared then the extent of coasts of Denmark and the Netherlands, in respect of which no such cut-off effect existed. And no such cut-off effect was present, also in the Bay of Biscay agreement, or in the Atlantic region in the 1977 award. The avoidance of the cut-off effect is an independent equitable criterion which stands on its own feet and does not have, nor needs, the support of the factor resulting from a comparison in the length of coast of the parties.

35. A correction by 28′ instead of the 18 adopted by the Court, would in our view have been more equitable. The resultant line would have allowed practically three-quarters effect to Malta and produced an area ratio of around 1 to 3.54, i.e., approaching half the 1 to 8 ratio of the coast. We feel that such a relationship between the two area/coast ratios would have been

more reasonable. Furthermore, the expert cartographer appointed by the Court had informed it that such a 28′ correction would have resulted in a line dividing into two equal parts the disputed area, that is to say, the area claimed by both Parties, lying between the Maltese strict equidistance line to the south and the line of strict proportionality advocated by Libya to the north.

36. However, had the Court actually proceeded to an equal division of that disputed area between the Parties, it might have appeared to have, so to speak, split the difference between their claims. Even so, concern to avoid giving the false impression of having effected a compromise cannot be an adequate reason for the Court to rule out such a solution if there are strong arguments from equity for adopting it. As will be noted, the Court in 1969, and the Chamber of the Court in 1984, both recommended an equal division of continental shelf areas because they found that all the relevant circumstances pointed to its adoption. The Arbitral Tribunal for the maritime delimitation between Guinea and Guinea-Bissau also allotted equal areas because the two parties had coastlines of equal length.

37. It is admittedly beyond question that the Court, expected as it is to take law alone as the basis of its findings, has no power to effect compromises. But it is no less evident that, where special circumstances dictate equal division as a solution, the Court may not abnegate that solution, for by so doing it would be abandoning that very basis of law. Two observations are called for here. First, it has to be faced that the law governing maritime delimitations is still affected with a degree of indeterminacy, in the sense that the reasonings put forward do not invariably and automatically "produce" a delimitation line. Often, even, a regrettable but doubtless inevitable gap can be observed between the arguments expounded in a judicial decision and the concrete finding as regards the choice of delimitation line adopted. However well-founded, the reasoning does not necessarily, mathematically, "issue" in the conclusion adopted. This is, of course, because the law of the sea is still quite rudimentary and comprises few rules, and more especially because the entire process of maritime delimitation law is dominated by a "fundamental norm", that of the equitable result, which is as uninstructive as it is all-embracing. That being so, a judge can but anxiously, humbly, gauge and compare his crushing responsibility and the modest means at his disposal for assuming it. He undergoes what Verlaine called "l'extase et la terreur de celui qui a été choisi". He cannot see how to escape from the frustrating tyranny of a certain "praetorian subjectivism" when the very margin of indeterminacy responsible for it originated in a law still young and permeated with equity – which, though a highly respectable legal concept, is inevitably measured with a "human" yardstick. The finest legal dissertations on equity will never succeed in completely eliminating what is perhaps an irreducible core of the judicial subjectivism mentioned above. The utmost, in all honour, that a judge can then do is modest : to summon up all his resources with a view to reducing its scope and effects to a minimum. At the same

time, in a situation where one intends to judge exclusively on a basis of law but finds that equity is the fundamental norm of the law concerned, it is impossible to ignore that while

> "few terms are as pleasing to mind and heart [as equity, and] few so deeply touch an ingrained expectancy of human nature, few, on the other hand, remain so mysterious" (Paul Reuter, "Quelques réflexions sur l'équité en droit international", *Revue belge de droit international,* 1980, p. 169 *[translation by the Registry]*).

38. Secondly, to divide the area claimed by both Parties into two equal parts would in fact be neither a compromise – which it is not for the Court to undertake – nor an option partaking of the philosophical wisdom of King Solomon. In certain special circumstances, equal division appears to be self-recommending as a means of fully satisfying the requirements of equity. The Chamber of the Court declared as much in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case. As we read in its Judgment :

> "it is inevitable that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap" (*I.C.J. Reports 1984,* p. 327, para. 195 ; see also para. 157).

The solution of dividing the area into two equal parts, which we find more equitable in the present instance, also corresponds to what was suggested by the Court in 1969, namely :

> "if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally" (*I.C.J. Reports 1969,* p. 53, para. 101 (C) (2)).

IV. The Application of the Proportionality Test

39. In applying the proportionality test different figures have been quoted, depending on whether or not account is taken of the triangular area adjudicated to Malta towards the east, from Delimara Point to the 15° 10′ parallel, and from there towards the south, as far as the delimitation line indicated by the Court. It seems to us difficult to deny that this triangular area must be included in determining the extent of the areas which are attributed to each party. That triangle is part of the area where the Court has found that it has jurisdiction to decide, and consequently, it has been adjudicated, and it has been adjudicated in favour of Malta. So,

the real ratio of the areas adjudicated to each party is, in truth, of 1 to 2.38, which we think is insufficient from the point of view of equity.

40. The reason for taking this triangle into account is that, in applying the proportionality test, the comparison of areas must be made on the basis of counting the whole area which is adjudicated to each Party. It is true that adjustments have been made, in other cases, in order to determine whether a given area, such as the Tunisian waters in the Gulf of Gabes, or the Canadian waters of the Bay of Fundy, should be comprised in applying the proportionality test. In the above-referred cases, the areas of the Gulf of Gabes and the Bay of Fundy were already territorial waters of one of the Parties, and the issue considered by the Court was simply whether it was equitable to take account of those areas in determining the larger area to which the proportionality test had to be applied. But here the situation is entirely different : the Court is establishing a line which will determine the areas which "appertain" to each of the Parties. It seems obvious that, in applying the proportionality test, one should compare the whole area which each party is gaining as a result of the Court's Judgment. A different solution, of including only part of the area gained by one of the Parties, would lead to an inequitable result and thus run counter to the fundamental rule of maritime delimitation. It would also infringe the principle proclaimed by the Court in 1982, when it stated that "the only absolute requirement of equity is that one must compare like with like" (*I.C.J. Reports 1982*, p. 76, para. 104). Nothing is more comparable than the areas of continental shelf that each party obtains as a result of the Judgment of the Court.

(Signed) J. M. RUDA.

(Signed) Mohammed BEDJAOUI.

(Signed) Eduardo JIMÉNEZ DE ARÉCHAGA.