ORAL ARGUMENTS

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague,
from 26 November to 3 December 1984,
President Elias presiding

PLAIDOIRIES

PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

tenues au Palais de la Paix, à La Haye,
du 26 novembre au 3 décembre 1984,
sous la présidence de M. Elias

LIST OF ABBREVIATIONS USED IN THE ORAL ARGUMENTS

LM	Memorial of the Libyan Arab Jamahiriya
MM	Memorial of Malta
LCM	Counter-Memorial of the Libyan Arab Jamahiriya
MCM	Counter-Memorial of Malta
LR	Reply of the Libyan Arab Jamahiriya
MR	Reply of Malta

LISTE DES ABRÉVIATIONS UTILISÉES DANS LES PLAIDOIRIES

ML	Mémoire de la Jamahiriya arabe libyenne
MM	Mémoire de Malte
CML	Contre-mémoire de la Jamahiriya arabe libyenne
CMM	Contre-mémoire de Malte
RL	Réplique de la Jamahiriya arabe libyenne
RM	Réplique de Malte

NINTH PUBLIC SITTING (26 XI 84, 3 p.m.)

Present: President ELIAS; *Vice-President* SETTE-CAMARA; *Judges* LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-KHANI, SCHWEBEL, JENNINGS, DE LACHARRIÈRE, MBAYE, BEDJAOUI, *Judges* ad hoc JIMÉNEZ DE ARÉCHAGA, VALTICOS; *Registrar* TORRES BERNÁRDEZ.

Also present:

For the Government of the Socialist People's Libyan Arab Jamahiriya:

Mr. Abdelrazeg El-Murtadi Suleiman, Professor of International Law at the University of Garyounis, Benghazi, *as Agent*;

Mr. Youssef Omar Kherbish, Counsellor at the Secretariat of Justice,

Mr. Ibrahim Abdul Aziz Omar, Counsellor at the People's Bureau for Foreign Liaison, *as Counsel*;

Mr. Derek W. Bowett, C.B.E., Q.C., LL.D., F.B.A., Whewell Professor of International Law at the University of Cambridge,

Mr. Herbert W. Briggs, Goldwin Smith Professor of International Law emeritus, Cornell University,

Mr. Claude-Albert Colliard, Honorary Dean, Professor of International Law emeritus at the University of Paris I,

Mr. Keith Highet, Member of the New York and District of Columbia Bars,

Mr. Günther Jaenicke, Professor of International Law at the University of Frankfurt-am-Main,

Mr. Laurent Lucchini, Professor of International Law at the University of Paris I,

Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I,

Mr. Walter D. Sohier, Member of the New York and District of Columbia Bars,

Sir Francis A. Vallat, G.B.E., K.C.M.G., Q.C., Professor emeritus of International Law at the University of London, *as Counsel and Advocates*;

Mr. Mohammed Alawar, Assistant Professor of Geography, Al-Fateh University, Tripoli,

Mr. Scott B. Edmonds, Instructor of Cartography and Director of Cartographic Services at the University of Maryland, Baltimore County,

Mr. Icilio Finetti, Professor of Geodesy and Geophysics at the University of Trieste,

Mr. Omar Hammuda, Professor of Geology, Al-Fateh University, Tripoli,

Mr. Derk Jongsma, Senior Lecturer in Geology at the Vrije Universiteit, Amsterdam,

Mr. Amin A. Missallati, Professor of Geology, Al-Fateh University, Tripoli,

Mr. Muftah Smeida, Second Secretary, People's Bureau for Foreign Liaison,

Mr. Mohamed A. Syala, Surveying Department, Secretariat of Planning, Tripoli,

Ms Victoria J. Taylor, Cartographer at the University of Maryland, Baltimore County,

Mr. Jan E. van Hinte, Professor of Paleontology at the Vrije Universiteit, Amsterdam, *as Advisers*;

Mr. Rodman R. Bundy, Member of the New York Bar,
Mr. Richard Meese, Docteur en droit,
Mr. Henri-Xavier Ortoli, Member of the New York Bar, *as Counsel*;

For the Government of Malta:

H.E. Mr. Edgar Mizzi, Ambassador, *as Agent and Counsel*;

Mr. Ian Brownlie, Q.C., F.B.A, Chichele Professor of Public International Law, University of Oxford; Fellow of All Souls College, Oxford,
Mr. Elihu Lauterpacht, Q.C., Director of the Research Centre for International Law and Reader in International Law, University of Cambridge,
Mr. Prosper Weil, Professor at the University of Law, Economics and Social Sciences, Paris, *as Counsel*;

Commander Peter B. Beazley, O.B.E., F.R.I.C.S., R.N. (Retd.), Hydrographic Surveyor,
Mr. Georges H. Mascle, Professor of Geology, Dolmieu Institute of Geology and Mineralogy, University of Grenoble,
Mr. Carlo Morelli, Full Professor of Applied Geophysics, University of Trieste (from morning sitting of 4 February 1985 (IV)),
Mr. J. R. V. Prescott, Reader in Geography, University of Melbourne,
Mr. Jean-René Vanney, Department of Dynamic Geology, Pierre et Marie Curie University, and Department of Teaching and Research, Sorbonne University, Paris, *as Scientific and Technical Advisers*;

Assisted by:

Mr. Roger Scotto, Assistant Secretary, Oil Division, Office of the Prime Minister, Malta,
Mr. Saviour Scerri, Petroleum Geologist, Oil Division, Office of the Prime Minister, Malta,
Mr. Mario Degiorgio, Petroleum Geologist, Oil Division, Office of the Prime Minister, Malta,
Mr. Tarcisio Zammit, First Secretary, Embassy of Malta to the Netherlands,
Miss M. L. Grech, Administrative Assistant, Office of the Prime Minister, Malta.

OPENING OF THE ORAL PROCEEDINGS

The PRESIDENT: The Court meets today for the oral proceedings in the case concerning the *Continental Shelf*, which was instituted by the notification on 26 July 1982 of a Special Agreement signed on 23 May 1976 between the Socialist People's Libyan Arab Jamahiriya and the Republic of Malta.

This Special Agreement provided for the submission to the Court of a dispute concerning the delimitation of the continental shelf between the two countries, and defined the Court's task more particularly in the first article.

Since the Court did not include upon the bench a judge of either Libyan or Maltese nationality, both Parties have exercised the right conferred on them by Article 31 of the Statute of the Court to choose a judge *ad hoc* to sit in the case. The Court therefore sits with the participation of Judge Jiménez de Aréchaga, designated by the Libyan Arab Jamahiriya, and also of Judge Valticos, designated by the Republic of Malta in succession to Judge Castañeda, who previously participated in the proceedings but has, I regret to say, felt obliged to withdraw for reasons of health.

The solemn declaration required to be made by judges *ad hoc* under Article 20 and Article 31, paragraph 6, of the Statute was made by Judge Jiménez de Aréchaga at a public sitting on 14 October 1983, and I now call upon Judge Valticos to make a similar declaration. May I ask all present to stand while the Declaration is made.

M. VALTICOS: Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.

The PRESIDENT: Please be seated. I place on record the solemn declaration made by Judge Valticos. Judge Jiménez de Aréchaga will be able to join us only a little later this afternoon.

The oral arguments which are about to be presented have been preceded by written proceedings in which each Party has filed a Memorial, a Counter-Memorial and a third pleading, a Reply, submitted at their specific request under the terms of their Special Agreement. The case became ready for hearing when the Replies were duly filed on 12 July 1984.

Article 53 of the Rules of Court provides that the Court may, after ascertaining the views of the Parties, decide that copies of the Pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings. The Court has today taken a decision in that sense.

In accordance with Article II of the Special Agreement, and following consultation with the Parties, the Republic of Malta will present the case first.

ARGUMENT OF MR. MIZZI

AGENT FOR THE GOVERNMENT OF MALTA

Mr. MIZZI: Mr. President, Members of the Court. It is my privilege to open before this distinguished Court the case of the Republic of Malta in its dispute — or as the other Party prefers to call it, its "difference" — with the Socialist People's Libyan Arab Jamahiriya concerning the principles and rules of international law which are applicable to the delimitation of the continental shelf appertaining to Malta and that appertaining to Libya. The dispute extends also to the way in which, in practice, the principles and rules identified by the Court as applicable to the delimitation of the continental shelf of the Parties can be applied by them in this particular case, in order that they may, without difficulty, delimit such areas by an agreement to be concluded in accordance with the findings of the Court.

The dispute, or difference, which has brought our two countries before this Court has been the only one to taint what has otherwise been an exemplary relationship between friendly neighbours; a relationship which may more aptly be described as brotherly. This does not mean that there are no differences of opinion, no differences of appreciation or of approach, between the Governments of the two countries: no two States, just as much as no two individuals, are that much alike. Indeed one of the main factors contributing to the excellent relations that exist between the Parties is the recognition of, and respect for, one another's individuality as a nation and as a sovereign State.

But the difference between the two Parties concerning the extent of their continental shelf is of a very different category. It concerns — indeed affects very directly — the extent of their jurisdiction and of their very sovereignty. For Malta, moreover, the issue has been both vital and urgent.

While the question may have been equally important for Libya from the juridical and perhaps even the political aspect, once it had taken a position in conflict with that of Malta, the delimitation of its shelf with Malta has never been on Libya's list of priorities.

Malta's position has been quite the opposite. In the 1970s Malta had the task of diversifying an economy which had for centuries been geared to service the military requirements of stronger and bigger nations into an economy based on manufacturing, agriculture, fisheries, tourism and other peaceful activities. For these Malta required — and still requires — both capital and sources of energy, possibly of its own. Its urge to find out whether the Maltese shelf contained the mineral resources which could provide it with the necessary sources of energy and of the resultant capital is too obvious to need further justification or elaboration.

Hence the insistence by Malta in making such arrangements with neighbouring States as would enable it to proceed with the exploration and exploitation of the natural resources which nature — so little generous on land — may have placed beneath the waters surrounding the Maltese Archipelago.

In the early 1970s, when technology had advanced sufficiently to permit exploration further to the south of Malta, and when the exploration carried out to the north and east of Malta, in shallower waters, had not been encouraging, while at the same time the economic demands were increasing, the urge for further exploration came to apply more particularly to the parts of the Maltese

shelf which faced Libya. It was also the part which offered the best prospects. Contrary to expectations, Libya chose to contest Malta's claim to a line equidistant between it and Libya: hence the present dispute which, at one stage, seriously disturbed the relations between the two countries and brought co-operation to a standstill.

I do not propose to recall any of those regrettable events, for these are now things of the past, and ever since the Jamahiriya ratified, in 1982, the Special Agreement of 1976 (I, pp. 5-8), the two countries have again been closely co-operating together for the welfare of their people. It is not possible, however, to avoid all reference to some aspects of the history of the dispute which is before the Court.

Thus it is important, in Malta's view, to recall that the dispute did not arise in 1965, when Malta first informed the Libyan Government of its intention to abide by the 1958 Geneva Convention on the Continental Shelf. Nor did it arise in 1966, when Malta enacted the Continental Shelf Act, 1966, adopting the median line as the line delimiting its continental shelf from that of its neighbours, unless another line were agreed to. Libya, though fully aware of Malta's intentions and of their subsequent implementation, raised absolutely no objection. On the contrary, since Libya had been specifically requested to state whether or not it was "in full accord" with Malta's position concerning the determination of its maritime boundaries, including, of course, the Malta-Libya boundary, Libya's silence could only mean that Libya was "in full accord" with that position.

I myself recall going to Tripoli in those early days of Malta's independence and being given, by the Libyan Government of the day, all the help and information the Maltese Government had requested to initiate the process for what eventually became concessions for the exploration and exploitation of Malta's continental shelf. There was not, then, the least doubt in anybody's mind that the appropriate boundary with Libya (as well as with Italy) was the median or equidistant line.

Of course, at that time the need for an agreed boundary with Libya — or with Tunisia — did not arise. Technologically the exploitation of the areas north of a median line with Libya, or east of a median line with Italy or Tunisia, was not feasible in all areas nearer Malta. What was urgent, therefore, as far as Malta was concerned, was an agreement with Italy, and only with respect to the area between Malta and Sicily. This agreement was in fact reached, and, although it was only a provisional one, it was sufficient to enable both countries to proceed to the physical search for, and exploitation of, the natural resources of their respective continental shelves; exploitation being obviously limited to the areas which contained natural resources.

With respect to Libya the situation was quite different. As the Maltese Minister of Justice and Parliamentary Affairs — quoted by Libya — said in the Maltese Parliament during the debate on the Bill which eventually became the Continental Shelf Act, 1966, the desirability of an agreement with either Libya or Tunisia was not then relevant. To use his words: "In so far as Africa is concerned, this matter [that is, delimitation by agreement] is not relevant today." In the context of the Minister's statement, "today" meant July 1966; and it is clear that at that time the area requiring an agreed delimitation line was that facing Sicily.

This is why Malta took one course of action with respect to Italy and a different course of action with respect to Libya, and why it took no action at all, at least at that time, with respect to Tunisia and the Pelagic Islands belonging to Italy.

With respect to Italy, Malta sought to reach some form of an agreement delimiting the respective zones of jurisdiction in the area between Sicily and Malta. With respect to Libya, Malta gave notice of its intentions for the future and sought Libya's assent to the position it intended to adopt. Malta therefore sent the Note Verbale of 5 May 1965. This Note, while giving due notice to Libya, did not press for a formal agreement on a definitive line. The Note, however, did put Libya on notice and, contrary to what Libya suggests by quoting from the debates in the Maltese Parliament of July 1966, Malta had every intention in due course to establish the boundary of its continental shelf in the direction of Libya.

This intention not only results very clearly from the facts just stated, but is also confirmed by the point made by the then Leader of the Opposition, Mr. Mintoff, during the same debates in the Maltese Parliament and reproduced by Libya in Annex 1 of its Reply *(supra)*. Mr. Mintoff, in 1966, pointed out that:

> "There is a shallow part in this area which divides Malta from Libya which is so shallow as to permit it to be exploited for the purposes of research for the exploration of oil, and I think that what the Government meant to say when it said that the sea was deep was that the shallow part was so much nearer to Malta that there should not be much cause for dispute on this point between ourselves and Libya."

The shallow part referred to by Mr. Mintoff is the Medina Bank which is in fact nearer to Malta than it is to Libya. On the other hand, the area where a median or equidistant line would have been negotiated with Libya, had Malta pressed for an agreement in 1966, would have been to the south of the "shallow area" known as the Medina Bank, and therefore at depths which then precluded exploitation. This is why Malta felt it irrelevant at the time to initiate negotiations with Libya. As far as Malta was aware Libya was "in full accord" with Malta's views as to the principles and rules which governed delimitation between the two countries.

There can therefore be no question as to what that position was and still is. The position of Malta has always been that, as between opposite States, the continental shelf of each of them extends up to the limits recognized by international law as pertaining to them until these meet and overlap. The areas of overlap must then be divided, and the dividing line indicated by equity and by the legal principles flowing from the very concept of continental shelf, that is entitlement on a basis of equality to a maximum natural prolongation and non-encroachment, is the median or equidistant line.

This position was never contested by Libya until 1973. Even at the first meeting held in July 1972 — some seven years after the Note Verbale of May 1965 — with the object of formalizing an agreement on the actual boundary, the objection raised by the Libyan delegation did not concern the principles and rules governing the matter as viewed by Malta. The objection concerned a mere detail, namely, the use of the island of Filfla, to the south of Malta, as a basepoint. It was only at a subsequent meeting — that of 23 April 1973 — that Libya first departed from its implied acceptance of Malta's position and advanced its own concept and theory of proportionality, namely, that the common continental shelf was to be divided in proportion to the lengths of the respective coastlines. The result was the proposal of that same date, and this (5) is reproduced as Figure 1 of the dossier[1] which Malta has prepared for the

[1] The folders that were specially prepared for the use of the Court by the Parties in order to illustrate their oral arguments have not been reproduced. If a map or illustration included in a folder is reproduced in the maps volume of the present series (V), this is indicated in the margin of the text. *[Note by the Registry.]*

benefit of the Court, and which the Members of the Court are respectfully asked to use for ease of reference.

From the undisputed facts which occurred between 1965 and April 1973 one cannot but conclude that there was then no cause for dispute between Malta and Libya concerning the extent of their continental shelf.

Of course, once Libya decided on a different course, the situation changed. Indeed, at least on paper and by word of mouth, the position changed so radically that the Libyan claim was pushed to such extremes as to encroach on waters over which Malta exercises uncontested jurisdiction, not only with respect to rights related to the contiguous zone but also with respect to the exclusive fishing rights within a 25-mile limit.

At the same time, however, even after 1973, the Libyan conduct with respect to other matters, such as concessions for petroleum activities, was quite different. In fact, while these concessions were clearly indicative of a claim to sovereignty south of the median line with Malta, they were on the contrary indicative of hesitation and doubt in so far as they extended northwards of this line.

The two Libyan concessions which encroached in part on what Malta considers to belong to it, are NC 53 in favour of Total Libya and the concession made to Exxon on 29 September 1974. Apart from the doubts still unresolved concerning the northern boundary of NC 53 — which, contrary to Libya's suggestion in its Reply, have not been laid to rest — it is unquestionable, because it results from Libya's own documentation as presented to the Court, that in both these concessions the undertaking by the licensee to carry out a "work programme" was expressly restricted to such areas as not to require either Total or Esso to carry out operations in the areas north of the median line, before the boundaries of the continental shelf of Libya with neighbouring States, including Malta, had been finally determined by agreement. Indeed, as will be seen shortly, in the case of NC 53 the very boundary of this concession was made coterminous with such an international boundary.

The words used in the case of Total Libya are: "after international boundaries have been agreed upon" (*supra*, LR, Ann. 3-a); and in the case of Esso Standard Libya Incorporated, the words used are:

> "until such time as there has been a demarcation of the offshore area subject to the jurisdiction of the Libyan Arab Republic (as it then was) from the offshore area subject to the jurisdiction of Malta".

Moreover, as has already been shown in Malta's written pleadings, both Total and Exxon expressly stated in their formal communications to the Maltese Government that they had not carried out any activities in areas claimed by Malta.

It is also worth noting, at this stage, that even if one were to regard these concessions as some form of a Libyan claim and even if the extent and shape of NC 53 were considered, for the sake of argument, to be those suggested by Libya, even these concessions fall far short of the Libyan 1973 claim and are also considerably less than what Libya is now claiming.

In contrast to what may be described as a Libyan attempt to stake a claim by merely appearing to do so, Malta's conduct is clear evidence of its consistent claim to the entire area facing Libya, up to the equidistant line. Not only has Malta given out concessions up to the very limits of its claim; it has also in all its concessions imposed a work programme applicable to the entire area of the concession. Moreover, in respect of at least Blocks 14 and 16, whose southern boundary is the median line itself — they are shown on Figure 2 of the dossier

before the Court — this could not be otherwise. The same commitment, however, also applied to Blocks 9, 10 and 11 as well as to the more northerly Blocks 2, 3 and 4.

As to the Libyan concession NC 53, the question of dates appears to have now been resolved: the Heads of Agreement were signed on 14 April 1974, while the Exploration and Production Sharing Agreement was signed in October 1974 and came into force on 17 December 1974. The southern part of this concession also appears to present no problems; but both the western and northern boundaries are still very much undefined.

Although the map attached to the Libyan Law of 17 December 1974 — at least as now reproduced by Libya — does give a shape to the concession similar to that which Libya reproduced as Map 11 of its Memorial, neither the Heads of Agreement nor the Exploration and Production Sharing Agreement establish any precise line. On the contrary, both these documents (with some allowance for an evident omission in the Heads of Agreement as reproduced in Annex 3-a of the Libyan Reply, *supra*) describe the western and the northern boundary of this concession as a line corresponding to: (7)

> "the seaward limit of jurisdiction of the Libyan Arab Republic over the sea-bed and subsoil underlying the Mediterranean Sea as established by or pursuant to an agreement between the Libyan Arab Republic and any other relevant Mediterranean State claiming jurisdiction over such sea-bed and subsoil".

However, the work programme undertaken by Total with respect to this area is limited to 6,000 square kilometres, an area which very nearly corresponds to the area shown by Petroconsultants as the area of NC 53.

Far therefore from having laid to rest Malta's doubts about this Libyan concession, the facts as they result from Libya's own documentation are unequivocally that the northern boundaries of NC 53 would only be defined in due course when the Malta-Libya and Italy-Libya line will be agreed; and secondly that both NC 53 and the Exxon concession were made without any commitment on the part of the licensee to carry out any petroleum activities north of the median line between Malta and Libya.

These facts further confirm Malta's submission that by their conduct the Parties have indicated that the median line is, to say the least, very relevant to the final determination of the boundary in the present case.

Libya sees in what it calls the "no-drilling understanding" "an important element of mutual conduct that is relevant to the delimitation question". I have tried hard to see the logic of the Libyan conclusion and I must admit that I could not find any. I feel at the same time that Malta should not run the risk of again being accused, without foundation, of avoiding all reference to the matter. I have said "without foundation" because Malta has already answered the Libyan allegation in Chapter I of its Reply. It was there pointed out that the so-called understanding stems from a remark contained in the United Nations Secretary-General's Report to the Security Council; and it was also pointed out that Libya would have presented a more balanced picture of the situation if it had quoted the Secretary-General's Report more fully. In fact, Libya failed to quote the part of the Report which justified Malta in undertaking drilling operations.

The true facts are that there is and can be no evidence, whether written or oral, of any such understanding, if by understanding is meant a binding commitment, as Libya seems to imply. No such commitment was ever given or implied, or indeed sought by either side.

It is, on the other hand, understandable that once Malta and Libya had agreed to have the dispute settled peacefully by referring it to the Court for adjudication, both of them were expected, if for no other reason out of respect for the Court, to refrain from certain activities in delicate areas. There were also other very practical reasons, not least of which the excellent relations existing between the Parties, which counselled a similar course.

This conduct of self-restraint, however, was only to be expected in so far as the dispute was before the Court; and until the Special Agreement was ratified not only was the dispute not before the Court but no progress towards its resolution could be registered.

I do not wish to recall the unhappy history of the Special Agreement between 1976, when it was signed, and 1982 when it was ratified by Libya. As I have already said, these are things of the past and are better forgotten. In the circumstances, however, I cannot avoid recalling the promise which Libya made — in my presence — that the Agreement would be ratified within a week. That week turned first into months and then into years.

Malta could reasonably be expected not to seek to enforce its claims while the case was pending before the Court, as it now is; but as events turned out, no reasonable person could expect Malta to suffer passively the inactivity of the other Party, even if Malta had in fact committed itself to do so — which it had not.

So much, therefore, for the so-called "no-drilling understanding".

I shall now, with your permission, Mr. President and Members of the Court, go back for a moment to the events of 1973.

April 23 of that year is a very special day in the history of the dispute before the Court. Although the meeting held on that day was not the first one at which delegations from the two countries had met to establish an agreed boundary, this was the very first occasion on which Libya contested the validity of Malta's position. Even as late as a few months earlier — in July 1972 — Libya had merely contested the use by Malta of a few particular basepoints, namely those resulting from the use of Filfla, for the purpose of establishing stranght baselines; and consequently Libya was still, by its conduct, accepting that the equitable and otherwhise appropriate dividing line was the median line. But on 23 April a radical change took place in the Libyan position; and it may be said that it was on that date that the present dispute first arose. On that date Libya took the position that the continental shelf between the two countries was to be shared between them in proportion to the length of their respective coastlines. To use the very words of the Libyan delegation "the distance between the two coastlines was divided in the same proportion that the two shorelines bore to each other".

At the discussions held in Valletta and Tripoli during the ensuing months, it became increasingly clear that the change in the Libyan position was due to the belief that this is what in essence had been decided by the Court in the *North Sea Continental Shelf* cases. In Libya's view the Court had, in those cases, discredited equidistance, whether as a principle or as a method, and had decided that in order to satisfy equity delimitations had to reflect the ratio between the lengths of the coastlines of the two States.

In justification of this thesis Libya quoted, at times *ad nauseam*, the words of the 1969 Judgment "a reasonable degree of proportionality . . . between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast". But Libya would not acept that —

1. The decision in the *North Sea Continental Shelf* cases did not indicate "a

reasonable degree of proportionality" as a principle or rule of international law applicable to delimitation, but merely as a factor which the Parties to that case were to take into account in the course of the negotiations of the boundaries — an element to which the Court accorded the last place among the factors to be so taken into account; and

2. That in the *North Sea Continental Shelf* cases not only was the delimitation to be effected between adjacent States but between States placed in very special circumstances of adjacency, where the use of median or equidistant lines would indeed have resulted in an inequitable delimitation.

Nor would Libya accept that other cases, particularly those between opposite States, could be dealt with, and were as a rule dealt with, differently. It was pointed out to the other side that the Court had, in the very same Judgment of 1969, given a clear indication of the application of the principles and rules it had itself identified to the case of opposite States — as is the present case. In paragraph 57 of the decision in the *North Sea Continental Shelf* cases, in fact, the Court held that

> "The continental shelf areas 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 determined by means of a median line."

The Maltese delegations had also invited their Libyan counterparts to look at what other States had done, especially in comparable situations. At that time, that is around 1974-1975, 44 delimitation agreements had been signed between States in various parts of the globe. Of these 22, or one-half, were between opposite States and the other 22 were between adjacent States. In all but 9 delimitations the States concerned had relied on equidistance. In other words equidistance had been applied by agreement in almost 80 per cent of the delimitations so settled. This practice was constant whether the agreements were entered into before or after the 1969 Judgment, and thus showed beyond the shadow of a doubt that Libya's interpretation of the *North Sea Continental Shelf* Judgment was wrong. Conversely, no known case had applied any form of proportionality, much less the form of proportionality advanced by Libya. Even Germany, in its delimitations with Denmark and the Netherlands, had for the most part accepted equidistance, and any addition obtained through negotiations after the 1969 Judgment was in no way related to proportionality.

The views of Malta and Libya, however, whether on the then only case forming the jurisprudence on the subject or on State practice, which was already quite substantial, remained so divergent that it was clearly impossible to reach an agreement, except that of referring the divergence to the Court. Thus in May 1976 a Special Agreement was signed in Valletta where the Parties agreed to refer their differences to the Court and agreed also to abide by its decision.

Mr. President, this brings me to the *Task of the Court*.

By the Special Agreement (I) the Court is requested to decide two things: Firstly,

> "what principles and rules of international law are applicable to the delimitation of the area of the continental shelf which appertains to the Republic of Malta and the area of continental shelf which appertains to the Libyan Arab Republic";

and secondly,

> "how in practice such principles and rules can be applied by the two

Parties in this particular case in order that they may without difficulty delimit such areas by an agreement as provided in Article III".

The first request is intended to resolve the differences between the Parties as to the principles and rules of international law which are applicable in the present case; and although, quite naturally, these differences still exist — indeed they are greater now than they have ever been — there is no divergence between the Parties as to the task of the Court in this respect.

By the second request the Parties have asked the Court to indicate not only which are the applicable principles and rules, but also how, in practice, these can be applied by the Parties in order that the Parties may — *without difficulty* — establish the actual boundary by agreement.

The Parties had foreseen that if the decision of the Court were to be limited — as in the *North Sea Continental Shelf* cases — to a mere enunciation of the applicable principles and rules of international law, there would remain the possibility, or more likely the probability, that the disagreements between the Parties would re-appear when it came to drawing the line. Libya could not accept that the line itself should be drawn by the Court as, in its view, this was preferably done by agreement between the Parties. Malta on the other hand was afraid that if room were left for argumentation as to the proper way of applying the principles and rules identified by the Court as being applicable to the case, the reference of the dispute to the Court would fail to achieve its main objective.

In fact the purpose of the reference is not that of obtaining an academic response to the legal questions submitted to the Court, but the practical result of an agreed boundary to enable both Parties to know with certainty the extent of their respective jurisdictions. The Parties did agree to draw the line themselves, but they also agreed that following the decision of the Court this should be a simple exercise: an agreement to be reached, as the words of the Special Agreement expressly provide, "without difficulty". This aim cannot be achieved unless the Court were to state in the clearest possible terms how the exercise is to be carried out.

Libya has since suggested that the task of the Court in the present case is more similar to that arising from the Special Agreements in the *North Sea Continental Shelf* cases than to that assigned to the Court in the *Tunisia/Libya* case.

Malta submits that the request to the Court contained in the Special Agreement in the present case was specifically intended to give a second task to the Court, in addition to that which it was given in the *North Sea Continental Shelf* cases. The task of the Court in those cases was very much in the minds of the Parties when they added what is very clearly a further task in the present case: an additional task having a very specific and important purpose, at least for Malta. Moreover, in Malta's case the issue is a very urgent one, and Malta cannot wait indefinitely for a clear indication of the areas subject to its jurisdiction.

The same situation apparently applied to Tunisia whose Special Agreement with Libya was, with a few additions, a reproduction in Arabic and French of what Libya had already agreed with Malta in English and Arabic. In the *Tunisia/Libya* case the Court was also requested to take account of matters which it is not expressly requested so to do in the present case; but the purpose of the request that the Court should indicate the practical way in which the principles and rules it identifies as applicable may be applied by the Parties, is in both cases identical: that of having a boundary established by

agreement between the Parties, but established "without difficulty" on the basis of the findings of the Court.

Having briefly stated Malta's position on this issue, I may, with the Court's permission, conclude with the words of the Court in the *Tunisia/Libya* case. Malta agrees that also in the present case the whole controversy is of minor importance "since [the Court] has in any case to be precise as to what it decides". In the *Tunisia/Libya* case the Court could not "agree with the repeated reference of Libya to 'guidance' as defining the requirements of what the Court should specify". In the present case Libya has avoided the word "guidance", but it is in substance repeating the views it held in the case with Tunisia. Malta respectfully asks the Court to decide on this matter in the same way as it did in the *Tunisia/Libya* case.

Malta, however, agrees with Libya on one question concerning the task of the Court. This concerns the extent of the Court's decision in view of possible claims from third States. Malta agrees that the Court should not feel inhibited from extending its decision to all areas which, independently of third Party claims, are claimed by the Parties to this case. Indeed if the Court were to exclude any area so claimed because of present or possible future claims by Italy it would — contrary to its own decision on the application by Italy to intervene in the present case — be deciding on Italy's claims vis-à-vis either Malta or Libya or both.

In Malta's view the proper course for the Court to take, and I say this with great respect, is to recall expressly that the rights of third States are safeguarded by Article 59 of the Statute of the Court. The Court, however, could not indicate any areas to which its judgment ought not to extend. First of all it is physically impossible for the Court to do so: in fact, the claims so far advanced have not only changed several times but are also still very much undefined. In any case there can be no guarantee that those are the only claims to which the areas contested by the Parties to this case may be subjected, or that Italy is the only State that may advance a claim. Secondly, it is Malta's submission that it would be legally wrong for the Court to refrain from adjudging on an area claimed by the Parties to the present case on the ground that third States have also indicated that they may lay a claim to it. By so doing the Court could be deciding — beyond its jurisdiction — that the claim by the third State may be justified.

Whatever the adjudication by the Court as between Malta and Libya, the rights of third States will remain unaffected. Indeed, as Libya has pointed out, if in such areas the Court will have indicated whether, as between Malta and Libya, a particular area is to be regarded as appertaining to either Malta or to Libya, the third State would know beforehand to which of the two States it ought to direct its claim when it decides to do so.

Malta, however, does not share Libya's view that the Court may distinguish between those areas where there is no claim and the areas where there is one. In Malta's view, if the Court were to make such a distinction it would run into the very same difficulties it would encounter if it were to decline to extend its judgment to all areas claimed by the Parties. In fact, any distinction between areas where there is a claim and areas where there is not would have no practical purpose and would be objectionable on jurisdictional grounds.

Such a distinction would have no practical purpose since it could be contradicted by subsequent events. There can in fact be no end to claims by third States until a final agreement covering all possible claims is entered into between all States in the area. Until this happens an area described by the Court as free from claims may be subjected to a claim by a third State; and con-

versely an area subject to a claim at the time of the Court's decision may subsequently cease to be so. A claim could also, as are Italy's claims in the present case, be so obscure and undefined that it would be practically impossible to define the area to which the claim refers.

In Malta's view, moreover, the Court should not make such a distinction. As already submitted, it would be legally wrong for the Court to do so. In its Judgment on Italy's application to intervene the Court said expressly that if it were to identify areas to which Italy could lay a claim this would, to use the Court's own words (see para. 30):

> "be tantamount to the Court's having made findings, first as to the existence of Italian rights over certain areas, or as from certain geographical points or sets of points; and secondly as to the absence of such Italian rights in other areas, or as from certain geographical points or sets of points".

It is Malta's belief that all that needs to be done to protect the rights of third States, is an express *caveat* recalling that whatever is contained in the Judgment in the case between Libya and Malta does not (indeed may not) affect the rights of third States, whether they have or have not laid a claim to any of the areas covered by the Court's decision. Anything beyond that could very well amount to a finding with respect to such claims, either in a positive or a negative sense and this must — for jurisdictional reasons — be avoided.

Mr. President and Members of the Court, I shall now turn to the differences between the Parties that concern the issues of substance upon which the Court has been requested to adjudicate by the Special Agreement.

These are: the identification of the principles and rules of international law which are applicable to the delimitation in the present case and the way in which the principles and rules so identified are to be applied in order that Malta and Libya may, in practice and without difficulty, draw the line which separates their respective continental shelf areas.

It is not my task to develop Malta's views on these matters. The case for Malta will be more fully and more ably presented to the Court by my learned friends and colleagues. My submissions will be limited to a very cursory and quite brief review of the main points of difference between the Parties in order to present to the Court an outline of Malta's case. My contribution will therefore include a criticism of the Libyan written pleadings, but only in their essentials, and will set out Malta's case in its broad outline.

The case for Libya — as it now stands — has been set out and developed in its written pleadings. Viewed from the legal aspect, Libya's case differs considerably from the position taken by Libyan delegations during the discussions that led to the signing of the Special Agreement. On the other hand, from the practical point of view, that is in respect of the physical extent of Libya's claim, there has been little change, if any, in Libya's quest for the lion's share of the continental shelf between Malta and Libya.

The change in Libya's position as to the principles and rules applicable in the case consists mainly of two developments.

The first is the introduction of an entirely new element: the physical features called by Libya the "Rift Zone" and the "Escarpments-Fault Zone"; and Libya's perception of natural prolongation in the context of the continental shelf.

The second is the attribution of a different role to proportionality: while Libya had previously considered proportionality as the main principle or rule governing delimitation in the present case, it now appears to accept that proportionality has a much more modest function.

But before examining these changes on their merits, it is pertinent to make certain preliminary observations.

Until Libya filed its Memorial in April 1983, it had based its case exclusively on proportionality and had attributed to proportionality the role of a legal principle or rule. It is not in any way being suggested that Libya could not, or should not, have changed position or brought in new arguments. Libya was perfectly free to do so. But the fact remains that it was not until 1983 that Libya first advanced the view that physical features in the sea-bed and subsoil were relevant to the delimitation of the Parties' continental shelf. Nothing of any legal relevance — such as case law or State practice — had happened in the meantine to justify such a radical change, and it may therefore be reasonably assumed that the reason for it was a realization that the legal basis previously adopted had been wrong.

The second point that needs to be made — or rather repeated, because it has already been made in the Counter-Memorial — concerns the names given by Libya to the physical features which, according to Libya, are the termini of Malta's physical natural prolongation, particularly the various and diverse physical features which Libya calls the "Rift Zone". There are, no doubt, various and diverse geological and geomorphological features in the Pelagian Basin, and there are areas — not just one area, but areas — within that Basin, in which, according to some geologists at least, there has been rifting; there are also areas — and again not just one but more than one area — where the rifting is still active. But what Libya has done is to take one particular area — the area which suits it — and call it the Rift Zone. The area which Libya designates by that name is, however, known to geologists, geomorphologists and geographers, and is shown on all maps — not by the Libyan name — but by the separate names of the separate features which Libya groups together. These are the Pantelleria Trough, the Malta Trough, the Linosa Trough, the Malta Channel and the Medina Channel. When the whole area — not the sea-bed features, but the geographical area — is referred to by scientists, the name generally used is the Sicily or Sicilian Channel.

Libya first baptized these features collectively by the name "Rift Zone" in its Memorial. It then admitted quite frankly that it did so, to quote Libya's own words "for reasons of simplicity" (I, LM, p. 29, para. 3.12). But Libya has since been using that name as if the area were in fact known by that name. *No one else, not even the Libyan scientists have used that expression in the way Libya does.* Indeed the authors of the Libyan Technical Annex attached to its Memorial had clearly refused to do so. The Court will recall what Malta pointed out in its Counter-Memorial, namely that Professor Fabricius declined the paternity not only of the Libyan assertion that the northern limits of the Pelagian Block are marked by the Rift Zone, but also of the name itself. Even more recently, Professor Finetti, in the Libyan Reply refers to the area not as the Rift Zone but as the Sicily Channel Rift Zone.

The third point to be made as a preliminary to more substantive observations is that it is practically impossible for Malta not to refer to the so-called Rift Zone by that name. Malta disagrees entirely with Libya's views on this matter and *must therefore refer at least to the Libyan concept called the Rift Zone in* order to contradict it. Moreover the Court by now knows exactly which area one is referring to by the use of that name, and it would be inopportune and probably also too cumbersome to refer to that area by some other expression.

The point I wish to stress here is that when Malta uses that expression it does not do so — as Libya has suggested — because Malta accepts the existence of this zone, with the consequences Libya wishes to draw from that

acceptance, but merely because it is either compelled to use that expression to rebut the Libyan submissions or, as Libya itself first used that name, "for reasons of simplicity" or convenience.

The Court, however, must not draw any other conclusion from the use of the Libyan expression by Malta. Indeed it may perhaps not be amiss to observe in this connection that the repetitive use of particular expressions can have the effect of producing an unconscious acceptance of what is intended to be conveyed by those expressions. In extreme cases it could even take the form of brainwashing. Of course I am sure Libya had no such intentions: I am simply recalling a psychological reality which has to some extent conditioned even Malta's own way of expressing itself although, of course, it is not Malta's way of thinking.

Having made these observations and clarified Malta's position, I shall, and so will my colleagues, feel free to refer to the "Rift Zone" whenever we need to refer to the area called by Libya by that name. At the same time we shall, at least occasionally, place that expression in quotes in order that our position may not be misunderstood.

With these preliminary observations out of the way, I can now, Mr. President, turn to the substance of the issues which arise from Libya's use of the physical features of submarine areas relevant to the delimitation.

The submissions which conclude the Libyan Memorial (I), as well as its Counter-Memorial (II) and the Reply *(supra)* — and which therefore may be taken to be the substantive submissions of Libya to the Court — summarize the Libyan position on the physical features of the sea-bed and subsoil of the area which constitute the continental shelf between Malta and Libya in the following terms:

> "A criterion for delimitation of continental shelf areas . . . can be derived from the principle of natural prolongation because there exists a fundamental discontinuity in the sea-bed and subsoil which divide the areas of the continental shelf into two distinct natural prolongations extending from the land territories of the respective Parties." (Submission No. 4.)

On the basis of that submission and of the other submissions in which Libya sets out the principles and rules it believes to be applicable, Libya formulates its last submission (Submission No. 9) in the sense that:

> "The principles and rules of international law can in practice be applied by the Parties so as to achieve an equitable result, taking account of the physical factors and all the other relevant circumstances of this case, by agreement on a delimitation within, and following the general direction of, the Rift Zone as defined in the Libyan Memorial."

These submissions contain in a nutshell Libya's position on the physical factors which it derives from the geology and geomorphology of the region. The Libyan case rests also on the geography of the area; but this is something which will be considered in other contexts. For the moment only the geology and geomorphology of the area which are regarded by Libya to be relevant are under consideration. In respect of these physical features Libya asserts that the "Rift Zone" constitutes a fundamental discontinuity in the sea-bed and subsoil of the submarine areas lying between Malta and Libya. From this fact, coupled with its views of the relevant circumstances, Libya concludes that the delimitation should follow the direction of the Rift Zone and should be contained within it.

To these submissions Malta replies, and believes it can show conclusively, that Libya's case is untenable both in fact and in law.

Although no reference is made in the submissions to the physical features east of Malta which Libya calls the "Escarpments-Fault Zone", it is also Libya's view that Malta's continental shelf terminates at these features, and that all areas to the east of them constitute a continental shelf to be delimited between Libya and other States, that is Italy and presumably Greece. In Malta's view this Libyan claim is not merely untenable, it is preposterous.

In view of the complexity of these issues I shall deal with them under three separate headings:

1. The "Rift Zone" and the physical facts.
2. The "Rift Zone" and the law.
3. The "Escarpments-Fault Zone".

1. The "Rift Zone" and the Physical Facts

There are obviously several facts concerning the submarine area between Malta and Libya on which scientists will readily agree; there are other facts on which some scientists will agree; there are also other facts which, though there is not in their regard outright disagreement between scientists, are, however, differently interpreted or evaluated, or are facts to which scientists will give a different emphasis. This is only natural. Moreover there is still, in respect of the relevant areas much work to be done, both in research and study; and the complete facts concerning several of the parts that make up the area are still to be ascertained.

One must therefore be very careful in reaching conclusions on such limited knowledge and it must be said that in most respects the scientists engaged or quoted by the Parties take this cautious approach.

No so Libya. Libya rushes to the conclusion that the scientific facts show clearly that there is such a fundamental discontinuity in the submarine areas between Malta and Libya that the "Rift Zone" is in fact the southern limit of the Maltese continental shelf and the northern limit of the Libyan shelf.

No such conclusion is reached by any of the scientists engaged or quoted by Libya. This conclusion is of Libya's making and, in Malta's view, completely without scientific foundation. All that the scientists — even the Libyan scientists — say is that there is an area mostly to the west and south-west of Malta, and extending, but in a much reduced form, to the south of Malta, in which tectonic and other forces, including rifting, have produced troughs and lesser grabens or channels. Some of these grabens are quite deep, while the channels are rather shallow.

Quite naturally, for scientists these features may be very important for the study of the region, and may even call for special attention. But nowhere do any of the scientists that have contributed to the case, whether through a direct contribution or through their independent work, nowhere do any of them say that these features — even if they could be collectively called a rift zone — are such that they divide the Pelagian Basin into two distinct and separate geological units. All they do is describe the features and try to identify their origin and history.

When it comes to statements such as "Libya has shown in its Memorial and Counter-Memorial that the Rift Zone constitutes a fundamental discontinuity in the areas of the continental shelf between Libya and Malta" (*supra*, LR, para. 5.21), or to the assertion that "This evidence shows that [the Rift Zone] cannot be regarded as other than a fundamental discontinuity in the sea-bed and subsoil in areas of shelf lying between Libya and Malta" (*supra*, LR, para. 5.29), it is Libya that is gratuitously asserting that it is so. None of these conclusions

can be attributed to any of the scientists. They are all Libyan assertions to which none of the scientists have subscribed.

On the contrary, Libya's advisers have had to disclaim the paternity of certain Libyan positions; and have also felt compelled to explain that a Libyan position is not shared by scientists. Thus, in his contribution to the Technical Annex to the Libyan Memorial, Professor Fabricius found it necessary to describe one of the limits of the Pelagian Block in the following terms:

> "The northern limits of the Block are defined by the Libyan Memorial as created by the Rift Zone running from the Strait of Tunis, across the Pantelleria, Linosa and Malta Troughs and the Malta and Medina Channels to the Heron Valley."

As a scientist he could not but attribute the definition to Libya; he could not say it was his own, because it was not. Indeed, he also felt compelled to add:

> "Other definitions adopted by some scientists place the northern boundary of the Pelagian Block extending as far north as the Sicilian coastline." (Para. 3A of p. I-4 of the Technical Annex, I.)

Professor Fabricius had also assisted Libya in the case with Tunisia, and he could not have failed to recall that in that case even Libya had placed the northern boundary of the Pelagian Basin much farther to the north than the newly found Rift Zone.

The Libyan scientists, without distinction, frequently refer to the area between Malta and Libya by its well-known and established name of Pelagian Sea or Pelagian Basin or Pelagian Block — as it is variously called; and the Rift Zone, whether it is referred to by that name or by the name of the individual features which Libya includes within that name, is considered to be a part of that whole area and not as being one of the boundaries of the area. To quote but one instance from another Libyan scientist, Professor Finetti, one may pick as a typical example the view expressed by him in his paper reproduced as part of Annex 7 of the Libyan Reply *(supra)*. There Professor Finetti says

> "The Pelagian Basin is generally characterized by large areas having flat or slightly deformed sea-bed morphology. However, cutting across the sea-bed of the Pelagian Basin from the Egadi Valley to the Heron Valley are the huge troughs of Pantelleria, Linosa and Malta and the Medina and Malta Channels."

These features, which together make up the "Rift Zone" could not cut across the Pelagian Basin if they constituted its northern boundary; they can cross it only if they are part of it.

Similar views are to be found in other technical studies produced for Libya or quoted by Libya. Moreover, the area through which the Rift Zone is claimed to pass, is accepted without question as being a region with its own proper name — the Pelagian Basin, Block or Sea; a simple name accepted by all scientists. These facts, and their acceptance by scientists, contradicts the Libyan view that the Pelagian Sea or Basin ends at the "Rift Zone", as well as the Libyan contention that the area north of the "Rift Zone" is fundamentally distinct from the area to the south of that zone.

There is also in the work of one of the Libyan experts, a more explicit contradiction of these Libyan theses, and a confirmation of the Maltese view that the Pelagian Block is indeed one block geologically. In his contribution to the Technical Annex attached to the Libyan Memorial, Professor Fabricius gave the following opinion:

> "The block-like character of the sea-bed underlying the Pelagian Sea is especially emphasised by the deep escarpments to the east, forming a natural border to the Ionian Basin and the Sirt Basin (or Rise) which contain abyssal plains almost 4,200 metres in depth." (I, LM, Technical Annex, p. I-5.)

What expression could better describe the unity and compactness of the Pelagian Basin, from Sicily all the way down to Libya, than the expression used by Professor Fabricius to describe it, that is, its "block-like character"?

In view of this scientific evidence which contradicts rather than supports the Libyan claims concerning the "Rift Zone" in the Sicily Channel, it is not at all surprising that while making these claims Libya unwillingly has to accept the basic continuity of the Pelagian Block. Of course it cannot do this directly; but there can be little doubt that it does so indirectly when it disregards or plays down — for it cannot deny — the other areas of rifting cutting through other parts of the Pelagian sea-bed and subsoil.

As Professor Mascle has shown, and as will be further shown during these hearings, there has been rifting in much of the Pelagian Basin. The illustration, (24) Figure 3 of the dossier before the Court, shows a system of faults and also where the rifting has taken place. Some rifting is still active in more than one area; and the same illustration also indicates where this is so. It will be seen that the areas of faults, as well as of active rifting, are to be found both in the vicinity of Malta and to the south in the vicinity of Libya. This is accepted by Libyan experts, such as Professor Fabricius, although he points to differences in degree between the two; and the Libyan pleadings make no serious attempt to deny the conclusion of Professor Mascle.

Nor could Libya expect to show otherwise. As the paper prepared in 1981 by Christian Blanpied and Gilbert Bellaiche — a copy of which is included in the Maltese dossier as Document A for the convenience of the Court — as this paper shows, the rifting and other forces to which the Sicily Channel has been subjected are in no way unique. There are other faults, such as those which have given rise the the Jarrafa Trough in the southern Pelagian Basin, which are known to be presently active and to have been active over the same time-span as the Pantelleria, Linosa and Malta grabens. What Libya has done is to divert all attention to one particular area and give it a name, in order to create the impression that there is only one such area or zone in the region, that one which it suits Libya to highlight.

Blanpied and Bellaiche have also pointed out in their study just referred to that, while the northern grabens, such as those of Pantelleria and Linosa, have been the subject of previous work — covering the years 1964 and 1979 —

> "little attention has been paid to the troughs located on the southeastern end of the Tunisian platform, that is, the Jarrafa and Tripolitanian Troughs, except from a purely geomorphological aspect".

Now, Blanpied and Bellaiche conclude that the Jarrafa Trough — and their study is limited exclusively to that feature — can conclusively

> "be considered as an element of the intercontinental belt of grabens defined by Illies (1969) that runs from Sardinia through the Strait of Sicily to the African grabens".

Libya's excuse for disregarding these physical features, much closer to its coasts, is that they fall outside the disputed area. However, apart from the fact that the area to be divided between Malta and Libya is the whole area lying

between the two countries, and the Jarrafa and Tripolitanian Troughs are therefore within the area in dispute, the point Malta is making is that the whole of the Pelagian Basin is a geological continuum. Consequently it is very relevant to establish whether or not there are in this whole area, and not merely in the area chosen by Libya, physical features of such a nature as to destroy that continuity. Clearly, if there are physical features which could have that effect, and if that effect has legal consequences, they must be taken into account wherever they are, because the same effect and the same legal consequences must be given to them whether they are in the vicinity of Malta or in the vicinity of Libya. It surely cannot be said — though this is what Libya does — that the Sicily Channel rifting is relevant because it is nearer Malta than Libya, or the Jarrafa-Tripolitania rifting is not because it is nearer Libya. What can, on the contrary, be said is that since the rifting to the south is accepted by both Parties as not producing a fundamental discontinuity in the shelf, the rifting in the north, which is of an identical nature and has had the same origin and very similar history, cannot have that effect.

Libya sees a contradiction in Malta's position concerning the southern troughs. Libya says that by pointing to these grabens Malta contradicts its view of the Pelagian Block as a geological continuum. The contradiction is in Libya's position not in Malta's. Malta considers that neither the Sicily Channel rift zone, that is the northern troughs, nor the rift zone in the area of the Jarrafa and Tripolitanian Troughs in the south, constitute a fundamental discontinuity in the geology of the region, and is therefore perfectly logical in its approach to the matter in issue. Libya, on the contrary, regards the northern troughs as having the effect of destroying that continuity, but denies the same effect to the southern troughs. Libya looks at these features not objectively, as Malta does, but in the perspective of its interests: hence the blatant contradictions in the Libyan positions.

A very similar contradiction is also evident between the position now taken by Libya and that which Libya took in its case with Tunisia. Libya was then bent on proving that it could claim the whole of the Pelagian Basin directly to the north of its coastline — or landmass — on the strength of what it called its "northward thrust". It was therefore in Libya's interest to accept the truth about that Basin, namely that it is a geological and geomorphological unit.

The following quotations — all taken from the Libyan Counter-Memorial in the *Tunisia/Libya* case — will suffice to prove this point.

The first quotation —

> "The continental shelf area concerned is basically undifferentiated and forms part of the Pelagian Basin, a distinct geologic and geographic unit . . . without marked features that would affect delimitation . . ." (P. 10, para. 25.)

The second quotation from the Libyan Counter-Memorial —

> "We are here dealing with a simple shelf, a physiographic unit, part of the Pelagian Basin." (P. 103, para. 233.)

The third quotation —

> "The geological evidence demonstrates the existence of a single continental shelf . . . That shelf forms a portion of the Pelagian Basin which is itself a geologic and geographic unit forming a component of the stable North African plate." (P. 158, para. 391.)

The final quotation —

"The entire Basin is a geologic and physiographic unit . . ." (P. 197, para. 491.)

Libya dismisses these clear statements confirming the scientific view that the Pelagian Basin is a single geological and geomorphological unit by the mere excuse that in the *Tunisia/Libya* case the relevant area was different from that in the present case. There is no question that the area for delimitation in the two cases is different, but it is clear from the parts of the Libyan pleadings just quoted that Libya makes a clear-cut distinction, in those statements, between the area for delimitation and the Pelagian Basin, of which the former is expressly stated to be only a part. The expressions "geologic and physiographic unit", "geologic and geographical unit" and "a distinct geologic and geographic unit" were, without the shadow of a doubt, used by Libya not to describe the areas relevant for delimitation with Tunisia but to describe the whole of the Pelagian Basin.

In conclusion, Malta's submission on the geological and geomorphological features of the area relevant for delimitation in the present case may be summarized as follows:

1. The Pelagian Block or Basin is a geological and geomorphological unit or continuum. Like most, if not all, other faults, it has undergone tectonic and other forces, including some which have caused rifting, in the case of the region in question throughout much of the area comprised in it, but, this notwithstanding, the Pelagian Block has retained its essential or basic unit.

2. The zone in the Sicily Channel, which Libya has called the Rift Zone, is just one of such areas where there has been, among other effects, a rifting; moreover this rifting, both in the Sicily Channel and in the Jarrafa and Tripolitanian Troughs, is still somewhat active, though it has been on the decrease for several million years.

3. Neither the rift zone in the Sicilian Channel nor any other feature in the Pelagian Basin, including other areas of rifting, are such as to disrupt the essential or basic unity of the sea-bed and subsoil underlying the Pelagian Sea.

The Court adjourned from 4.33 p.m. to 4.48 p.m.

Mr. President, Members of the Court, I had just finished dealing with the aspect of the Rift Zone in its relation to the physical facts. I shall now deal with the second aspect, the Rift Zone and the Law.

2. The "Rift Zone" and the Law

Libya claims that the Rift Zone in the Sicily Channel terminates the natural prolongation of the land territory of Malta and that, consequently, the Libyan shelf may be regarded as extending northwards up to that zone. To use other Libyan expressions having more or less the same effect, Libya claims that because of the existence of what it calls "these critical elements" the boundary should be within, and follow the general direction of, the Rift Zone.

This Libyan thesis is untenable in law even if it were true as a physical fact — which it is not, as I believe Malta has shown — that the troughs and channels comprised in the Rift Zone did in fact constitute a fundamental discontinuity in the Pelagian Basin. In order to show this, the Rift Zone will be treated as if it were in fact a feature which physically could be relevant to delimitation and not, as Malta believes it to be, just one of several features of a similar or comparable nature, origin, and even history, which are to be found in the

Pelagian Basin without, however, affecting its fundamental or essential unity. In this part of my introduction to Malta's case I shall try to show that even if Libya were correct in its evaluation of the physical elements of the case, these facts would still not lead to the legal conclusions drawn by Libya. In contemporary international law these facts are irrelevant to both entitlement and delimitation, except, in respect of entitlement, in the special circumstances of very wide shelves — which are certainly not those of the present case.

The Libyan argument rests, on the legal plane, on Libya's notion of natural prolongation in the context of the continental shelf. Libya accepts that:

> "The natural prolongation of the respective land territories of the Parties into and under the sea is the basis of title to the areas of continental shelf which appertains to each of them." (Submission No. 2.)

And also that:

> "The delimitation should be accomplished in such a way as to leave as much as possible to each party all areas of continental shelf that constitute the natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the other." (Submission No. 3.)

As long as Libya does not embark upon its own interpretation of "natural prolongation" as used in the various passages it quotes from judgments and other authoritative sources, there is not much difference between the Parties in this case on the principles and rules just enunciated. Malta could very well subscribe to them as they are described in the Libyan Submissions. But as soon as Libya starts developing its arguments based on natural prolongation, it becomes clear that except as will be seen in the area of entitlement, Libya identifies the legal concept of natural prolongation in the context of the continental shelf with the purely physical elements of the phenomenon known by that name. Consequently for Libya, even such a physical feature as a trough or a series of troughs and channels, could be sufficient to interrupt — not just physically but also legally — the natural prolongation of the land territory of a State into and under the sea.

In Malta's view this line of argument completely lacks support in international law and is in contradiction of the contemporary law of the continental shelf.

It is of course accepted that the continental shelf as a legal concept owes its origin to physical considerations; but it is equally well established that, as a legal concept, the continental shelf has never been equivalent to what a geologist or a geographer would consider as strictly falling under that name in a scientific sense. As the Court had occasion to observe in both Judgments concerning the delimitation of continental shelf areas — or rather in all three Judgments concerning the delimitations of continental shelf areas — although the legal concept derives from the natural phenomenon, it has, to use the Court's own words, "pursued its own development" and this development consisted in a "widening of the concept for legal purposes" (1982 Judgment, pp. 45-46, paras. 41-42).

Even in 1958, only a few years after the Truman Proclamation, the constraint on the extent of the shelf was placed by the Convention of that year not on the morphology of the sea-bed, much less on its geology, but on the progress achieved by technology, which was already advancing very rapidly, with the result that there were in fact no definable limits to the extent of the continental shelf that could be claimed by a State so long as the natural resources of the sea-bed and subsoil could be exploited.

The concept has since developed still further and the continental shelf now extends at least up to 200 nautical miles from the coast unless the physical phenomenon itself extends beyond that distance. Except in these latter, and rather rare, cases, the extent of the natural prolongation of a State's territory into and under the sea for the purposes of establishing the limits of the continental shelf now depends exclusively on distance. What is beneath the water throughout that distance, no matter how deep, indented or deformed the seabed may be, and even if the ocean floor is reached, a State may regard all those submarine areas as appertaining to it *ipso jure*, unless and until any such areas may also be claimed by an equal and identical entitlement by other States.

This is, in the opinion of Malta, the present state of customary international law; it is now also reflected in the 1982 Convention on the Law of the Sea. The continental shelf as a purely physical notion never did alone form the basis of title to continental shelf rights: these derived from a legal concept which always differed somewhat from the natural phenomenon. As time passed and "the legal concept pursued its own development" by a "widening of the concept", the physical elements gradually lost even the little relevance they may have retained, until, as Judge Jiménez de Aréchaga concluded in the *Tunisia/Libya* case, "the geological and geomorphological elements . . . [were] left out by the International Law Commission in 1956 and the Conference in 1958". These elements have now only the effect of extending the continental shelf of a State beyond 200 miles from its coast, whenever the physical elements themselves extend beyond that distance.

To the question therefore which Libya puts in its Memorial (I) at paragraph 6.08, that is whether natural prolongation, too, has lost all relevance, the simple answer is: yes, it has, if by natural prolongation one intends, as Libya does for certain purposes, the purely geological or geomorphological elements that form the continental shelf as known to scientists. This view has been confirmed by the most recent of judicial pronouncements namely the Judgment in the *Gulf of Maine* case. In that Judgment the Chamber, while recognizing the contribution to the formulation of the law made by the Court in the 1969 Judgment, added that in the *North Sea Continental Shelf* cases the Court had "attributed more marked importance to the link between the legal institution of the continental shelf and the physical fact of the natural prolongation than has subsequently been given to it" (para. 91); and later on, the Chamber expresses the view that the concept of adjacency "can be credited with the ability to express, perhaps better than that of natural prolongation, the link between a State's sovereignty and its sovereign rights to adjacent submerged land" (para. 104).

Libya does not seem to argue against the proposition that the outer limits of the continental shelf of a State may be defined by reference to a distance of 200 miles. In fact it is Libya's view that where there are "no problems of delimitation with neighbouring States . . . entitlement and delimitation (in terms of absolute outer limits) go hand in hand"; and it goes on to add that

> "whether the outer limits are defined in terms of a 200-miles limit or the outer edge of the continental margin, the correlation between entitlement and outer limits exists precisely because no question of a boundary with a neighbouring State is contemplated" (I, LM, para. 6.06).

These statements presuppose the acceptance by Libya that, when it is simply a question of establishing the outer limits of the continental shelf of a State, with respect not to another State but to the international community, and no

question of delimitation with another State is involved, a State is entitled — as Article 76 of the 1982 Convention provides — to a shelf 200 miles wide, irrespective of the physiography of the sea-bed, or beyond that distance if the outer edge of its continental margin lies beyond it. When, therefore, it is merely a question of entitlement, the outer limits of a shelf are determined, as a rule, by distance alone.

But when the object of the exercise is the delimitation of areas in respect of which there are conflicting claims Libya distinguishes between —

(1) "a situation where neighbouring States are located on different shelves, in terms of distinct natural prolongations"; and
(2) "a situation where neighbouring States are located on the same shelf, and where the shelf area in question may be regarded as much the natural prolongation of the one as of the other on the geological and geomorphological evidence" (I, LM, para. 6.08).

According to Libya, in the first situation "the evidence of 'natural prolongation' is fundamentally evidence of a geological and geomorphological character and serves to establish the basis for the boundary between different shelves". In the second situation the physical structure of the shelf "may still serve as a useful or determinant criterion for delimiting the shelf" but its role "is that of a relevant factor, not that of a limit to the area of entitlement" (I, LM, para. 6.09).

In order to evaluate the Libyan argument properly, and to answer it adequately, Malta has in all honesty tried to establish whether Libya considers the present case to fall under the first or the second of the situations which Libya itself envisages, and which have just been described in Libya's own words; but Malta has been unable to come to a definitive conclusion.

The Libyan formal submissions speak of a "fundamental discontinuity" such as to "divide the areas of continental shelf into two distinct natural prolongations extending from the land territories of the respective Parties". This and other statements to more or less the same effect, seem to place the present case in the first category of situations described by Libya. But in its Reply, *supra*, at paragraph 6.19, Libya takes offence because Malta has, according to Libya, accused it of "suggesting that the Rift Zone should constitute the boundary between the continental shelf areas appertaining to each of the Parties". In the same context Libya explains that

> "it has never advanced the proposition that the Rift Zone *per se* constitutes a natural maritime boundary between the States. Rather, Libya's position is that the Rift Zone provides critical physical elements for the determination of a boundary line which would be within and follow its general direction."

This Libyan explanation seems to indicate that Libya places the present case in the second category of delimitation situations, namely, one in which Malta and Libya are located on the same shelf, and therefore the shelf area in question may be regarded as much as the natural prolongation of Malta as of Libya on the geological and geomorphological evidence; but there are what Libya calls "critical physical elements [the "Rift Zone"] for the determination of a boundary line which would be within and follow its general direction".

I must confess that I am still somewhat doubtful as to which is in fact the Libyan position; it could be that there is a third category of situations which we have not heard about yet. We may, in fact, not have heard the last word on the matter.

But whichever the category in which Libya will finally place the present case it is clear that the Libyan argument is in any case seriously flawed because —

(a) Libya has given a different meaning to natural prolongation according to whether the concept is used in the context of the determination of the outer limits of a State's jurisdiction or in the context of a delimitation between States; and

(b) in the context of delimitation between States, Libya identifies natural prolongation, even on the legal plane, with physical features and makes it dependent on the geological and geomorphological structure of the seabed.

Malta believes it can show — indeed that it has already shown in its written pleadings — that neither of the above Libyan positions is legally tenable.

As regards the first of these positions, it is Malta's view that a legal concept cannot have different meanings simply because it is placed in different contexts; all the more so when these two contexts — entitlement and delimitation — though separate and distinct are, at the same time, intimately related. It is true that the two concepts are quite distinct: in fact, as was noted in the 1969 Judgment, the Court "did not regard an equitable delimitation and a determination of the limits of natural prolongation as synonymous" (p. 46, para. 44). At the same time it is undeniable that unless a State can establish its entitlement to an area there can be no question of a delimitation of that area with another State. In other words, unless there is an overlap of entitlements no question of delimitation can arise.

That is why Malta says that entitlement and delimitation always go hand in hand. But if they do, and the one, delimitation, is at least in some important respects, dependent on the other, entitlement, how can the same concept (natural prolongation) have one meaning for mere entitlement and a different — a completely different — meaning where conflicting entitlements call for a delimitation?

The second Libyan position I have just referred to has, I believe, already been shown to be wrong, and I shall therefore limit myself to a very brief recapitulation; and it is this: while the natural phenonemon was at the origin of the legal concept of continental shelf, the two have never been identical and the legal concept has pursued its own development by a widening of the concept for legal purposes. The physical elements have over the years gradually disappeared altogether up to a distance of 200 nautical miles from the coast, and up to that limit the only relevant factor is distance. The Rift Zone, therefore, whatever its true nature may be, is relevant for the determination of the legal issues between the Parties.

This conclusion has the support of the jurisprudence and State practice.

Both this Court and the Court of Arbitration in the Anglo-French Continental Shelf case refused even to consider such natural features as the Hurd Deep, the Jarrafa Trough and the Tripolitanian Furrow. With respect to the Hurd Deep the Arbitral Court expressly held that "there was no intrinsic reason why a boundary along this axis [i.e., the axis of the Hurd Deep] should be the boundary". The Court regarded the location of such features as a matter of chance — "a fact of nature", as the Court put it, which had no legal consequence.

In the *Tunisia/Libya* case the Court rejected categorically the argument that the delimitation of the areas of shelf appertaining to Tunisia and Libya should be made by reference to their natural prolongation as this might be established

on geological or geomorphological considerations. The position taken by the Court in the *Tunisia/Libya* case is very significant, since in that case both Parties had based their case on scientific elements — Libya essentially on geology and Tunisia essentially on geomorphology — and both had requested the Court to decide the case on that basis. It is true that the Court did not entirely exclude that there may be cases where physical features might be a factor to be taken into account; but the more important fact about that Judgment is that the Court did not take account of any of the scientific elements submitted by the Parties to the Court as a basis for its decision.

In the *North Sea Continental Shelf* cases neither geological nor geomorphological considerations were included among any of the principles and rules of international law identified by the Court as applicable to delimitation. The physical and geological structure of the areas involved were indicated by the Court merely as a factor to be taken into account by the Parties in their negotiations; and the wording used by the Court in that connection suggests that the Court was at least as much concerned about the natural resources which the geological structure of the area could show to exist or not to exist, or to exist across possible boundaries, as about the existence or otherwise of depressions.

In the *Gulf of Maine* case, even though geological factors were not significant, the Chamber nevertheless did observe that

> "a delimitation, whether of a maritime boundary or of a land boundary, is a legal-political operation, and that it is not the case that where a natural boundary is discernible, the political delimitation necessarily has to follow the same line" (para. 56).

Turning to State practice I feel it can be said with confidence that, with but one exception on which I shall comment later, no delimitation out of the 80 cases known to have been made by agreement between States, takes account of trenches, troughs, channels, deeps, depressions and other features, even where these are of a kind which could mark the limits of the physical continental shelf of the States concerned. As was pointed out in the Maltese Memorial, a similar observation had earlier been made by the Court of Arbitration in the Anglo-French case. The Court had held that:

> "to attach critical significance to a physical feature like the Hurd Deep – Hurd Deep Fault Zone in delimiting the continental shelf boundary in the present case would run counter to the whole tendency of State practice on the continental shelf in recent years" (p. 6, para. 10).

Malta has already indicated in its written pleading the delimitations in which very significant features — some of which are much deeper and more important than the rift zone in the Sicily Channel — played no part whatsoever. I shall therefore limit myself to a brief reference to the more important examples.

Though the depressions in the North Sea are not excessively deep — they range between some 400 and 700 metres — it is well known that none of the delimitations between the several States that border this sea have given any weight whatever to the geology or geomorphology of the region. On the contrary, with the exception of a limited part of the delimitation between Germany and the Netherlands and Germany and Denmark, all the delimitations have been effected on the basis of equidistance.

The Cuba-Mexico agreement of 26 July 1976 takes no account of the Campeche Escarpment and the Yucatan Channel, although they are some 3,000 metres deep; and the delimitation boundary is equidistant from the two countries.

The Cuba-Haiti agreement of 27 October 1977 ignores the Cayman Trough, which is 2,900 metres deep, and the two States expressly stated that they relied on equidistance to effect the delimitation.

The same may be said with respect to two other agreements in the Caribbean Sea involving Colombia and the Dominican Republic (11 January 1978) and the Dominican Republic and Venezuela (3 March 1979). Neither of these agreements takes account of such a notable structure as the Aruba Gap which reaches a depth of 4,600 metres, and in both cases the delimitations relied not on a physical phenomenon, the location of which is a mere accident of nature, but on the more equitable and the more reputable method of equidistance.

The examples of delimitations which treat depressions in the sea-bed as if they were not there are not limited to areas outside the Mediterranean. Indeed two of the delimitations which amply support Malta's submissions on the irrelevance of physical features concern areas which are very closely linked to the present case. I am referring to the Italy-Tunisia and the Italy-Greece agree-
(36) ments. The Court can see these delimitations on Figure 4 of the dossier. The delimitations have been reproduced on a bathymetric map of the Central Mediterranean in order that the Court may relate these delimitations with the relevant physical features of the region.

In the first of these agreements, viz. that between Italy and Tunisia, the area *which was delimited included not just parts of what Libya calls the Rift Zone* and which it invokes as the limit of the Maltese shelf, but the more geologically important sectors of that zone. By their agreement Italy and Tunisia have shown in the clearest possible way that the very same structures which Libya now considers as constituting a fundamental discontinuity in the sea-bed and subsoil, were, for both Italy and Tunisia, features which were totally irrelevant for the purposes of delimitation.

On the other side of Malta, that is to the east, there is what is probably the most important depression in the entire Mediterranean covering a huge area of tens of thousands of square kilometres and reaching depths of over 4,200 metres. It is known as the Ionian Abyss or Abyssal Plain, and its name gives a clear indication of the nature of this unique feature of the Mediterranean. Notwithstanding all this, when Italy and Greece agreed on a delimitation which covers most of the areas of shelf common to them, they took absolutely no notice of this feature even though geologically and geomorphologically it dwarfs the Rift Zone into insignificance.

They drew a perfectly equidistant line which, as the Court may see on
(36) Figure 4, runs right across the deepest central part of the Ionian Abyss, in complete disregard of the geology and the geomorphology of the area. And if this were not enough, Libya has made it clear that it regards part, indeed the larger part, of this depression as included in its own continental shelf, at least in its relations with Italy and Greece. This Libyan claim proves beyond doubt that Libya's own practice contradicts the position it has taken with respect to the Rift Zone in the Sicily Channel and confirms the general State practice that physical features are ignored in the process of delimitation. Of course Libya *does not apply the same standards to Malta, whether with respect to the "Rift* Zone" or the "Escarpments-Fault Zone"; but as evidence of State practice Libya's approach to the Ionian Abyssal Plain (as well as to Jarrafa and Tripolitania Troughs) is the clearest confirmation by Libya itself that physical features are considered by States to be legally irrelevant.

The only exception to this practice of States is the Timor Trench or Trough. There are, however, certain considerations about this physical feature of the submarine area between Australia and the island of Timor which show it to be

quite different from any other feature so far encountered in areas delimited by agreement, and to be therefore, to use legal jargon, a bad precedent.

The first consideration is the well-known one that in extent and depth there are few features that are comparable. The *Australian Year Book of International Law, 1970-1973*, 1975 (pp. 145-146), describes it as

> "a huge steep cleft or declivity called the Timor Trough extending in an east-west direction, considerably nearer to the coast of Timor than to the northern coast of Australia. It is more than 550 nautical miles long and on the average 40 miles wide, and the sea-bed slopes down on opposite sides to a depth of over 10,000 feet. The Timor Trough thus breaks the continental shelf between Australia and Timor, so that there are two distinct shelves, and not one and the same shelf, separating the two opposite coasts."

The nature of this Trough is the second consideration. In the view of Australia, the Timor Trough is of such a kind that there is no common area south of the Trough which could be divided between Timor and Australia; and it would appear that this line of reasoning had been accepted by Portugal at the time Timor was in part a Portuguese possession. The argument, however, is not accepted by Indonesia to which State the whole of Timor now appertains.

It may usefully be recalled here that the delimitation so far agreed covers only part of the submarine areas between the island of Timor and the northern coast of Australia. There is still a gap, several miles wide and commonly referred to as the Timor Gap, which has still to be delimited. Australia, obviously, wishes to close the gap by a straight line joining the two ends of the gap. Indonesia, however, is understood to be pressing for a boundary on the basis of an equidistant line. In this connection it is interesting to note that, in the light of what the Indonesian Minister for Foreign Affairs is reported to have said earlier this year, it would appear that Indonesia is basing its position on contemporary law (the distance principle), while the delimitation already effected had been based on the concept of the shelf as it had developed in 1958 at the time of the Second Conference (the exploitability principle). The report containing the Minister's statement was carried in a Melbourne newspaper, *The Age*, of 31 March 1984.

The third and very important fact about the Timor Trough is that geologically there is in fact not just two separate continental shelves, but each of those shelves originally belonged to different continents, or rather to different plates. Originally Australia and Timor were many thousands of miles apart and they are only close together now because they have been inexorably moving towards one another while the intervening ocean was pushed down the trough into the earth's mantle. So in a very real scientific sense the Timor Trough marks a fundamental discontinuity between Australia and Timor. The Timor Trough is a "subduction zone" where ocean crust is being forced down into the earth's mantle by plate tectonic motions.

The trenches that are comparable to it are the Peru-Chile Trench along the west coast of South America, the Tonga-Kemadec Trench north of New Zealand and the trenches off Japan. Nearer to the area in question in the present case, the Hellenic Trench may very well be the result of tectonic forces similar to those which formed the Timor Trench, that is to say the plate tectonic motions which brought the European and African plates together.

The depressions which Libya calls the Rift Zone are, however, a very different species. The sea-bed and subsoil of the area through which that zone runs is all part of the same continental block, part of the African plate. The inexor-

able motions of the European and African plates towards one another and the subsequent motions of those two plates, and the consequences of the forces unleashed by those motions, could not have left the Pelagian Block unaffected. But that Block remains a part of the African plate, a pre-existing continental block, which, notwithstanding the immense forces to which it has been subjected over millions of years, has retained its essential continuity. I now pass to the third element.

3. THE "ESCARPMENTS-FAULT ZONE"

To conclude this part of my presentation on Libya's claim that Malta's continental shelf is to be confined within two physical features of the sea-bed, namely, what Libya calls the "Rift Zone" in the south and south-west and the escarpments in the east, I shall now say a few words about the second of these features.

(37) As the Court can see by looking at Figure 5, or the bathymetric map at Figure 2 of the dossier presented by Malta for the convenience of the Court, running from just south of the toe of the Italian peninsula, down the eastern coast of Sicily in a south-easterly direction until it reaches midway between Sicily and Libya and then, first in a south-westerly and then again in a south-easterly direction almost right up to the Libyan coast, there is a scarp which is one of the most remarkable features of the Mediterranean. It is more than 700 kilometres long and the difference in level is between 1 to 3 kilometres. From Sicily to the north-east of Ras Zarrouq in Libya the scarp forms an abrupt transition between the epicontinental Pelagian Sea on the one hand and the deep parts of the Ionian Basin on the other. This is a brief but accurate description of what is essentially one escarpment.

Libya, however, chooses to pick out one part only of the escarpment — the one which lies east and south-east of Malta — and in the most arbitrary manner claims that Malta's continental shelf ends there. This claim, as I have already had occasion to remark, is not just unfounded, both in fact and in law; it is preposterous.

It must be observed in the first place that, in its remorseless attempt to shrink Malta's continental shelf to the smallest possible area, Libya even ignores the fact that the issue in this case is the delimitation of the areas of shelf which appertain to Malta and the areas of shelf which appertain to Libya. Consequently, as between Malta and Libya — and the case is limited to them — the area east of the escarpments, that is the whole of the area and not just the part chosen by Libya, is only relevant to this case in so far as part of it appertains to Malta and part of it appertains to Libya. To the extent, therefore, that such an area may appertain to third States or is to be divided between Malta and third States — and it is accepted that there are such areas — the issue is one outside the Special Agreement between Malta and Libya and therefore beyond the jurisdiction of the Court.

So much so that, in its formal submissions at the end of each of its written pleadings, Libya has not requested the Court formally to declare that Malta has no continental shelf in the area east of the escarpments. Even Submission No. 9, in which Libya suggests how in practice the principles and rules identified by the Court can be applied by the Parties, Libya refers only to the Rift Zone and there is no reference whatsoever to what Libya had earlier called the Escarpments-Fault Zone.

But Libya does suggest elsewhere in its pleadings that the area east of the

escarpments is one for delimitation between Libya and other States; and Malta feels that the Libyan position should be shown to be absolutely without basis.

This Libyan position, in fact, is not just untenable; it is blatantly contradicted by Libya's own claim to it and by the submission that other States also could lay a claim to it — all, except Malta.

If the escarpments, whether physically or legally, had any relevance to the delimitation of the areas east of them any such relevance would have to apply equally to all the States of the area, and not just to Malta. If the escarpments did in fact end the continental shelf of Malta on the scientific plane, and if the legal and scientific concepts of the continental shelf were identical, then the Ionian Abyssal Plain appertains to no State — not to Malta, not to Libya, not to Italy and not to Greece. But, of course, neither of these premises leading to that conclusion is correct and consequently also the conclusion is wrong.

Although not enough is known about the escarpments which border the Ionian Basin from Italy down to Libya, it can safely be said that even scientifically, and taking the definition of the continental shelf beyond the 200-mile limit as extending to "the outer edge of the continental margin", it cannot be maintained — and Libya has not even suggested this — that even the deepest part of the Ionian Abyss is not part of the continental shelf; much less can it be said that the escarpments mark that outer edge.

(38) On the other hand, if there is some doubt as to the physical nature of this area, then it must be observed that, as can be seen from Figure 6 of the Maltese dossier, an arc of circle with a radius of 200 nautical miles drawn even from one basepoint on Malta will cover the whole of the area claimed by Malta; whereas the same cannot be said of similar arcs of circle drawn from any basepoint on the Libyan coasts. Thus Libya is clearly attempting to deny Malta areas to which it could not itself lay a claim unless physically they could be regarded as a continental shelf beyond the distance of 200 nautical miles. I need hardly add that if the area constitutes a continental shelf beyond 200 miles, because the natural phenomenon extends beyond that distance, it must *a fortiori* be a continental shelf within that distance and must therefore also be part of Malta's continental shelf.

Legally, of course, the Libyan claim is quite absurd and I do not feel I need to say much to make the point. Italy and Greece, and even Libya itself, regard the escarpments as having no legal relevance whatsoever in so far as their entitlements are concerned; and the same must, by the same legal logic, apply to Malta.

Not surprisingly, Libya argues that it has a long coast extending as far as Egypt. Is this relevant, one is bound to ask? If, as Libya appears to suggest, both science and the law deny to Malta a continental shelf east of the escarpments, is the law such as to enable Libya to overcome the scientific and legal obstacles because its coasts are longer? It would be a strange law which did that: a law not of equity or equitable principles, but a law ensuring that bigger States become even bigger and smaller States are deprived even of what is theirs.

This is not the law. Whether in international relations or as between citizens, the law does not deserve to be called by that name unless all were equal in its eyes. As Malta will submit when it comes to the same theme pursued by Libya under a different name, the fact alone of a longer coastline by itself generates larger areas of continental shelf but does not, and cannot, entitle a State to any privilege whatsoever, whether under the guise of science or, as Libya does elsewhere, under the guise of proportionality.

Libya is quite aware of this truth. At the same time its objective is to see that Malta gets the smallest possible share of the shelf. Libya therefore resorts

to every kind of argument so long as it might serve its purpose. The physical features Libya calls the "Rift Zone" and the "Escarpments-Fault Zone" are nothing else but an excuse for a partition of the areas between Malta and Libya with more or less the same result — though not the reasoning — of Libya's 1973 proposal, that is to say "in the same proportion that the two shorelines bore to each other".

Mr. President and Members of the Court, I shall now turn my attention to the second main argument on which Libya rests its case, and that is —

PROPORTIONALITY

The formal Libyan submissions summarize the Libyan position on proportionality in the following terms:

> "In the particular geographical situation of this case, the application of equitable principles requires that the delimitation should take account of the significant difference in lengths of the respective coastlines which face the area in which the delimitation is to be effected" (Submission No. 6);

and

> "The delimitation in this case should reflect 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 appartaining to the respective States and the lengths of the relevant parts of their coasts, account being taken of any other delimitations between States in the same region." (Submission No. 7.)

These two submissions — which are in effect two different formulations of what is essentially the same argument — may reasonably be taken to indicate that Libya invokes proportionality in the form of a ratio of the lengths of coastlines and attributes to it, if not the quality of a principle or rule of law, at least that of a necessary corollary — a requirement, Libya calls it — of equity. There are several other parts in Libya's written pleadings which — as Malta has already indicated in its pleadings — show that while Libya professes not to accord to proportionality the role of an independent source of continental shelf rights, in effect and as a matter of practice Libya relies on proportionality effectively as a basis for delimitation, and not as it would have us believe as a "test" of the equities of a delimitation resulting from the application of the principles and rules of international law which are applicable to the case.

Libya's dilemma is obvious. It cannot rely on proportionality as a principle or rule or as an independent source of rights.

In other words, it cannot base the boundary line it seeks on proportionality. At the same time Libya must invoke proportionality as more than a mere test and more than a mere factor for adjustment — the only roles jurisprudence has attributed to it — because if it did so Libya would be left with no basis for delimitation which proportionality could test or adjust. Libya is therefore compelled to dress up the version of proportionality which it adopted for the 1973 proposal with legal respectability and call it a test. In effect, however, the role given by Libya to proportionality in this case is much more significant and determinant than a mere test, or as a factor which the Parties may take into account.

Thus — to quote but one passage from the Libyan pleadings — at paragraph 6.90 of the Libyan Memorial (I) we find the following proposition, which is typical of the Libyan approach:

"Although not a legal principle which itself gives rise to rights, proportionality as a factor or guide is intimately connected with the concept of the continental shelf based on natural prolongation; it may even be said that it is the necessary logical consequence of this concept since its purpose is to ensure that each natural prolongation will be accorded its appropriate weight."

This passage is a very good example of the role Libya attributes to proportionality. In fact what Libya does, practically throughout its written pleadings, is to develop *pari passu* its own version of natural prolongation, which is fundamentally based on the "Rift Zone", and its own version of proportionality, which is essentially based on the ratio of the lengths of coastlines, in order — and this is the object of the whole exercise — to arrive at a boundary which is practically the same one Libya started from in 1973.

That there is no rational or logical connection between the chance location of a depression in the sea-bed, or any other like feature, and the equally circumstantial difference in the lengths of the coastlines of the two States, need hardly be pointed out, much less stressed. The absence of any connection whatsoever is too obvious. But what Libya would have us believe is that by putting these two circumstances of nature together one obtains the legally appropriate boundary based on equitable principles.

The true legal position must be the opposite: if two facts of nature happen to coincide, this could be no more than a mere coincidence, and could therefore have no legal consequence. Unless the coincidence of two facts has a legal significance, and therefore in some way also a logical connection, such a coincidence must remain meaningless and therefore without any relevance in law. And if this is so when two circumstances happen to coincide, the logic of the legal irrelevance of such a coincidence must apply with greater conviction when the coincidence does not even exist in actual fact but has been artificially set up by Libya to create the illusion of a connection.

The two facts which Libya claims to be intimately connected, and which Malta regards as a coincidence of Libya's own making, are natural prolongation and proportionality. Malta has already shown that the Libyan version of natural prolongation is untenable on the facts and is contradicted by contemporary international law: the "Rift Zone" cannot, whether in fact or on the legal plane, be the basis of a delimitation. These arguments will also be developed further during the oral hearings; but for the present what remains to be shown is that the Libyan version and utilization of proportionality also lacks a legal basis.

Mr. President, Members of the Court, the phrase "a reasonable degree of proportionality . . . between the extent of the continental shelf areas appertaining to the coastal State and the length of its coasts" was first used by the Court in its 1969 Judgment. In order, therefore, to appreciate the true meaning and purport of that expression one must, in the first place, examine the circumstances of the case in which it originated and any explanations the Court itself may have given with respect to it.

The circumstances of the case are very well known and simple to describe. It was a case of three States on a concave coastline, with the State in the middle — Germany — hemmed in by the other two, the Netherlands and Denmark. All the concavity was practically to be found in the German coastline, while the coastlines of the other two States had a more favourable configuration. It was very clearly a case where the application of a method or methods of delimitation and the search for an equitable solution were very difficult.

It was in these circumstances that the Court indicated as a factor to be taken into account by the Parties "an element of a reasonable degree of proportionality" between the extent of the shelf and the length of the coast. Moreover, as the Court itself had, a few paragraphs earlier (para. 98), clearly stated, this exercise was to have a very specific purpose. To use the Court's own words, this factor was to be taken into account "in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 52, para. 98).

It was thus made abundantly clear, from the very moment in which it was first used, that the factor of a "reasonable degree of proportionality" was not one of such general application as would make it a requirement in all cases to be taken into account. Indeed the Court mentioned only two cases in which this was appropriate. It is not being suggested that these are the only two cases in which some degree of proportionality may properly be required to remedy what would otherwise be an inequitable result. But its adoption is limited exclusively to cases in which the application of the principles and rules of international law to a particular case create an imbalance or a distortion as a result of the special circumstances of the case, and such imbalance or distortion must be remedied in order that an equitable result may be achieved. Unless these conditions concur or, in other words, whenever the application of the principles and rules of international law do not create an imbalance or distortion — an inequity —, the "element of a reasonable degree of proportionality" has no part to play.

In its written pleadings Malta has quoted rather extensively from the jurisprudence to prove this point, and I am sure that my colleagues will again refer to some of these when they pursue this matter further, and I shall not therefore burden the Court with a further repetition. I shall only refer, and very briefly, to the latest case — that of the *Gulf of Maine* — in which even though the Chamber did take account of the difference in length of the coasts of the Parties for a limited purpose, it declared expressly its awareness —

> "of the fact that to take into account the extent of the respective coasts of the Parties concerned does not in itself constitute either a criterion serving as a direct basis for a delimitation, or a method that can be used to implement such delimitation" (para. 185).

The second point to be made — or rather recalled since it has been repeatedly made by both sides — is that equity does not mean or involve, much less require, a refashioning of geography. Indeed equity as a legal concept can only be applied within a legal framework; and, in the context of the continental shelf, this framework must reflect the geography of the region. That is why equity must respect geography and cannot refashion it.

Consequently, if a State which is entitled, by the applicable legal principles and rules, to a given extent of shelf were to have its entitlement reduced, in the name of equity, simply because an opposite State has a very long coast, equity would be refashioning nature and geography, and the result would be an apportionment of shelf areas based not on equity — which ought to respect geography — but on distributive justice: an objective which the Court has on more than one occasion held not to be the function of equity in cases of delimitation. This principles applies equally if, as often happens in the case of island States, the extent of the shelf to which a State is entitled is several times its land territory.

The legal basis of continental shelf rights is to be found in the State's sover-

eignty *ipso jure* over the natural prolongation of its land territory into and under the sea. For legal purposes the length of the coastline is immaterial and the shelf rights of a State extend seawards from its coasts irrespective of their length. Geographically this outward reach is regulated and constrained by the configuration of the coast, including of course its length; but on the legal plane a State is entitled to as much shelf as its coast can generate.

In order, therefore, that such entitlement may terminate, the shelf must either have reached the absolute limit recognized by international law — in most cases the 200-mile limit would apply — or have encountered an equal entitlement of another State arising from that State's seaward reach from its coasts. When this happens the areas in which the legally equal entitlement overlap have to be divided. Such a division can only be equitable if it leaves to each of the States concerned as much as possible of the areas of their respective natural prolongations. The same principle may also be stated in a negative form, namely, that the division cannot be equitable if it allows one State to encroach upon the natural prolongation of the other State. Since there is an overlap, to say that one State must not encroach on the natural prolongation of the other cannot be taken literally, since a total non-encroachment is impossible. The principle can, therefore, have only one meaning and that is that the area of overlap must be divided equally, as both this Court and the Court of Arbitration in the Anglo-French cases have held.

From the point of view of geography, the attributes of the two States may be equal or unequal; and when the lengths of the coasts are unequal the attributes will also differ in their extent. But this difference in extent, this inequality, is not an operation of equity or the law, but the result, the natural result, of two unequal facts producing unequal results.

The purpose of the "Trapezium Exercise", as Libya has called it, is exactly that of showing how a longer coast naturally produces a larger area of shelf. And the Court is invited again to look at the practical effects of a trapezium as (39) shown in Figure 7 of the dossier before it. But to give to a State an even larger share than that allocated to it by nature would amount to a refashioning of nature — a refashioning of geography.

Malta has, in its Counter-Memorial, drawn the attention of the Court to the fact that on the basis of boundaries which respect the geography of the Central Mediterranean and the rules of equity, and therefore on the basis of boundaries broadly reflecting an equal division of areas between various States, Libya would — without encroaching on the areas of shelf appertaining to others — retain an area which is approximately nine times the area Malta would obtain on broadly the same basis. Libya has taken this observation to mean a recognition by Malta of a form of proportionality test (II, LCM, para. 6.33).

That was not, of course, the purpose of the facts given by Malta. What Malta intended to show, and I believe Malta has shown, is that on the basis of the appropriate method of equidistance which Malta believes to be applicable in this case, the longer coastline of Libya generates a shelf by far larger than the area of shelf which Malta's smaller coastline is capable of generating.

That this is so has the best possible confirmation in Libya's own calculations. In footnote 4 of page 41 of its Counter-Memorial (II), Libya gives the extent of the area which Malta's "trapezium construct" — to use Libya's phraseology — would allocate to Malta and to Libya respectively. According to these calculations, out of 288,074 square kilometres, Malta would get 47,848 and Libya 240,230 square kilometres. Malta has not taken the trouble to check whether or not the Libyan calculations are exact — nor does it matter in Malta's view whether the ratio between the areas is 1:5 or 1:9 or any other

ratio — because the object of the trapezium exercise is intended to show the mathematical truth that in circumstances such as the present ones, a longer coastline necessarily generates a larger area of shelf; and this is precisely what the Libyan figures show.

What Libya, by its calculations, has confirmed is that a longer coastline generates a relatively larger area of jurisdiction than a shorter coastline. I said a relatively larger area and not a proportionately larger area: neither in nature nor in the legal concept of continental shelf is there any room for the kind of proportionality Libya seeks to apply in the present case. Both nature and the law give to Libya a substantially larger area of shelf than that which is allocated to Malta. And this is as it should be; but what nature and the law have allocated to Malta Libya must not covet.

In the footnote from which the Libyan calculations have been drawn, Libya not only makes calculations which are so precise as to turn the "test" of proportionality into an accurate mathematical exercise — which of course it should not be — but refers also to landmass and again makes very precise calculations between the landmasses of Libya and Malta and their relationship to the areas which a trapezium exercise would allocate to the two Parties.

This is not the only place where Libya tries to draw legal conclusions concerning continental shelf rights from the size of the landmass. In fact a recurring theme throughout Libya's pleadings is that Libya is huge; that not only has Libya a very long coast but it also has a very large area of land territory behind that coast. Malta, on the contrary, is very small and its coastline is very short.

The length of the coastline of a State, given normal circumstances, necessarily affects the extent of the maritime rights it generates. Landmass, on the contrary, has absolutely no bearing whatsoever — whether physically or legally — on the size of the continental shelf, or of any maritime right of a State. A State may have a huge landmass and a very short coastline; but it is only the coastline that matters. Only the coast generates maritime rights and influences the extent of the areas over which they are exercisable. All the landmass behind the coast is completely irrelevant. The same is true about the opposite case: a State may have a long coastline and only a few miles of hinterland. That State will have a very large continental shelf which bears no relation to the depth of its land territory.

An island, because it is surrounded by water and therefore its natural prolongation extends in all directions, must, in normal circumstances, also generate rights over the surrounding sea areas, which may also not be proportionate to its size. But these are facts of nature, the realities of geography which — according to the jurisprudence — must not be changed or refashioned.

These principles of international law apply to all maritime rights; from the territorial sea to the contiguous zone, from the exclusive economic zone to the continental shelf. Both in customary international law and in jurisprudence there has always been one part only of the land territory of a State which is recognized as capable of generating maritime rights: the coast.

And it is only the coast and its configuration, including its length, which can determine or influence the extent of the areas in which the State exercises those rights. The landmass of the State is irrelevant.

From these brief submissions on the question of proportionality, the following conclusions may be drawn:

1. Proportionality is not a principle or rule of international law applicable to the delimitation of the continental shelf; nor is proportionality an independent source of rights.

2. Proportionality merely expresses the criterion or factor for determining the reasonable or unreasonable — the equitable or inequitable — effects of particular geographical features or configurations upon a delimitation which would otherwise be indicated by the general configuration of the coasts of the Parties. Proportionality may appear in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines. But it may also appear, and more usually does, as a factor for determining whether an equidistance-line boundary is or is not reasonable or equitable in the particular geographical circumstances of a case.

3. Proportionality in the form of a ratio of coastal lengths is not a necessary adjunct of equity and is not therefore applicable in all cases: it may only be invoked when circumstances such as those recognized by the jurisprudence so require, as in the *North Sea Continental Shelf* cases.

4. Finally, even when it is relevant to the attainment of an equitable solution, proportionality does not take the form in which Libya envisages its application, that is, a strict ratio between the extent of the shelf and the length of the coastline. Proportionality "does not entail any nice calculations" as the Arbitral Court expressed the concept; and landmass is, of course, irrelevant.

When the present case is examined in the light of the propositions that have just been set out, it will be found that proportionality — in its true meaning and proper applicability — has no role to play in the delimitation of the shelf areas appertaining to Malta and those appertaining to Libya. The geographical setting is a perfectly regular one: two States face one another with absolutely no islands in between or any other features which could create an imbalance or a distortion. The differences between them generate by themselves a difference in the extent of the respective continental shelf areas and any further accentuation of such a difference would amount to a refashioning of geography.

Placed against this setting, the legal position that results is that of two natural prolongations extending seawards one towards the other: they meet and overlap and to conclude with the very words of the Judgment in which the notion of proportionality was first mentioned, they "can therefore only be delimited by means of a median line". There are no islands, rocks or other minor coastal projections creating disproportionately distorting effects; there are no markedly concave or convex coasts causing an imbalance; there are no irregular coasts which need to be reduced to their truer proportions; and there is no land boundary to complicate matters. There is only the sea, with its sea-bed and subsoil. That submarine area is the natural prolongation of both States and it belongs to both of them; but as these natural prolongations overlap they have to be divided. Of course, since Libya has a longer coast it will, by the mere seaward extension of that coast, retain a larger area that that which Malta by reason of its shorter coastline can retain; but there is no inequity in that natural division of the common areas that requires to be remedied. It is not true, as Libya contends in its sixth formal submission, that:

> "in the particular geographical situation of this case, the application of equitable principles requires that the delimitation should take account of the significant differences in lengths of the respective coastlines".

That difference in lengths of coastlines produces by itself a delimitation which takes account of the difference; but it does not require any further adjustments.

Any such adjustment would imply a refashioning of geography and if the adjustment were to take the form which Libya seeks to obtain from the Court, the refashioning would be such as to enclave Malta within an area even

smaller than would be justified by its existing fishing rights and extend Libya's continental shelf almost right up to the Maltese territorial waters : Malta
(40) again invites the Court to look at the dossier, Figure 8, to see the effects of Libya's claim.

Libya has accused Malta of expecting a larger share of the limited shelf of the Mediterranean than its size warrants. As has been already pointed out, this is no legal argument; it is the argument flatly rejected by the Court of a sharing out according to size. But once the point has been made, Malta feels it ought to recall that nature has smiled upon Libya, both on land and in the sea, and both with respect to the extent of the areas over which it has jurisdiction and to the extent of the natural resources which those areas are known to contain; and this is what the present dispute is all about. Because of its geographical position, the configuration and length of its coastline, and particularly as it happens to be where the Mediterranean is at its widest, Libya can safely expect a substantial part of the continental shelf that is to be divided amongst the several litoral States without the need of looking for more. Compared to what other Mediterranean States will ultimately get, Libya is certainly not disadvantaged. Indeed it would be inequitable if Libya were to be
(41) given more than what nature in its bounty has allocated to it. Figure 9 of the Maltese dossier shows the extent of the Libyan continental shelf if the Central Mediterranean sea-bed were to be divided on the basis of equidistance.

The Court rose at 6.06 p.m.

TENTH PUBLIC SITTING (27 XI 84, 10 a.m.)

Present: [See sitting of 26 XI 84, Judge Lachs absent.]

The PRESIDENT: The sitting is open. Before calling upon Dr. Mizzi I have to announce that for personal reasons, duly explained to me, Judge Lachs will be absent from the hearing today.

ARGUMENT OF MR. MIZZI *(cont.)*

AGENT FOR THE GOVERNMENT OF MALTA

Mr. MIZZI: Mr. President, Members of the Court, in my statement yesterday I recalled the main events in the history of the dispute which has brought the Parties before the Court, and I gave in that context a brief account of the conduct of the Parties, in so far as it is relevant to the decision of the Court.

I also indicated the main arguments on which the Libyan case rests; namely, the Rift Zone and proportionality, and I tried to show how the Rift Zone was seriously flawed, both in fact and in law, and why proportionality had no part to play in the present case.

I now come to the last part of my presentation in which I shall attempt to give, in very broad terms, more disposition with respect to the issues which the Parties have submitted for adjudication by the Court.

In rebutting the views expressed by Libya as to the principles and rules of international law applicable to the delimitation of the continental shelf and of the practical application of those principles to the present case, which are the substantial issues between the Parties, I have already recalled several of the views of the Republic of Malta on those issues. I shall therefore do my best to avoid repetition as much as possible. I do, however, beg the indulgence of the Court if some repetition will be found to be unavoidable.

The task of identifying the principles and rules applicable to the delimitation of areas of continental shelf claimed by two or more States has been eased considerably by the Court's Judgment in the *North Sea Continental Shelf* cases. Although the Court, in setting out those principles and rules, could not but have had very much in mind the special circumstances — indeed the very unusual circumstances — of those cases, the principles and rules identified by the Court in general terms appear to be of rather general application. They have in fact been substantially followed by the Court itself in the *Tunisia/Libya* case and by the Court of Arbitration in the Anglo-French case. In the *Gulf of Maine* case, the Chamber described the Court's decision in the *North Sea Continental Shelf* cases as "the judicial decision which has made the greatest contribution to the formation of customary law in this field"; and this description cannot but mean an endorsement of the principles and rules first enunciated by the Court in 1969.

The same may not, at least to the same extent, be said of the factors which the Court held that the Parties were to take into account in the delimitation of areas in the North Sea. These, in fact, appear to be conditioned by, and to relate particularly to, the very special circumstances of those cases. At the

same time it would not appear correct to say that the factors indicated by the Court in those cases relate exclusively to them and may not have a wider application. A middle course appears to be the correct one to take. In other words, while the factors indicated by the Court may also find application in other cases, care must be taken not to mistake them for principles or rules or to extend their application to circumstances to which they do not, and were never intended to, apply.

Having made these preliminary observations, I can now pass on to a brief review of the Court's findings in 1969 and their applicability in the present case.

In the words of the Court's Judgment, the principles and rules of general application are:

> "(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;
>
> (2) 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, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them" (*I.C.J. Reports 1969*, p. 53, para. 101 (C)).

The first requirement, that delimitation is to be effected by agreement is satisfied, in the present case, by the undertaking contained in the Special Agreement to determine the boundary by an agreement in accordance with the findings of the Court.

Malta also accepts that the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances. These principles, however, are not very easily ascertainable in practice. In fact, what constitutes or which are the equitable principles for the purposes of a delimitation of shelf areas has never been authoritatively defined; and it would be very presumptuous of me to try to do so. The Court did, in its 1969 Judgment, give some idea of what it meant by equity, but it did so more in a negative than in a positive manner, and in the context of cases in which the normal method of equidistance — as the Court accepted it to be — led to inequity in the special geographical circumstances of those cases. The Court did say, for example, that "Equity as a legal concept is a direct emanation of the idea of justice". But the two notions are often used interchangeably, and the one cannot be of much help for an understanding of the other.

Perhaps the notion of equity defies the precision of a definition; and one must be content with the various authoritative statements that have been made concerning it in the context of delimitation of shelf areas.

What appears to be less difficult to formulate is what equity is not or does not imply. Thus, equity does not justify a decision *ex aequo et bono*.

The equity that is to be applied in the determination of continental shelf boundaries is not equity outside the law. Equitable principles must be found within the legal framework applicable to the continental shelf and its delimitation. The division to be effected, therefore, is not a sharing out of areas on the basis of distributive justice.

In the second place equity does not necessarily mean or imply equality. As

the Court explained, "natural inequalities" such as those resulting from one State having an "extensive coastline" and another State "a restricted coastline" cannot be remedied by equity (*I.C.J. Reports 1969*, pp. 49-50, para. 91). More generally the Court's position on this aspect is that "there can never be any question of completely refashioning nature" (*ibid*, p. 49, para 91).

To strike a more positive note, it may be said that equity is to be looked for in the result rather than in the means to achieve it. When it is achieved it is recognizable and accepted as such. But the means are not so readily identifiable; neither are the considerations to be taken into account. It is the result produced by a balancing-up of all such considerations that will determine the equitableness of the result; but equity does not itself provide the means to achieve it.

The process is not always as difficult as it may sound to be: there are cases where a single method, such as equidistance, will suffice; there are others where some adjustment to such a method will be sufficient to satisfy the requirements of equity. But there are then other cases where equity is very elusive.

It was in the context of such a situation that the 1969 Judgment indicated the factors which the Parties were to take into account in their negotiations. In fact the Court did so — as clearly stated in the Judgment itself — because, in view of the special circumstances of the North Sea delimitations, "equity excludes the use of the equidistance method in the present instance, as the method of delimitation" (*ibid.*, para. 90). Consequently the Parties could only obtain an equitable delimitation by taking various factors into account or by applying various methods.

In the particular instance of the North Sea delimitations the Court indicated three factors to be taken into account:

> "(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
> (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
> (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region" (*ibid.*, p. 54, para. 101 (D)).

The last two factors which the Court described in the terms I have just reproduced have already been considered at some length; and I do not intend to take any more of the time of the Court than is absolutely necessary to recall the main conclusions which Malta has drawn with respect to the geology and geomorphology of the shelf areas to be delimited, and to the test of proportionality.

On the geology and geomorphology of the region, Malta's position is that, apart from the consideration that in contemporary international law these elements are legally irrelevant, the scientific evidence shows that:

(a) the Pelagian Basin, of which the areas to be delimited form part, is a geological continuum; and
(b) neither the so-called "Rift Zone" in the Sicily Channel nor other areas of

rifting, such as the Jarrafa Trough, disrupt the basic or essential unity of the Pelagian Basin;

and therefore the physical and geological structure of the areas involved are not even a factor to be taken into account; even if these elements had some relevance in contemporary law.

As to natural resources, and their presence in the shelf areas to be delimited, not enough is known to make this factor "readily ascertainable". The dispute before the Court has prevented the area from being properly surveyed and explored. From what is known, however, it may be said that if there is one area to which Malta can lay a claim that is more likely than any other to contain mineral deposits that area is to be found south of Malta, and more particularly in the vicinity of the equidistance line between Malta and Libya. Nothing will, of course, be known for a certainty before the two sides can tell which are the areas subject to their respective jurisdiction. But the Parties are before the Court because they are fairly confident that there are mineral deposits in the area and the likelihood of that presence increases as one moves further to the south of Malta.

For Malta, this factor is therefore of the utmost importance, since if Malta were deprived of any part of the areas to which it properly lays a claim it could happen that it will be deprived forever of the very possibility of owning its own resources.

On proportionality, Malta's position is that this factor only comes into play when the delimitation suggested by otherwise appropriate methods proves to be inequitable in view of the special or unusual circumstances of the case; and even when, in those circumstances, the test of proportionality becomes relevant, it does not take the form Libya has given to its version of proportionality. In other words all equity would require in such a case is "a reasonable degree of proportionality" and not a ratio of lengths of coastlines. In the present case, there is no inequity in a delimitation indicated by the method derived directly from the very concepts of equality of entitlements and non-encroachment, namely the method of equidistance whereby an equitable division of areas is obtained. Such a line would give full effect to the seaward reach of the opposite coasts according to their configuration, including their lengths which, by reason of their difference, generate a relative, but also substantial, difference in the extent of the areas allocated respectively to Malta and to Libya by a median line. There are no special or unusual features which could affect that line on grounds of equity; indeed any adjustment of that line coule not be done without a refashioning of geography.

It may therefore be said that neither of these two factors — physical elements and proportionality — are relevant in the present case.

The other factor mentioned by the Court is, on the contrary, one which is of a rather more general application, in the sense that a delimitation cannot be effected without regard being had to the general configuration of the coasts of the Parties and the presence or otherwise of special or unusual features.

Of course, when the Court directed the Parties in the *North Sea Continental Shelf* cases to take account of these considerations, the Court must have had very much in mind the special and quite unusual features of the coastlines of the Parties to those cases; and it would seem that the Court was referring to those particular features in its recommandations to the Parties. To the extent that this is so, also this factor would not be applicable to the present case since there are no "special or unusual features" "in the general configuration of the coasts of the Parties" in this case.

However, the geography of the region and the configuration of the coasts of the Parties, even when they are simple and normal as they are in the present case, are not just relevant to the delimitation of the areas of shelf comprised within those coasts: they contain the key elements of the framework in which the delimitation can properly be effected.

These considerations have been amply discussed in Malta's written pleadings and will again be presented by my colleagues to the Court. I shall therefore limit myself to recalling the key elements of the present case in summary form. These are:

(a) the coasts of Malta and Libya are opposite and are set at a considerable distance from each other;

(b) there is an absence of intervening islands or other unusual features and the relationship of the Maltese and Libyan coastlines is remarkable only in terms of its normality;

(c) the primary elements of the geographical facts are uncomplicated and consequently each pertinent coast should be given its appropriate legal significance on the basis of the distance principle and the use of controlling basepoints.

Apart from the factors set out by the Court in 1969, no authoritative list exists of the relevant circumstances which are to be taken into account in drawing maritime boundaries; but there should be little doubt that the number of such circumstances is not a restricted one, their relevance of course being a matter for evaluation in the light of all the circumstances taken together.

In its written pleadings Malta has indicated what it believes to be relevant circumstances in the present case. In this context, the expression "relevant circumstances" is intended to refer to those circumstances which are not the key elements of the case rather than to all the circumstances lumped together; and this is why Malta has referred to them as the "Other Relevant Factors". It is, in any case, to these circumstances that I am now referring.

Two of these circumstances are very much connected with the process of delimitation. These are: the conduct of the Parties and delimitations with third States. The others affect more directly the entitlement of Malta to its continental shelf and the need to protect the sea and land territory subject to its jurisdiction. These are: security interests, particularly for neutral States; and economic and related factors, especially in the case of island-developing States.

I shall not be dealing with these matters in any more detail than I have already done with respect to the conduct of the Parties and delimitations with third States. These aspects, as well as the other relevant circumstances I have just recalled, will be treated more comprehensively by my colleagues. I also do not wish to stray too much away from the main line of Malta's position on the legal principles and rules applicable to delimitation in the present case. I do, however, wish as Agent of the Republic of Malta, to stress the importance Malta attaches to its security interests. Indeed, as a neutral State Malta has a special duty to protect and defend those interests. There is no difference between the Parties as to the relevance of security interests; nor could there reasonably be any, since security was one of the vital considerations which prompted the Truman Proclamation and is still a key element of continental shelf rights. There is however a difference of approach since even in this context Libya claims greater security needs and tries to switch Malta's needs to one direction only, that is, away from Libya. I shall not stress the obvious, namely, that the security interests of States are equal and that an island's security needs are all seawards and face all directions, but I shall recall once more

that Libya pushes its claims almost right up to the territorial waters of Malta and the northern border of its "Rift Zone" encroaches even on that part of the Maltese territory. Malta cannot but be, to put it mildly, disturbed by this approach.

Mr. President, the requirement of taking into account all the relevant circumstances is an essential element of the principle that delimitation is to be effected in accordance with equitable principles, taking account of all relevant circumstances. This principle, which is fundamental to all delimitations of continental shelf, owes its judicial affirmation to the Court's 1969 Judgment. That Judgment has also authoritatively indicated the result which the application of that principle must bring about. In the words of the Court, the application of equitable principles and the taking into account of relevant circumstances, must result in each Party being left with "as much as possible" of "all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea". The same result is also formulated by the Court in a negative form, as if to emphasize the importance of this concept: and its says the delimitation must be effected "without encroachment of the natural prolongation of the land territory of the other".

The application of this principle in cases of adjacent coasts often creates difficulties mainly because the encroachment is a frontal one and, not infrequently, has a cutting-off effect. But in the case of opposite States, the contrary is the rule. This is particularly true when there are "no islets, rocks or other minor coastal projections which could have a distorting effect" and where the distance between the opposite coasts is significant. In such cases, the overlap is relatively equal and at some distance from the two coasts; and there is normally no cutting-off effect. To borrow again from the Court's Judgment of 1969, which emphasized — and not without reason — the distinction between adjacent and opposite coast:

> "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." (*I.C.J. Reports 1969*, p. 36, para. 57.)

This is in fact the only way in the case of opposite States standing in a relationship of normality with one another in which each State can be left with maximum areas of its natural prolongation and with minimum encroachment by the other State. It is also the only method which results in an equitable division of the areas.

When in the *Tunisia/Libya* case the Court had reached a point in the delimitation between the two States in which Libya and Tunisia became very nearly opposite States, the Court — though giving only partial effect to the Kerkennah Islands — established an equidistance line between the two almost opposite coasts.

The delimitation established by the Court of Arbitration in the Anglo-French case departs from equidistance only with respect to the Channel Islands in view of their very particular position on the wrong side of the median line and — in order to give a half effect to the Scilly Isles in view of their distorting effect on an otherwise equitable equidistance line dividing the shelf between two laterally related coasts.

In the *Gulf of Maine* case, subject to an adjustment which the Chamber felt was necessary in the special circumstances of the case, and which related to areas where the coasts were lateral or adjacent, the Chamber expressly recognized that in a geographical situation of opposite coasts

"the application of any method of geometrical origin, no matter which, including that propounded in paragraph 1 of Article 6 of the 1958 Convention, can in practice only result in the drawing of a median delimitation line" (para. 216).

This is also in Malta's view the only practical way in which the principles and rules of international law may be applied in the present case. The logic of this conclusion is confirmed by the second paragraph of the Court's *dispositif* in the 1969 Judgment quoted above. It is there expressly provided that where there is an overlap of natural prolongations — that is, of entitlements — that overlap must be divided either as the Parties may agree or, failing agreement, "equally". In this context "equally" does not necessarily mean equal parts. The equality which is clearly intended by the Court is relative equality, dependent mostly on the configuration of the coastlines, including their length. In fact the Court uses the term equality in the context of two natural prolongations extending one towards the other and meeting in the middle; and it is clear, therefore, that the equality the Court refers to is an equality of distance; and equality of seaward reach of the two coasts; and equality which permits the configurations of the two coastlines to generate their appropriate extent of continental shelf rights.

By stating what should be done when two entitlements claimed by opposite States meet and overlap, the Court has also indicated the practical way in which the principles and rules of international law are to be applied to a delimitation which is unaffected by special or unusual features and, of course, when the Parties cannot agree on where to draw the boundary line. The areas which overlap must be divided by a line which, in order to respect as fully as is practicable the natural prolongations of both States, and without encroaching on the natural prolongation of the other, must be mid-way between the relevant basepoints on their coastlines.

In support of the equitableness of this conclusion Malta has shown that this practical method has been accepted and acted upon by a very large number of States in comparable situations as reflected in the various delimitation agreements to which Malta has made reference in its written pleadings. The importance of State practice lies in the fact that it is inconceivable that a method so often used by States to determine the boundaries of their jurisdiction over such vital matters as sovereignty and natural resources should not, as a rule, be equitable.

It is true of course that no two situations are identical; but it is equally true that many situations are comparable; and Malta believes to have shown — and will confirm this evidence further during these proceedings that in most, if not all, comparable situations States have adopted or relied on equidistance. This practice cannot but mean a general acceptance by States that a delimitation based on equidistance is, as a rule, equitable. Where it is not, this is because of the special circumstances of the case, in most cases the geographical configuration of the coastlines in relation to the area to be delimited. Of course in such cases resort must be had to an abatement, or only partial application of that method, or even an outright exclusion of that method and the adoption of another, or a combination of methods. But in the absence of these circumstances — and Malta believes that such is the present case — equidistance is the method States have most frequently adopted.

Libya unwillingly accepts these facts, because they are undeniable. It has, however, played down the role of equidistance in State practice and has inflated out of all proportion any slight deviation from it. It has also in a number

of cases tried to show — which is very often not the case — that the delimitations related to coasts whose difference in lengths was not very marked. These are, however, matters of detail and it is not proposed to deal with such matters at this stage. Like several other matters I have touched upon in my statement, State practice and its importance in the present case, whether with reference to the wide use of equidistance as a method of delimitation or with reference to the irrelevance for the purposes of delimitation of the difference in the lengths of coastlines and of the geology and geomorphology of the sea-bed, will be discussed more fully by my colleagues during the coming days.

They will show amongst other things that —

- State practice contradicts both arguments on which Libya's case mainly rests, namely —
  - *(a)* that geological and geomorphological features control the delimitation of continental shelf boundaries, and
  - *(b)* that proportionality is a determinant factor in the delimitation process;
- on the contrary, State practice supports the equidistance method as the one *which is, in most cases, the equitable and therefore the appropriate method*, whether or not some slight modification or adjustment may, for special reasons, be indicated.

My colleagues will also show that there is no foundation, indeed no truth, in Libya's allegation that there has been a "trend away from equidistance" since the Court's Judgment in the *North Sea Continental Shelf* cases. When States have departed from the method of equidistance they did so for reasons which have nothing to do with that Judgment. In fact, as has been shown in Malta's written pleadings, the percentage of agreements which have relied on equidistance as against those that have not, has been higher since 1970 than it was before 1969. This is eloquent evidence that if one were to speak of a trend, this trend has been towards and not away from equidistance.

The Libyan conclusion is a further demonstration of the Libyan misinterpretation of the Court's 1969 Judgment. That Judgment did not in any way discredit equidistance; it simply held that in the special circumstances of three adjacent States *in which one of them was hemmed in by the other two*, equidistance could not be the sole method of delimitation — not that it was not an appropriate method — but could not in those circumstances be the sole method of delimitation.

As the Court may have noted, I have referred to the Judgment in the *North Sea Continental Shelf* cases more than to any other judicial pronouncement, and I have also quoted from it more extensively than from any other source. I have done this with a purpose. As the Chamber in the *Gulf of Maine* case has recently recalled, the 1969 Judgment has made the greatest contribution to the formulation of the law on the subject; and that fact is by itself sufficient to explain why I have resorted to that Judgment more than to any other decision. But I also wanted to bring out the fact that the 1969 Jugdment, which Libya considers to have discredited equidistance, has done nothing of the kind.

That Judgment merely stated that the equidistance method was not mandatory under customary international law and that in the special circumstances of the cases before the Court it could not be applied as the sole method of delimitation. It fully recognized, however, that in most cases equidistance was quite appropriate and, indeed, that as between opposite States it was the only possible method, except where special circumstances otherwise demanded.

The 1969 Judgment, therefore, fully supports Malta's position with respect

to Libya, where the case is one of opposite States in a setting undisturbed by abnormalities.

At the same time I believe to have also shown that Malta's position is equally supported by the other judicial or arbitral decisions, namely, the Judgments in the *Tunisia/Libya* case and in the *Gulf of Maine* case, and the decision of the Court of Arbitration in the Anglo-French case.

The validity of equidistance as an equitable method of delimitation in a large and varied number of cases is further confirmed by State practice. State practice shows, beyond doubt, that equidistance is not just the simplest method but is also, in most cases, the more equitable. It is also the most adaptable to the variations and adjustments which might be necessary in view of the special geographical situations of particular cases. It may, in fact, be said that the slight adjustments or variations to which the method has been subjected both by the courts and by States, have, rather than discrediting, enhanced the validity, importance and adaptability of this method.

In the present case it is Malta's submission that equidistance is the method most appropriate for the delimitation of the shelf areas appertaining to Malta and Libya respectively. This method reflects the conduct of the Parties at least between 1965 and 1973; it gives appropriate and just weight to such important relevant circumstances as the equal need of both States to protect their security interests and to meet their economic and related requirements; above all, equidistance respects, more than any other method, the geographical circumstances of the present case and the consequential entitlement of the two States to continental shelf areas as generated by the configuration of their respective coasts, including of course the lengths of those coasts.

In conclusion I may assert, with confidence, that —

(i) the principles and rules of international law applicable to the delimitation of the areas of the continental shelf which appertain to Malta and Libya are that the delimitation shall be effected on the basis of international law in order to achieve an equitable result;

(ii) in practice, the above principles and rules are applied by means of a median line every point of which is equidistant from the nearest points on the baselines of Malta, and the low-water mark of the coast of Libya.

Mr. President, distinguished Judges, I have come to the conclusion of my statement. Before leaving the rostrum, however, I wish to give to the Court, and to our friendly opponents, an indication of the distribution among counsel of the various aspects of Malta's case.

Mr. Elihu Lauterpacht will start with the Special Agreement that has brought the Parties before the Court, and the task of the Court. He will then deal with the physical facts of the case, with particular reference to the Libyan presentation of those facts. He will also discuss State practice in relation to equidistance, geography and the problem of third States and non-geographical relevant factors.

Professor Weil and Professor Brownlie will examine the major legal issues which divide the parties. Professor Weil will discuss, in particular, the process of delimitation, natural prolongation, distance and equidistance; while Professor Brownlie will examine the question of lengths of coasts and territorial magnitude, and that of proportionality.

Mr. Lauterpacht will then sum up the case for Malta and I shall conclude the first round for Malta with a few words.

Mr. President, I have finished. May it please the Court to call on Mr. Lauterpacht. I thank you all.

The PRESIDENT: Thank you, Dr. Mizzi. I now call upon Mr. Lauterpacht.

ARGUMENT OF MR. LAUTERPACHT

COUNSEL FOR THE GOVERNMENT OF MALTA

Mr. LAUTERPACHT: Mr. President and Members of the Court, may I begin by expressing my pleasure and sense of privilege at once again appearing before you.

You have just heard a clear and compehensive re-statement of Malta's case presented by the Agent for Malta. Certainly the view could be taken that Malta might conclude its oral argument with that statement. It has dealt concisely and succinctly with the principal elements of the case — already so fully canvassed in the written pleadings. One might indeed say, that after such an overture who needs an opera. On the other hand, the view might be taken that, because the Statute contemplates a stage of oral proceedings, respect for the Court requires that each side present a statement of its case which goes beyond a summary recapitulation of its written position. It is, therefore, in accordance with that view that counsel for Malta now seek to develop their case in a way that they hope will, even at this juncture, provide the Court with further assistance.

It falls to me to deal first with a preliminary question, namely, the task of the Court in the light of the Special Agreement. After that I shall go on to certain substantive aspects of the case, which I shall outline in more detail after *dealing with this first subject.*

Permit me, therefore, to begin with some reference to the nature of the task before the Court. On this matter, the Parties appear to disagree on one question and almost to agree on another. The question on which they disagree is that of the degree of particularity with which the Court should express its conclusions regarding the questions put to it in the Special Agreement. The question on which the Parties largely agree is that of the relationship between the claims of third parties and the content of the Court's judgment.

May I speak first of the question on which the Parties disagree. It is this: how precisely should the Court describe the consequences which will flow from its treatment of the substance of the case?

Malta has expressed its view of the task of the Court in the Memorial in the following words:

The task,

> "is to identify the principles and rules of international law applicable to the delimitation of the continental shelves of the two Parties with effectively the same degree of particularity as those principles were identified in the *Tunisia/Libya* Judgment. The Court should indicate the boundary which, in its view, would result from the application of such method as the Court may choose for the Parties to achieve the relevant determination." (I, MM, p. 11, para. 22.)

Libya, however, is evidently apprehensive about the prospect of the Court stating its conclusions so precisely. It is worried, to use the words of the Libyan Reply, lest

> "The Court . . . conceive its role as prescribing for the Parties a single method of delimitation having the degree of precision of, for example, the equidistance method."

The Libyan reply continues:

> "Libya dissents from such a view, for it would leave to the Court virtually no choice at all other than to sanction the application of a pre-ordained method, such as Malta's application of equidistance." (*Supra*, LR, para. 1.05.)

Malta submits that this apprehension on the part of Libya is misconceived. It is, of course, true that in the present case Malta sees an application of equitable principles reaching an equitable result as involving the use of equidistance. This is a matter which I shall develop further when I turn to the substance of Malta's case. But it remains a fact that Libya has rejected equidistance in favour of resting the whole of its case on the proposition that the Court should discharge its task by declaring that the line should fall "within, and following the general direction of the Rift Zone". Malta's submission is that there is nothing in the situation which obliges, or entitles, the Court to reach so vague and general a conclusion as that advocated by Libya.

For this submission there are two reasons: first, it must be borne in mind that a conclusion expressed even word for word in the terms of Libya's final conclusion would not in practice satisfy the terms of the Special Agreement.

What is Libya's contention? I read from Libya's ninth submission, which appears in identical terms in its Memorial, Counter-Memorial and Reply:

> "The principles and rules of international law can in practice be applied by the Parties so as to achieve an equitable result, taking account of the physical factors and all the other relevant circumstances of this case, by agreement on a delimitation within, and following the general direction of, the Rift Zone as defined in the Libyan Memorial."

With this must be compared the relevant words of the Special Agreement, namely, the second phrase of Article I (**I**, p. 5):

> "The Court is requested to decide . . . how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may without difficulty delimit such areas by an agreement as provided in Article III."

I am bound to draw attention particularly to the words "without difficulty". Libya's ninth submission, when using the words "can in practice be applied by the Parties" makes no mention of the requirement that the principles and rules should be such that they may be applied "without difficulty". Yet these words would not have been inserted in the Agreement if the Parties had not intended that they should introduce into the case some identifiable element of ease.

One thing, however, is plain beyond the need for elaboration. It is that a direction by the Court which instructs the Parties, without more, to draw a line "within, and following the general direction of, the Rift Zone" would be a prescription for continuing difficulty and tension. It would in no way advance the settlement of the dispute between the two countries. There would be room for disagreement upon two major categories of points:

First, what is the "general direction" of the Rift Zone "as defined in the Libyan Memorial". The range of possibilities is evidently large. The Rift Zone, as illustrated by Libya, is an extensive area and it does not run in one direction only. The clearest depiction of the concept appears in Figure 4 of the Libyan Memorial, page 132. The Court can readily see the scope that exists for argument about the question of "general direction".

Second, there would also be room for argument as to how far any line should run and as to the points at which it should turn and terminate.

The Court will bear in mind that the Libyan proposal of April 1973, which was described in paragraph 4.34 of the Libyan Memorial (I) and is depicted in Figure 1 of Malta's dossier, is a line which is constructed on the basis of proportionality — as conceived at that time by Libya. Libya has in no way receded from its contention that proportionality remains relevant and has, indeed, gone so far as to argue that a Rift Zone line satisfies the test of proportionality.

This being so, it is evident that if the Court should, for example, accept the idea of some Rift Zone line and then leave it to the Parties to reach an agreement on so general a basis, Libya is likely to seek to introduce into the construction of that line the changes in direction — no less than nine in number — which may be perceived in the line which it proposed in 1973 as a line of proportionality. And those nine changes of direction may be seen in Figure 1. Such a proposal would clearly be one productive of controversy. It is to guard against that kind of risk that the Court should establish with a much greater degree of precision than that for which Libya contends, the elements which the Court considers should be taken into account in the construction of the line.

I turn, Mr. President, to the second reason why the Court should not accept the Libyan invitation to limit its task to the kind of general identification contemplated in the ninth Libyan submission. The Court will bear in mind the point already made in Malta's pleadings, especially its Memorial, that there is a close similarity between the Special Agreement in this case and the one in the *Tunisia/Libya* case which was the subject of the Court's Judgment of 1982. The *dispositif* of that Judgment stands, in the submission of Malta, as a precedent for the kind of way in which the Court should approach its task in this case. (In saying this, of course, I need hardly add that I am in no way commenting on the recent Tunisian Application for interpretation of the 1982 Judgment.)

The *dispositif* of the 1982 Judgment is divided into three sections. In the first, section A, at page 92, the Court states the applicable principles and rules for the delimitation; in the second section, B, at page 93, the Court identifies "the relevant circumstances to be taken into account in achieving an equitable delimitation"; and in the third section, C, at pages 93 to 94, the Court sets out in detail the "practical method for the application of the aforesaid principles and rules of international law in the particular situation of the present case". There then follows, in some detail, a description of the two sectors into which the Court divided the area of delimitation, and as the Court said: "each requiring the application of a specific method of delimitation in order to achieve an overall equitable solution".

The justification for this degree of precision is demonstrated with striking force by one passage in Judge Schwebel's separate opinion in the recent *Gulf of Maine* case. The Court will recall that the operative part of the decision of the Chamber, defining precisely the course of the single maritime boundary, was adopted by four votes to one, including the vote of Judge Schwebel. Nonetheless, he delivered a separate opinion in which he indicated clearly that he would have identified a different line — not radically different, but somewhat different. The way in which Judge Schwebel explained why he was prepared to set aside his preferred conclusion in favour of the one which attracted the support of the other three majority Members of the Chamber is particularly

relevant here and with your leave, Mr. President, I should like to read to the Court the relevant but brief passage in Judge Schwebel's separate opinion.

After stating that he has voted for the Chamber's Judgment because he was generally in agreement with its reasoning, he added this further reason:

> "because I recognize that the factors which have given rise to the difference between the lines are open to more than one legally — and certainly equitably — plausible interpretation . . .
>
> On a question such as this, the law is more plastic than formed, and elements of judgment, of appreciation of competing legal and equitable considerations, are dominant. It is easier to criticize than to construct . . . While I am convinced of the equity of my conclusion, nevertheless I am not prepared to maintain that the Chamber is necesssarily wrong and that the line which its position on the test of proportionality has produced is inequitable. On the contrary, it is to be expected that differences of judgment on the application of equitable principles will arise, which at times may not admit of confident conclusions of law." (*I.C.J. Reports 1984*, p. 357.)

Now, Mr. President, that passage recognizes very clearly that in a situation where the relevant circumstances were established virtually to the point of agreement, there could still be good faith doubt about their reflection in terms of a specific boundary line. If, therefore, the terms of the Special Agreement in the present case are to be satisfied, it is clear that something a good deal more exact is called for than the very general conclusion advocated by Libya.

To conclude this consideration of the task of the Court, I may mention the aspect on which the Parties appear to be in agreement, namely, the relationship between the Court's Judgment and the position of third States, and for all practical purposes this means the position of Italy.

The Libyan position in this regard is stated in its Reply, paragraphs 1.06 and 1.07. There it says:

> "the task entrusted to the Court can lead to a judgment which, . . . should extend to all the areas of continental shelf relevant to a delimitation between Libya and Malta" (*supra*, LR, para. 1.06).

Malta agrees with this statement.

But Malta does not agree with the statement which follows in the next paragraph (para. 1.07) of the Libyan Reply, which is to the effect that a distinction may have to be made between that part of the area in which there are no claims by third States, and that part or parts in which there is such a claim.

Malta does not believe that the application by Italy to intervene in the present proceedings should be permitted to complicate the task of the Court or of the Parties. The basis of the Court's jurisdiction in this case is the Special Agreement and the limits of the Court's task are set by that agreement. The situation contemplated by that article is essentially and exclusively a bilateral one between Libya and Malta. These States, being Parties to the Special Agreement, have the right to ask the Court to identify the principles and rules of international law applicable to the delimitation of the continental shelf boundary throughout its length between them. The fact that a third State may make a claim which touches part of the area affected by the bilateral delimitation is quite irrelevant. With the greatest of respect, not only to the Court as a whole but also to its individual Members who expressed a variety of differing opinions in relation to the intervention proceedings earlier this year, I must stress this point.

It is an unquestionable rule of law — enshrined indeed in the case law of the Court as well as the relevant convention that two States sharing a common continental shelf delimitation problem are entitled to proceed to a bilateral delimitation by means of a negotiated treaty. There is no rule of law which says that they must take into account between themselves the claims, actual or potential, of third States. If they reach an agreement which a third State believes affects its interests adversely, that third State may negotiate with each or both of the contracting States, as circumstances require. That, indeed, *is precisely the situation which Italy and Tunisia created when they agreed* upon their continental shelf boundary in the area of Lampedusa, Linosa and Lampione — an area which, as one independent and careful author has put it is "located in maritime space that seemingly should be divided between Tunisia and Malta" (Karl, "Islands and the Delimitation of the Continental Shelf", 71 *American Journal of International Law*, 642, 647 (1977)). Malta's rights having been affected by this settlement between Italy and Tunisia, it is now up to Malta to resolve the matter with each or both of those countries.

It is also the situation — as is less frequently recalled — that obtained between the Federal Republic of Germany, on the one hand, and Denmark and the Netherlands respectively, on the other, as a result of the conclusion on 31 March 1966 between Denmark and the Netherlands of the agreement by which those two States established an equidistance boundary between them in areas of the North Sea to which the Federal Republic of Germany laid claim (see *I.C.J. Reports 1969*, pp. 14 and 18). Subsequently, in the light of the Court's 1969 Judgment, the Federal Republic negotiated an adjustment of the boundary with each of the other two States.

If that is the position in relation to treaty settlements, it can be no less so in relation to judicial settlement. The duty of the Court (as, with respect, I understand it) is to aid the actual Parties to the dispute which has been submitted to it to resolve their differences. And if in so doing it takes into account what are no more than claims by third parties, then it steps outside the jurisdiction conferred upon it by the Parties.

It is, of course, understandable that the Court would not wish to be seen as doing anything which specifically and absolutely prejudices the rights of third States.

Those rights — such as they may be — can adequately be safeguarded by adherence to the approach which the Court set out in its Judgment of 21 March this year; there, at pages 26 and 27 the Court said, speaking of the judgment that it will give in this case:

> "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."

By using words such as these, the Court may, in Malta's submission, quite properly answer the questions put to it in Article I of the Special Agreement with regard to the whole of the line necessary to divide the area of continental shelf appertaining to the two Parties respectively.

It will, of course, then be necessary for Libya and Malta to negotiate an agreement "in accordance with the decision of the Court" — as is prescribed in Article III of the Special Agreement. At that time, Italy will, of course, be fully entitled to invite either or both of the Parties to negotiate with it on the boundary of those parts of the continental shelf which it may claim to affect it; and Italy will be equally free to propose that if any dispute remains unresolved it should be submitted to this Court. It is only at that stage, if it is ever

reached, and not before, that the Court may properly assess the nature and extent of Italy's claims vis-à-vis Libya and Malta.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

Mr. President and Members of the Court, I turn now from the task of the Court, conceived in terms of the Special Agreement, to another important threshold question, namely, that of the task of the Court conceived in the terms of application of law.

The question is: what is the basic rule of law applicable to this case? In answering this question, the Parties have shown a similarity of approach. Both have referred to the role of the Court as being to apply equitable principles in order to achieve an equitable result.

The double-barrelled invocation of the word "equitable" in relation to the performance of a judicial function based, as Article 38 of the Statute reminds us, on the application of law, requires a moment's consideration, even in front of the very Court whose own jurisprudence has made the dominant contribution to this concept of "the application of equitable principles leading to an equitable result".

I venture to embark upon this consideration because there are, I shall submit, two important elements which need to be borne in mind:

The first is that if an equitable result is to be pursued through the channel of the application of equitable principles, the factors or circumstances relevant to that pursuit cannot be limited to those which are exclusively physical in nature — whether geographical, geological or geomorphological. Equity is not a matter that can be determined through blinkers or shutters. Equity involves taking a view of the matter as a whole by reference to every factor which is adduced as bearing on the fairness, reasonableness or justice of the result.

The second element which bears re-statement is that, notwithstanding the latitude with which the formula of what I may call for convenience the "equitable principles/equitable results" concept vests the Court, it is nonetheless important to note the existence and character of State practice relevant to the problem.

So having stated why in my submission it is pertinent to examine the meaning of the "equitable principles/equitable results" doctrine, I should like, Mr. President, with your leave, briefly to recapitulate its judicial history. I realize that no one is better acquainted with this history than are the Members of this Court. Nonetheless I hope that you will bear with me while I seek to recall two things: first, that we are dealing with equity within the framework of law; and second, that as initially conceived, and even as subsequently applied, the concept of equitable principles does not involve any arbitrary or artificial restriction of relevant equitable factors.

The starting point is, of course, the Court's Judgment in the *North Sea Continental Shelf* cases.

The first mention of "equitable principles" appears in paragraph 55 of the Judgment when, in a passage where the Court was dealing with the evolution of Article 6, paragraph 2, of the 1958 Continental Shelf Convention, the Court stated in the broadest terms that "current legal thinking" was and remained "governed by two beliefs", of which one was that delimitation should be effected on "equitable principles". Interestingly enough, the Court cited no specific source for the origin of this important concept.

The next mention of "equitable principles" appears in paragraph 85 of the Judgment which, relying on the observations (such as they were) in the earlier

paragraph, asserted the existence of "certain basic legal notions", of which the first was that delimitation must be the object of agreement and "that such agreement must be arrived at in accordance with equitable principles".

Thus far nothing had been said in the Judgment about the content of these "equitable principles". However, in paragraph 85 *(b)* the Court came to the point by saying: "the parties are under an obligation to act in such a way that, in the particular case, and taking *all* the circumstances into account, equitable principles are applied" (emphasis added). Admittedly, this sentence does not actually state what an equitable principle is, but it does provide guidance as to how the concept operates by stating unequivocally that in the particular case all the circumstances must be taken into account.

Shortly afterwards, when affirming in paragraph 88 that "it is precisely a rule of law that calls for the application of equitable principles", the Court gave another indication of the breadth of considerations which should determine the content of any particular delimitation:

> "It must however be noted that the rule [the rule of equity] rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable."

The reference here to the word "just" is important because, once again, the criterion is stated in broad terms without any qualification and this approach is maintained in a passage which, though often cited, has sometimes not been appreciated in its full significance. It appears in paragraph 91:

> "Equity does not necessarily imply equality. There can never be any question of completely refashioning nature . . . Equality is to be reckoned within the same plane, and it is not such natural inequalities as these [i.e., absence of access to the sea or unequal length of coastlines] that equity could remedy."

Now, the important point to observe is that the sentence which I just quoted reads: "*Equality is to be reckoned within the same plane.*" *It does not read:* "Equity is to be reckoned within the same plane." In other words, the Court was not saying that the equities of the situation had to be assessed exclusively in terms of geographical inequalities. "Equity" was conceived of as being a broader concept.

And this is clearly shown when one turns to the next two paragraphs, 92 and 93. There the Court first said that "the problem is one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable" and then it went on to state in paragraph 93:

> "In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case."

Accordingly, in the next paragraph (para. 94) the Court identified as some of the aspects to be taken into account, the geological, the geographical and "the idea of the unity of the deposit".

Finally, in paragraph C, 1 of the *dispositif* the Court referred to the need to take into account "all relevant circumstances".

In concluding these references to the *North Sea Continental Shelf*, it is inter-

esting to note that despite the fact that the Court discussed specifically the application of "equitable principles", it did not more than allude, virtually incidentally, to the purposes of such application. Evidently the Court assumed that the transition from "equitable principles" to an "equitable solution" was self-evident, for the only reference made to the solution was in paragraph 92 where the Court spoke of "results" in the following terms:

> "it is necessary to seek not one method of delimitation but one goal. It is in this spirit that the Court must examine the question of how the continental shelf can be delimited when it is in fact the case that the equidistance principle does not provide an equitable solution."

Now, Mr. President, I turn from the *North Sea Continental Shelf* cases to the Anglo-French Continental Shelf case, which built on and added to the *North Sea Continental Shelf* Judgment in some helpful respects.

First, it provided for the first time a synonym, other than the word "reasonable", for the expression "equitable character". At paragraph 84 the decision spoke of "the appropriateness — the equitable character — of the method". Now this identification between appropriateness and equitable character, almost casual, but for all that the more striking, lies at the heart of the matter. It shows that "equity" in this context is not a technical concept but is equivalent to "appropriateness" and hence may be identified with other comparable terms such as justness, fairness or reasonableness. All of these are large concepts, the application of which is not restricted by any arbitrary exclusion of specific classes of consideration.

Second, going on now with the Anglo-French decision, the Tribunal when considering by reference to equitable considerations the effect of the Channel Islands upon delimitation, introduced into its analysis a number of factors, like the following: the political relation of the islands to the United Kingdom (para. 183); the limits of the territorial seas and the coastal fisheries of the two sides; the potential of an extension of the territorial sea of the islands from 3 to 12 miles (para. 187); navigation, defence and security interests, as well as "geographical, political and legal circumstances of the region" (para. 188).

I pass from the Anglo-French case to the Court's own Judgment in the *Tunisia/Libya* case. The particular significance of the Judgment in the present context lies, first, in the express acknowledgment of the unsatisfactory nature of the use of the word "equitable" as qualifying both "principles" and "result" in the "equitable principle/equitable solution" context. The Court said:

> "The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to achieve this result. It is, however, the result which is predominant; the principles are subordinate to the goal." (Para. 70.)

Next, the Judgment is of value for the emphasis which it lays on the association between "equity" and "justice". "Equity" says the Court, "as a legal concept is a direct emanation of the idea of justice" (para. 71).

However, in paragraph 107 of the Judgment, the Court stated that it could not take into account economic factors to which both Parties had referred in their pleadings. I respectfully submit that the Court should not lose the present opportunity to clarify the scope of this paragraph. Malta contends that this paragraph need not and should not be read as a total exclusion of the relevance of economic considerations to the determination of an equitable result. For one

thing, such an exclusion would run counter to the whole philosophy underlying the concept of an equitable solution. An equitable solution is one which is fair, just, reasonable or appropriate by reference not to some arbitrary selection of factors but by reference to all circumstances which could influence an objective observer in assessing the merits of the situation. To exclude economic factors when, as is evident virtually beyond the need for reassertion, the present case is one about access to economic resources and nothing else, would be to exclude the single most relevant consideration.

No less to the point, the words actually used by the Court in the *Tunisia/Libya* Judgment do not need to be read as excluding the relevance of economic considerations in the present case.

The Court appears to have been influenced by the view that the considerations invoked in that case were "variables which unpredictable natural fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other". "A country", said the Court, "might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource." However, the facts of the present case do not bring it within the area of unpredictability contemplated in these lines. It is a fact that in resource terms Malta is poor and that unless the resources believed to lie in the area embraced particularly in the southern part of Malta's claimed area are developed for the benefit of Malta, its resource position is unlikely to change significantly. It hardly needs to be said that Libya is in a totally different position. It has vast onshore resources. It is already developing its offshore resources both in the area of its continental shelf identifiable as a result of the 1982 Judgment, and in the area lying to the south of Malta's claimed line. In addition, of course, there are substantial offshore resources to the east of the area affected by the delimitation with Malta. There is nothing to stop Libya making use of the revenue from these resources over their foreseeable life-span so as to develop and diversify its economy and thus eliminate the structural weaknesses in it which Libya has mentioned in its Counter-Memorial. Little such opportunity is open to Malta; the main elements in its economy are tied to activities which are much more exposed to the adverse consequences of recession in other countries than is the sale of oil on the scale which is open to Libya, even in the harshest of times.

Turning, Mr. President, from the *Tunisia/Libya* case to the next case, it is appropriate to pass to the Judgment of the Chamber of the Court in the *Gulf of Maine* case. This contains what the Chamber described as a "more precise reformulation" of the relevant rules in the following terms:

> "delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result" (para. 112 (2)).

For present purposes what matters are the closing paragraphs of the Judgment, from paragraph 232 onwards.

In dealing with the third, or outer, segment of the line, the Chamber acknowledged that this segment is "the one of greatest interest to the Parties, on account of the presence of Georges Bank". It was the real subject of the dispute "from the viewpoint of the potential resources of the subsoil and also, in particular, that of fisheries that are of major economic importance" — those are the words of the Chamber. Accordingly, the Chamber continued:

> "Some enquiry whether, in addition to the factors provided by the geo-

> graphy of the Gulf itself, there are no others that should be taken into account, is therefore an understandable step. It might well appear that other circumstances ought properly to be taken into consideration in assessing the equitable character of the result produced by this portion of the delimitation line, which is destined to divide the riches of the waters and shelf of this Bank between the two neighbouring countries." (*I.C.J. Reports 1984*, p. 340, para. 232.)

"These other circumstances" said the Chamber, consisted of the data on "human and economic geography": and the Chamber said, such data may:

> "be relevant to assessment of the equitable character of a delimitation first established on the basis of criteria borrowed from physical and political geography" *(ibid.)*.

The Chamber therefore examined the effect of its proposed delimitation upon both fishing and petroleum activities. It considered that they could not be taken into account as relevant circumstances because they did not reveal that the result would be

> "*radically inequitable*, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned" (*ibid.*, p. 342, para. 237; emphasis added).

Malta ventures to make three observations regarding the approach adopted by the Chamber.

The first is that the Chamber accepted the basic relevance of economic considerations as material to the assessment of the equitableness of a line constructed by reference to physical and political geography. This is in accord with the position previously adopted by the Court.

The second is that the Chamber set very high the level at which economic considerations might be regarded as affecting the equitable validity of a line established by reference to geographic criteria. It appears to be not enough that the impact of the economic considerations should show the otherwise determined line to be merely "inequitable". The considerations must show that it was "radically inequitable". Again, it appears to be not enough that there should be merely "repercussions" from the proposed line upon the livelihood and economic well-being of the population of the countries concerned. It is necessary that those repercussions should be "catastrophic". Mr. President, Malta ventures to observe that these two qualifications of "radically" inequitable and of "catastrophic" repercussions do not appear to be ones which have previously figured in the Court's consideration of an equitable solution. The Court has not previously contrasted an "equitable solution" with a "radically" inequitable one. There is, therefore, room for consideration of the question whether there rests upon a party seeking to show that a solution is inequitable the seemingly heavier burden of establishing that it is radically inequitable.

A comparable comment may be made regarding the use of the word "catastrophic" as qualifying "repercussions". One may compare this word with the language used in paragraph 107 of the *Tunisia/Libya* Judgment, which dealt with the question of "economic considerations" and to which I have already referred. However, that paragraph does not seem to support the requirement that the economic considerations should spell catastrophe before they can have any impact upon the equitableness of the solution. Of course, both Malta and Libya will survive regardless of the indications which the Court gives in its

judgment. Neither will be afflicted by catastrophe. If Malta's claims are recognized, the economic impact on Libya will be marginal. But if Libya's claims are recognized, the effect on Malta will be very serious indeed, in the sense that it will not be able to better its economic position by access to the natural resources which are believed to lie to the south-east.

Again, some clarification would be helpful as to whether it is necessary, in order to demonstrate the inequitableness of a particular line, that a party must demonstrate that the repercussions upon its livelihood and well-being will be "catastrophic".

And the third observation, Mr. President, that one may make upon the Judgment of the Chamber, is that it did in fact examine certain economic elements in the case — as is evident from paragraphs 238-241 of the Judgment. Thus the Chamber observed (para. 238) that:

> "nothing less than a decision which would have assigned the whole of the Georges Bank to one of the Parties might possibly have entailed serious economic repercussions for the other".

Again, in the next paragraph, the Chamber pointed out:

> "that the delimitation line drawn by the Chamber so divides the main areas in which the subsoil is being explored for its mineral resources as to leave on either side broad expanses in which prospecting has been undertaken in the past and may be resumed to the extent desired by the Parties" (para. 239).

So much then for the helpful Judgment of the Chamber in the *Gulf of Maine* case.

And I pause, next to submit, that there is useful guidance also to be obtained from the Report of the Conciliation Commission in the case of the *Continental Shelf Area between Iceland and Jan Mayen (International Law Reports*, Vol. 62, p. 108). The Conciliation Commission was of distinguished composition. The Conciliator appointed by Iceland was Mr. Andersen who had been the leader of Iceland's delegation to the United Nations Law of the Sea Conference; the Conciliator appointed by Norway was Mr. — now Judge-elect — Evensen. The Chairman was the eminent American lawyer and diplomat, Mr. Elliot Richardson.

The mandate for the Commission was:

> "the submission of recommendations with regard to the dividing line for the shelf area between Iceland and Jan Mayen. In preparing such recommendations the Commission shall take into account Iceland's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances." (P. 111.)

In carrying out this mandate the Commission said:

> "Although not a court of law, the Commission has thoroughly examined State practice and court decisions in order to ascertain possible guidelines for the practicable and equitable solution of the questions concerned." (P. 125.)

The Commission expressly stated that amongst the factors to which it had given special consideration were the following:

> "*(a)* Iceland is totally dependent on imports of hydrocarbon products.

(b) The shelf surrounding Iceland is considered by scientists to have very low hydrocarbon potential." (P. 126.)

It is thus plain that both Iceland and Norway in drawing up the Agreement and the Commission in carrying it out had in mind that economic considerations had a direct and essential bearing upon the question. Nor was this regarded by the Commission as a consequence simply of its function as an organ of conciliation; the paragraph from which I have just extracted the mention of economic factors was itself introduced by the quotation of the paragraph from the decision of this Court in the *North Sea Continental Shelf* cases where the Court says that:

> "there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures" (*I.C.J. Reports 1969*, p. 50, quoted at 62 *ILR*, p. 126).

In this respect, therefore, the Commission appears to have seen itself as applying the same legal standard as the Court would have. The Agreement of 22 October 1981, to which Libya has referred in its pleadings, states in its preamble that the Parties have found it possible to proceed on the basis of the Commission's recommendations, that is, the Agreement by which the two States, Norway and Iceland, agreed to implement the recommendations of the Commission.

A point has now been reached at which it may be appropriate for me to recall the direction in which my argument is developing. I have been examining the manner in which this Court, in the *North Sea Continental Shelf* and *Tunisia/Libya* cases, the Chamber of this Court in the *Gulf of Maine* case and the Court of Arbitration in the Anglo-French case have developed the concept of what I am calling "equitable principles/equitable result". The reason why I embarked upon this survey was to support two submissions.

The first, was to the effect that the circumstances or considerations material to the identification of an equitable solution were not limited to physical circumstances, but could and should embrace non-physical considerations in the shape of relative economic circumstances. On this first submission I believe that I have said enough — except perhaps to add this: that the economic circumstances which are referred to may be on a macro-economic scale, rather than on a micro-economic one. In responding to Malta's statement of the economic situation, Libya sought to make itself out as a country with an oil-dependent and therefore unbalanced economy — from this it would appear, in Libya's unstated submission, to follow that Libya requires more oil to maintain that condition for a longer period before it needs to readjust its economy to its changing resource circumstances, some time well in the twenty-first century. Malta does not believe that it is appropriate to enter into a discussion in this case of Libya's handling of its economy, whether in the future or in the present in relation to the future. For such a discussion, would, for purposes of contrast with the point I am making now, be in the field of micro-economics — the day-to-day details of how much money Libya makes and how much it spends and in what way.

Malta submits that it is sufficient now to refer to economics on a macro-economic scale, which is particularly possible in a case where there is so evident a disparity between the economic positions of the Parties. It may be recalled that in each of the cases in which equitable principles have previously been applied there was a much more even balance between the economics of the respective Parties.

Perhaps I may be permitted quickly to pass them in review. In the *North Sea Continental Shelf* cases, although the Federal Republic of Germany was evidently a more substantial economic unit than Denmark or the Netherlands, the imbalance was not on the scale that it is in the present case. In any event, the Court will remember that there was no argument between the Parties regarding the whole concept of equitable principles/equitable result and of the relevance thereto of economic factors.

In the Anglo-French case, the size of each of the contending Parties would have made a reference to economic balance absurd. In the *Tunisia/Libya* case, even though Libya may have been better off than Tunisia in oil terms and larger in terms of area, the discrepancy in their positions was perhaps not so large as to enable the Court confidently to embark upon a comparison of their respective economic strengths. And in the *Gulf of Maine* case, despite the fact that the United States is a more powerful economic unit than is Canada, each Party was of such a size that the outcome of the case could only have relatively little impact on the overall economics of the two States.

To say that that is not so in relation to Malta as one of the Parties to the present case is too obvious to require further rehearsal of the facts. Nonetheless, it is important that the Court should not permit the very obviousness and simplicity of this point to be obscured by a flood of more complex and controversial considerations.

Enough then, Mr. President, about the economic aspects of the concept of equitable principles/equitable results. With your permission, I should like to turn to the second aspect of the concept, which it falls to me to argue, namely, the relationship between equity and the idea of equidistance. This is, of course, a very important aspect of the case which will be dealt with primarily by my colleague, Professor Weil. However, it has been thought that it may be helpful to Professor Weil in keeping his argument within manageable dimensions if I address the Court on the question of State practice showing the use of equidistance.

Now it is not my purpose in referring to the extent and nature of State practice regarding the use of equidistance to repeat what Malta has already said on this subject in its three written pleadings. And what has also been expounded by the learned Agent for Malta. I shall seek to do only two things, and each of them, briefly:

The first is to recall the purpose for which Malta refers to State practice involving the use of equistance.

The second is to reply to some of the arguments raised by Libya in its Reply with a view to showing the unreliability of the Libyan presentation of material and hence the inadequacy of its response to Malta's assertion.

First, Mr. President, a few words about the framework or perspective within which Malta presents its evidence on State practice. Libya seems determined to read Malta's materials on State practice as being deployed exclusively to show that there is a rule of law requiring that the equidistance line be applied wholly and exclusively in situations such as the present. For this purpose Libya introduces the materials on State practice in its Reply *(supra)* (at para. 4.06) wih a quotation from a passage in Malta's Memorial which appears *not* in the section on State practice in Malta's Memorial, but in a chapter entitled "Malta's Entitlement as an Island State" (beginning at p. 43 of Malta's Memorial, I). It would have been much more to the point — and, of course, a good deal less creative of confusion — if Libya had identified Malta's ground for reference to State practice in the chapter where such grounds might reasonably have been

expected to be found, namely Chapter VII on "The Principles and Rules of International Law applicable in the Context of the Present Delimitation" (this began at p. 59). Within that chapter there is a section entitled "3. State Practice" and within that section a subsection entitled "The relevance of State practice" (see p. 61). Within that subsection, following a quotation from the separate opinion of Judge Padilla Nervo in the *North Sea Continental Shelf* cases, there is a sentence which briefly and clearly identifies the role of reference to State practice. It says:

> "There is an evident value in recourse to the practice of States in like and comparable situations as an objective reflection of the application of equitable principles leading to an equitable result." (I, MM, para. 184.)

The point is made again in Malta's Counter-Memorial (II): "They [the delimitation agreements cited by Malta] provide compelling evidence of the standard of equity in customary law . . ."

And, of course, to refer to "customary law" in this situation is perfectly proper because the starting point of the whole consideration is that we are talking about equity within the law. It cannot for a moment be forgotten that the sole justification for recourse to equitable principles has been, since the first enunciation of the doctrine in the *North Sea Continental Shelf* cases, that law requires recourse to equity and that equity is applied at the dictate, and within the framework, of law. And Malta cites a body of practice which, though Libya may pick at it, has a relevancy, consistency and impact which defy contradiction. Finally, the point is repeated in paragraph 270 of Malta's Reply *(supra)*:

> "State practice likewise provides clear indications that in comparable geographical situations the equidistance method was considered by the parties as producing an equitable result."

In short, Malta does not contend that there is an absolute requirement in the shape of a specific rule of law to the effect that the system of equidistance must be applied, regardless of the circumstances. It is Malta's contention that in the circumstances of this case, the equitable solution involves the application of the system of equidistance.

So I may now, Mr. President, turn to my second group of comments on the use of equidistance. In them I shall identify the unreliability in a number of material respects of Libya's presentation of material on this point — so many, indeed — that I am bound to invite the Court to reach the conclusion that Libya has entirely failed in its attempt to show that the use of equidistance has not been regarded by the Parties concerned as the equitable solution in those settlements in which it was used. It is, I venture to submit, important that the Court should not allow itself to be led by Libya's latest assertions to feel that there may be any such doubt about the material deployed by Malta as to warrant hesitation in accepting it as evidence of what States have regarded as being equitable in comparable situations. I would, in passing, respectfully recall to the Court's notice, the *Expert Opinion on State Practice* by Dr. J. R. V. Prescott, which is annexed to Malta's Reply. There in short compass, Dr. Prescott, an established authority on boundary delimitation, analyses the situation. Dr. Prescott has dealt with boundary delimitation, including maritime boundaries, in a number of works and for a period of years. He has produced books under such titles as *Boundaries and Frontiers* (1978), *The Political Geography of the Oceans* (1975), and the *Map of Mainland Asia by Treaty* (1975). He is a Reader in Geography in the University of Melbourne and a

man who has specialized in this area more so than any other authority whom I can identify. His analysis does not need to be repeated here but is clear and speaks for itself.

To give substance to my invitation to the Court to reject Libya's attempt to rebut the relevance and content of the practice cited by Malta, perhaps I may be permitted to look more closely at the paragraphs on the subject which appear at pages 34 to 40 of the Libyan Reply *(supra)*.

In paragraph 4.06, after misstating the basis on which Malta refers to the examples of State practice — a matter to which I have already referred — Libya asserts that there are three principal defects in Malta's argument. I respectfully invite the Court to join me in a close scrutiny of some of the allegations of "defect", if for no better reason than to get some taste of the limitations of Libya's arguments on points of detail.

As part of the first alleged defect Libya declares:

> "It is clear that there is a large number of delimitation agreements where island States and island dependencies have not been accorded a median line in the delimitation of their continental shelves." (*supra*, LR, para. 4.07.)

When one looks at each of the Libyan examples, one finds that they never seem to tell the whole story. Either a part is omitted which is a part which supports equidistance, or the circumstances are identifiably different from those of Malta and Libya in the present case.

First, Libya produced three examples "found in the Maltese pleadings" (*supra*, LR, para. 4.08). The first example: the delimitation between Australia and Indonesia in which, so Libya states, Timor "received significantly less than equidistance treatment". That is true — but the situation was a special one. The line was dictated by the existence of the Timor Trough — a feature which creates a discontinuity between the Australian and Indonesian continental shelves of an entirely different and greater order of magnitude than any of the troughs which Libya invokes as relevant in the Pelagian Block. The deepest of the Pelagian troughs is the Malta Trough, said by Libya to have a maximum depth of 1,714 metres, a width of 11 miles and a length of between 87 and 108 miles (I, LM, para. 3.14). The same source indicates that the Timor Trough is more than 550 nautical miles long as opposed to 87 or 108 of the Malta Trough, and an average of 40 miles wide, as compared with 11 miles for the Malta Trough, and the sea-bed slopes down on opposite sides to a depth of over 10,000 feet, that is 3,000 metres or nearly twice the depth of the Malta Trough. Moreover, the Timor Trough marks the edge of a plate and is an area of subduction — thus amounting to a fundamental discontinuity in the strictest sense of the term.

The second and third examples given by Libya are of the treatment of the Italian islands of Pantelleria, Lampedusa, Linosa and Lampione and of the British Channel Islands. It is true that none of these islands was accorded an equidistance boundary — but the fact is that all the islands in question were dependent islands and thus not in a position comparable to Malta or to Bahrain, Indonesia, Japan, Sri Lanka, the Maldives, Cuba, Dominican Republic, Haiti and Papua New Guinea — to mention but some of the island States in relation to which equidistance has been applied.

The Libyan Reply then cites in tabular form 11 examples "where islands were not accorded strict equidistance in continental shelf delimitations" (*supra*, LR, para. 4.09). Mr. President, I began to prepare a comment on each of these situations and then, by the time I had reached the sixth illustration,

realized that I was simply tilting at windmills. Libya is not using these examples to contradict the relevance of equidistance, but only to support the proposition that there are cases in State practice where strict (and I emphasize Libya's own limitation of its argument by the use of the word strict — that is their word) equidistance has not been followed in continental shelf delimitations involving islands. Of course, there are such cases. Malta does not say otherwise and does not need to say otherwise.

There are cases where small islands — and even not so small ones — were not given full weight in a delimitation. They are always dependent islands. None of them are independent States. None of them is comparable to Malta in size or location. So some deviation from the norm is not surprising. What matters for present purposes, however, is that in each case it is obvious that equidistance was the starting point and that equidistance was regarded as reflecting the equities of the situation.

I turn next to a second major defect which Libya claims to find in Malta's use of State practice, namely, the assumption (as Libya puts it) that a method of delimitation, because it has been used in particular delimitation situations between other States, must of necessity be employed as between Libya and Malta at least as an *a priori* or "primary" delimitation (*supra*, LR, para. 4.10).

It is important that Malta should make its position clear on this matter. Malta is not suggesting any automatic application of equidistance to the present case simply because it has been used by other States. Malta's proposition may be put in the form of a question: why is it that equidistance plays so large a part in the delimitation of continental shelves of island States unless there is some community sense that equidistance is equitable in such circumstances?

The Libyan Reply asks, "How does Malta know?" what are the factors which determine a State's choice of a particular line (see *supra*, LR, para. 4.11). The answer lies, in large part, in the language which States use, coupled with the line which they actually draw. Thus, if States describe their agreement as equitable, or use some formula which has the same effect, and then use equidistance as the basic method of construction, can there be any better evidence that they thought that equity called for the application of equidistance?

One may look, for example, at the agreement between the German Democratic Republic and Poland concluded on 28 November 1975 (*Limits in the Seas*, No. 65). This is interesting for several reasons. First, the preamble states that the parties are "prompted by the desire to act in accordance with the provisions of the Convention on the Continental Shelf", and that of course was the Continental Shelf Convention of 1958. My understanding is that those provisions, Article 6, are seen, despite their wording, as being in effect, the equivalent of the equitable principles/equitable result concept. Second, the parties adopted the median line as the controlling principle. Now of course that was a delimitation between adjacent States but then comes the interesting part, the third observation. They expressly acknowledged that the line which they drew between them, the median line, should extend no further than a point equidistant between the German Democratic Republic, Poland and the Danish island of Bornholm. Fourth, it is clear that the relevant coasts of the German Democratic Republic and Poland are markedly larger than those of Bornholm. But, in so far as proportionality may depend upon the comparative length of coastlines, it is interesting that nothing is said about proportionality in this agreement between Germany and Poland and it does not appear that the concept was seen as having any role to play in the situation.

So, to sum up that item, Mr. President, what we have is a bilateral delimitation agreement. The governing principle is expressed in terms of reference to

the Continental Shelf Convention of 1958 which for present purposes may be taken as an indication of the equitable solution approach. The other important element in it is that these two adjacent States, confronted by an island belonging to a third State, out at sea, took the view that their bilateral delimitation should stop at the equidistance point between those two States and the third State's island, which is an acknowledgment in effect that in terms of equity they saw equidistance as the proper rule to apply to the delimitation with Denmark.

Now, to take another example, almost at random, one may look at the declaration of Uruguay and Brazil of 10 May 1969 (which appears as an Annex in the United States series *Limits in the Seas*, No. 73). There we find an unusually explicit acknowledgment of the relevance and role of State practice. The substance of the declaration is that the two Governments recognize the median line as the lateral limit of their respective maritime jurisdictions. But the substance is preceded by a series of preambular paragraphs of which the last provides a highly pertinent indication of the factors which motivated the two countries to reach an agreement which each would evidently have been more than surprised to hear characterized as other than equitable. This is what the last preambular paragraph said of this declaration by Brazil and Uruguay:

> "Considering the precedents established by international doctrines and practices, multilateral conventions, and particularly Article 12 of the Geneva Convention on the Territorial Sea and Contiguous Zone for the purpose of determining the lateral border between maritime jurisdictions of neighbouring countries."

That is interesting. Here are two countries which reach an agreement. They do not expressly say that they are reaching that agreement on the basis of equitable principles leading to an equitable result. But as I have suggested, it is inconceivable that either State would have thought that the conclusion thus reached by agreement was inequitable. And for the purpose of reaching that conclusion, what do they say? They say: we have looked at "the precedents established by international doctrines and practices", multilateral conventions and particularly the 1958 Convention for the purpose of determining the lateral border. That seems to me to be an inescapable indication of the concern those two States had to reflect in their own practice the conduct of other States as being something which established equitable standards.

Mr. President, I shall not pursue further the disagreement between the Parties as to the extent and significance of State practice which applies the equidistance concept. It must, of course, be recognized that when the Libyan Reply was prepared, Dr. Prescott's expert opinion was not then available. This opinion makes it clear that equidistance is a concept which has dominated State practice in boundary delimitation. It is no use Libya saying that in a number of cases equidistance was applied in an imperfect or qualified manner. The fact is that equidistance was the basic concept, from which the process of delimitation must have started and as a result of which the line adopted was clearly recognizable as a modified equidistance line. Nor is anything gained by Libya if it questions the motivation underlying the use of equidistance. The point which is almost too obvious to require statement is that: Dr. Prescott states in paragraph 52 of his opinion the following:

> "Before 1970 the proportion of boundaries which relied on equidistance was 76 per cent. In the period since 1969, 83 per cent of boundaries defined by the agreement have relied on equidistance." (*supra*, MR, p. 168.)

The dates of 1969 and 1970 are obviously selected by reference to the date of the Court's Judgment in the *North Sea Continental Shelf* cases. Can it for a moment be seriously maintained that States in concluding these agreements thought that the results which they were achieving were anything other than equitable?

I turn at this point from the question of the application of equitable principles, in the form of the concept of equidistance. But in doing so, I am anxious to avoid leaving the Court with any impression that equitable considerations which I have not mentioned, but which have previously been developed in Malta's written pleadings, are being abandoned. That is not the case at all. But I am mindful of the Court's rule relating to the appropriate content of observations in the course of the oral hearing. My task in relation to equitable principles and the associated identification of relevant circumstances has been a limited one — limited to some elaboration of the nature of State practice and a recollection of the relevance and role of economic factors. But as the oral arguments for Malta proceed, it will become evident that such additional considerations as Malta's concern for her own security are still a very important part of Malta's case.

I hope that it will not be seen as unduly repetitive if I emphasize the implications of Libya's claim that the boundary should be drawn within and along the line of the Rift Zone. The Libyan claim, if accepted, opens up the possibility that a continental shelf boundary line might be established within 25 nautical miles of Malta's shores. Libya would have sovereign rights to operate in this area with a view to exploring for and exploiting the natural resources of the sea-bed and subsoil. Malta would be confronted by the prospect of constant ship and aircraft movements close to its shores but not subject to its regulation, supervision or control. This movement would extend in time beyond the period of exploration to that of the construction and use of oil drilling and production rigs, standing on the sea bottom, with a wide range of associated submarine devices emplaced on the sea floor. It would be natural for anyone to feel apprehensive about all this activity and the presence and even possible misuse of so much technologically advanced and sophisticated equipment.

I hardly need to tell this Court of matters of which it can so readily take judicial notice. For we are no longer talking about development in the sea by reference to small rigs: we are talking about developments in the sea which involve the use of massive towers that stand several hundred feet high and provide accommodation for a hundred or more men, that include helicopter landing pads, and are in effect virtually artificial islands.

If the Libyan contention were accepted, and let us say the 1973 proportionality line were adopted, the effect would be that within perhaps 25 miles of Malta's coast, within ten minutes' flying time for a helicopter, you would have these structures. There would be the risk of pollution in the event of blowouts or other accidents, and yet none of the activities on board these artificial islands would be under Malta's jurisdiction.

Such a situation would be unacceptable anywhere else, except in areas so geographically constricted that geography created homogeneity and led to co-operation between neighbouring States. But there is no such geographical constriction here. In terms of simple national security, the proximity of so much foreign physical presence within, as I suggested, so short a flight of Malta, not more perhaps than 15 minutes' flight from its principal centres of population such as Valletta, is bound to be creative of genuine unease in Malta. The exposure to such threats and apprehensions is something which is a matter of good sense and fairness, as well as of sovereign equality, and should

be shared by the Parties equally; and the achievement of such equality is itself an equitable consideration favouring the use of the equidistance method.

Mr. President, I now turn to the third main section of my submissions. This relates to the "technical" part of the case — the geology and geomorphology of the area between Libya and Malta; and I recognize that 20 minutes before lunchtime is hardly the best moment in the day at which to turn to a subject which so manifestly provokes so little reaction amongst all of us.

But, the crux of this case for Libya is its assertion that there is in the so-called Rift Zone "a fundamental discontinuity in the sea-bed and subsoil separating the shelf area between the Parties". If Libya is wrong in this assertion, that is effectively the end of Libya's positive case. It may be left with the possibility of criticizing the development by Malta of its case. But unless Libya can satisfy the Court, in a clear and convincing manner, of its contention that the Rift Zone separates the shelf areas of the Parties, it does not even have the starting-point to support the most important of the submissions with which it concludes its Reply. This is Submission No. 9:

> "The principles and rules of international law can in practice be applied by the Parties so as to achieve an equitable result, taking account of the physical factors and all the other relevant circumstances of this case, by agreement on a delimitation within, and following the general direction of, the Rift Zone as defined in the Libyan Memorial."

If one knocks out the validity of that reference to a line "within, and following the general direction of, the Rift Zone", there is nothing left by way of positive assertion in the Libyan case; and that is why one has to look at the technical matters.

I can sincerely assure the Court that the last thing that I ever wanted was to get involved in a discussion of the geology and the geomorphology of the Mediterranean sea-bed. I should much prefer to argue solid points of law. Indeed, as the Court will have observed from the evolution of Malta's pleadings in this case, it is only reluctantly and subsidiarily that Malta has been prepared to follow Libya into any discussion of the sea-bed characteristics of the area. As the Court will appreciate, Malta's principal position in relation to the Libyan Rift Zone assertion is that as a matter of law it is irrelevant having regard to the substitution of distance for natural prolongation in its physical sense as the basis for claims to the continental shelf. Thus, even if Libya's presentation of its geological case were well founded in fact, it could not in law have any impact upon the present case. And this point will be duly developed by my learned friend, Professor Weil.

Nonetheless, since Libya has accorded such prominence to its geological case, the Court may feel that if Malta declines to react to it, that could reflect either some inability on Malta's part to do so, or some belief on the part of Malta that Libya's geological case is relevant and unanswerable. Nothing could be further from the truth; and so it falls to me to develop Malta's submission that Libya's case on the character and effect of the Rift Zone is, quite simply, wrong. And after that I shall need to refer to the Libyan argument regarding the so-called "Escarpments-Fault Zone".

I begin with the Rift Zone, and, Mr. President, if you will permit me, just so that we can all be clear as to the area about which I am speaking may I be permitted just to indicate it on the map. I am going to draw a line in the area in which I understand, in the Libyan arguments, is covered by the Rift Zone; and it is something that goes like this.

It lies to the west, the south-west, the south, and even so it is claimed, to the

south-east of Malta; and it lies, as the Court can see, very close to Malta — as I said a moment ago, the northern parts of the so-called Rift Zone can be as close as 25 nautical miles to the coast of Malta. And it is, as the Court will equally observe, a considerable distance away from the coast of Libya.

There are three respects in which the picture of geology and geomorphology presented by Libya cannot be accepted.

First, it is incomplete. It fails to analyse specifically and precisely the concept of a fundamental discontinuity separating the shelf areas between the Parties.

Second, the presentation of some important facts, and of the consequences sought to be drawn from others, are open to sufficient adverse comment to deprive them of persuasive value.

Third, the Libyan technical argument is incomplete because it fails to give due weight to other features of the sea-bed in the area between Malta and Libya which, if geological and geomorphological considerations are pertinent, have as much bearing on the question of delimitation as have the features constituting the so-called Rift Zone.

I shall begin with the fundamental defect of the Libyan case on the Rift Zone. Now this is not so frighteningly technical as one might apprehend. This defect is Libya's failure to establish the existence of the claimed fundamental discontinuity which, so Libya asserts, places Malta and Libya on two separate natural prolongations and hence on two distinct continental shelves.

It is a striking feature of all three stages of Libya's written pleadings that they contain no attempt whatsoever to identify the meaning of the expression "fundamental discontinuity" on which the whole of their case hangs, no attempt whatsoever to identify the meaning of that expression or the establishment and elaboration of it in factual terms. The point is simple, they do not, at any point in their pleadings, really grapple with the problem of the meaning of fundamental discontinuity. I will explain that now.

For example, the first place in the pleading at which a reference is made to "continuity" — namely, at the beginning of the section on "The General Setting" in Chapter 3 under the title "The Geomorphological and Geological Setting" (I, LM, para. 3.06) — the words "the continuity of this area of shelf" are used as if they had a single, clear, inescapable meaning. Apparently, it was not thought necessary to suggest that there was any room for a distinction to be drawn between the sea-bed and its subsoil or within the subsoil between the upper and the lower crust, which lie above the earth's mantle.

Indeed, the Libyan Memorial goes on with a persistence which excludes accident, actually to confuse the gemorphological and the geological aspects of the matter. Thus, it states a clear distinction between the Pelagian Block and the African Plate. "These are", Libya says, "quite different kinds of physical entities and are not co-extensive" (I, LM, para. 3.11). "The first", Libya states, "is geomorphological; the second is geological and involves consideration of the entire lithosphere of the earth" *(ibid.)*. At this point, therefore, the emphasis in the Libyan Memorial is on a geomorphological separation between Libya and Malta. In the next paragraph (para. 3.12) the Memorial glides into a different proposition without acknowledging the change of direction. In entering into a description of the northern boundary of the Pelagian Block (which, as recently as the previous paragraph, was seen as a geomorphological or, in effect, a surface feature), the Libyan Memorial claims that the features of this boundary "separate in the physical sense the natural prolongation of the Libyan landmass northward from the natural prolongation of Malta southward". Now, to most readers, Mr. President, this would appear to be a reference to geologi-

cal considerations since such words as "natural prolongation" and "landmass" refer to inherent content and structure rather than to surface shape. And fair enough, the Libyan Memorial within a few lines slips in a reference to the need for a discussion of geology. And so it continues: in one paragraph there is a reference to geomorphology (e.g., para. 3.15); in the next a reference to geology (para. 3.16); in the one following (para. 3.17) a reference again to geomorphology and in the one following a reference to them both in the phrase "the Rift Zone is a geological feature whose significance is reflected geomorphologically and whose effects are deforming the sea-bed and subsoil" (para. 3.18).

But that is a statment which begs the material questions. For the questions are: how much sub-soil? To what depth? And, most important, with what effect relevant to the task of the Court — a task of determining the limits of the entitlement of the Parties to the legal concept of the continental shelf?

As I have stated, the Libyan Memorial never grapples directly and openly with these questions. The nearest that it comes to them is the statement made almost glancingly that "Geologically, these Troughs are deeply-seated grabens which extend into the base of the earth's crust" (**I**, LM, para. 8.03). But in contrast with many less material assertions in the Libyan Memorial, this vitally important one is not accompanied by any evidential demonstration.

This failure to define the relationship between the claimed discontinuity between the natural prolongations of Malta and Libya and the subject-matter of the case is maintained in the Libyan Counter-Memorial. Malta is charged with conducting a "sketchy" discussion (**II**, LCM, para. 2.55) and with being "casual" in its treatment of sea-bed features (**II**, LCM, para. 2.64). But Libya's argument, for all the dimension of its technical display, still limits its mention of the essential detail to the statement (para. 2.59) that the depth of rifting in the area of the Medina Channel, which is only one of the rifts upon which it comes to rely:

> "slices through the Tertiary, Cretaceous, Jurassic, Triassic and Permian layers of the subsoil (strata as old as 250 million years) down to a depth of more than 5 kilometres. Seismic reflection profiles confirm this fact."

However, it is nowhere demonstrated that this faulting, whatever its degree and depth, establishes a "fundamental discontinuity" in relation to the very continental shelf in the delimitation of which the Court must aid.

That is not to say that the Libyan Counter-Memorial entirely ignores the relation between sea-bed and continental shelf. At one point, after making the important declaration that Libya does not question that "this whole area is part of the same African plate which is generally acknowledged to include the southern part of Sicily", the Libyan Counter-Memorial continued thus:

> "But the African Plate is not synonymous with the continental shelf. In fact, there are several distinct continental shelves to be found on the African Plate." (**II**, LCM, para. 2.60.)

Yet this assertion, of critical importance to Libya's case, is supported by a reference to authority which, when scrutinized, turns out to involve a number of manipulative steps which remove the conclusions a long way from the original data.

When one turns to the Libyan Reply, the situation is not much different. Again, the text speaks of the Rift Zone consituting "a fundamental discontinuity in the area of continental shelf lying between Libya and Malta . . ." (*supra*, LR, para. 5.21). But beyond developing certain technical arguments

already canvassed in the pleadings and to which I shall presently return, the concept of discontinuity in the continental shelf as such is not further developed.

And so, Mr. President, after what may seem a long introduction, I state expressly the point which during these past few minutes I have been making by implication. The Court is concerned with the delimitation of the continental shelf. Though the continental shelf is an expression which is geological in its origin, it is for the purpose of this case something which is legal in its present content. To speak, as do the Libyan pleadings, of a "fundamental discontinuity" in the sea-bed and the subsoil or in the continental shelf is absolutely not to the point unless that discontinuity is related to a currently acceptable working concept of the continental shelf. Not only does Libya not attempt to establish that relationship; it appears to be entirely unconcerned with the need for it. That is the first defect in the Libyan argument.

Now, it is reasonable to ask oneself, why should Libya have failed to grapple with this point? It could certainly not be because it failed to perceive its pertinence. It is rather, I would submit, because once the relevance of the point is identified, it is in the present case quite impossible to establish an appropriate discontinuity in the relevant continental shelf.

The Court rose at 1 p.m.

ELEVENTH PUBLIC SITTING (28 XI 84, 10 a.m.)

Present: [See sitting of 26 XI 84, Judge Lachs absent.]

The PRESIDENT: Further to my announcement yesterday, Judge Lachs is unable to be with us this morning.

ARGUMENT OF MR. LAUTERPACHT *(cont.)*

COUNSEL FOR THE GOVERNMENT OF MALTA

Mr. LAUTERPACHT: Perhaps the Members of the Court will permit me to remind them of the point that I had reached in my argument yesterday, by approaching it from a slightly different angle. It occurs to me that I could conveniently begin this morning by indicating to the Court the limited and unintimidating range of the physical features which figure in the controversy in this case.

For this purpose may I ask the Court to use, as the basis of this survey, (24) Figure 3 in the looseleaf binder provided by Malta. This is the one which is entitled "Faults and Rifting in the Pelagian Basin".

(24) This Figure corresponds to Figure 19, which appears in the Annexes to the Maltese Counter-Memorial **(II)**, Volume II, at page 50. So, I should be grateful if the Court would now allow me to take it through the following steps. I may (24) say that I have adopted this Figure 3 as the basis for presenting the situation to the Court, because the lines on it, which represent the pattern of troughs and rifting in the Pelagian Basin will assist the Court in finding the various fea- (11) tures which I shall indicate in a moment on the map. The Court will also find it helpful, perhaps not now but in due course, to look at the bathymetric chart of the Pelagian Sea, which appears in Malta's Counter-Memorial **(II)**, Volume II, at page 16; it is helpful and easy to follow.

I turn to the map behind me in order to go through the various features of the area.

Here is the Pelagian Sea; the whole of this area here, stretching up into its eastern limit, which corresponds in name with the edge of the escarpment. At that point the Sea changes its name and becomes the Ionian Sea; and the Court is primarily concerned with this section of the Pelagian Sea and part of the Ionian Sea.

The water depths in the Ionian Sea are evidently much greater than they are in the Pelagian Sea. This is a bathymetric map, and so of course the colours reflect the water depths.

The point should however be made that notwithstanding the considerable depths of water in the Ionian Sea, that whole area falls within the definition of the continental shelf which appears in the 1982 Law of the Sea Convention, the words of which I shall refer to in a minute. And the reason why, notwithstanding the depths, this is continental shelf area is because the sea-bed is overlain by a depth of six to seven kilometres of sediments. This area is also all continental shelf as is evident from the depths concerned.

Here is Malta and the associated island of Gozo. May I invite the Members of the Court to do as I do now, which is to connect the north-west extremity of the island of Gozo with the sea terminus of the land boundary between Tunisia and Libya by a straight line — rather like this. I am sorry that I am not very good at drawing straight lines, but that is intended to be a straight line connecting the two points. I shall call this line "the Straight Line" for ease and convenience. I apologize to my colleagues for venturing to use the definite article and capital letters to describe a feature even more common than the Rift Zone.

The area to the north-west of this line obviously does not lie in any way between Libya and Malta — the area to the north-west of that line.

In order to give the Court a full description of the area, so that it is as fair as much to my colleagues as it is to us, I have to go to the north-west of the line to identify the island of Pantelleria.

(24) Stretching south-east from Pantelleria, between the two lines which appear on Figure 3 just to the south-east of Pantelleria, is the Pantelleria Trough. That is in approximately that area, there — the two lines are the ones which have teeth, facing inwards and are running south-eastwards from Pantelleria.

Then at the south-east end of the upper line running from Pantelleria, with its teeth facing to the south-west, at the south-east end of that upper line one runs into the Malta Trough, which is approximately that area — there — and lies also between two lines with their teeth facing inwards.

The deep part of the Malta Trough lies principally to the north-west of the Straight Line. Only a small section of deep water lies to the south-east of the Straight Line, just south of Malta. Then the Malta Trough becomes markedly shallower, as the waters become shallower, and it runs into the Malta Channel, which is the extension to the east.

Now we have to go back to the south-east end of the Pantelleria Channel once more. We have looked at the extension of the northern part, now we must look at the extension of the southern part and when I use the word "extension" I am not accepting that that is a description of what actually happens in geological terms but it is convenient to use that word to describe the area to you. It is clear that at the south-east end of the Pantelleria Trough we run into the Linosa Trough, which stretches for a short way — I have made a slight mistake because the Linosa Trough does not extend beyond the Straight Line. The Linosa Trough is to the north-west of the Straight Line. So, to recapitulate, the Pantelleria Trough and the Linosa Trough lie entirely to the north-west of the Straight Line. Only the Malta Trough stretches slightly to the south-east of the Straight Line.

I go to the next feature. We have here a large innominate area — it does not have a name — which is at the end of the Linosa Trough, south of Malta where the waters are shallower. These waters then run towards the Medina Channel here and this Medina Channel descends into the Heron Valley, which is there. So we have the Malta Channel to the north, the Medina Channel to the south and the Heron Valley lying at that point.

South of the Medina Channel is the Medina Bank. This is a much shallower area and it is important in this case because it is the area in which we are all interested because in this whole region in dispute this is the area believed to be one where oil is most likely to be found. It lies well to the north of the equidistance line. It is the area in which Malta granted concessions in the period 1973-1974. So, this is the Medina Bank.

Just to the south-west of the Medina Bank lies the Melita Bank and to the south-west of the Melita Bank lies the Jarrafa Trough, which corresponds with

(24) the row of parallel lines in Figure 3, which is the second one from the bottom. Perhaps it will be helpful if I indicated first the Tripolitanian Furrow. The Tripolitanian Furrow lies here, in this area, and is the bottom set of parallel (24) lines with the teeth facing inwards in Figure 3. Slightly above that and slightly to the north-west of that is the Jarrafa Trough — the set of parallel lines above the Tripolitanian Furrow. The Jarrafa Trough gets deeper as it runs in the south-easterly direction. Likewise the Tripolitanian Furrow gets deeper as it runs in the south-eastern direction. The Tripolitanian Furrow is, of course, the Trough on which the Court has something to say in the *Tunisia/Libya* case. The Court in that case rejected the Tripolitanian Furrow as a relevant feature because the Court considered that its significant depths lay too far to the east to affect the delimitation between Libya and Tunisia. But those features of the Tripolitanian Furrow — its depths —, which were not relevant in the *Tunisia/Libya* case are relevant in this case — that is to say if any such features are relevant at all — because in this case the deeper waters of the Tripolitanian Furrow in this area lie, of course, between Libya and Malta.

Mr. President, I have ventured to take the Court through this accumulation of features, not because Malta attaches importance to them, but because Libya does so, or at any rate, attaches importance to all of them except those that do not suit it, namely, the Jarrafa Trough and the Tripolitanian Furrow.

So, at this point, we can come back almost to the point that we had reached yesterday and identify the crux of Libya's case. Starting from the Pantelleria, Malta and Linosa Troughs — which all lie to the north-west of the Straight Line and with the exception of that small projection of the Malta Trough slightly to the south-east of that line, Libya constructs out of those Troughs and of their much milder sea-bed expressions to the south-east, namely, the Malta and the Medina Channels, this conception of the Rift Zone, but really it rests simply on those three Troughs which stretch so far, and in one case only a little further, and then the relatively shallow expressions of the faulting to the south-east of Malta.

This area is not described by Libya as a rift zone but as "the Rift Zone", as if it were something very special and controlling. At the same time, while asserting the relevance of these features to the north, Libya insists on the irrelevance of the comparable features of the Jarrafa Trough and the Tripolitanian Trough to the south. This is a major discrepancy in Libya's approach to the geology and geomorphology of the area and I shall have more to say a bit later. For the moment, I limit myself to the situation in the north.

Here Libya says that there is a "fundamental discontinuity", such as by itself to warrant the area to the north of the so-called fundamental discontinuity being regarded as one continental shelf and the area to the south of it as another; Malta's to the north; Libya's to the south.

And that is how I come to the point at which I closed yesterday. Although Libya talks about a "fundamental discontinuity", it never identifies in legal terms the structure in which that continuity is said to lie and to operate. Nor does it ever say what is meant to a geologist or geomorphologist by the concept of a fundamental discontinuity. Malta's position on the point is as follows: the only structure in which a discontinuity, if one exists, can operate in legal terms, is the legal structure of the continental shelf and the discontinuity must be of a kind which is recognized in law.

I can now pick up at the point where I stopped yesterday. This is an appropriate place at which to refer to the definition of the continental shelf which appears in Article 76 of the 1982 Law of the Sea Convention, and I apologize for reading parts of it because I am sure it is so familiar to you:

"1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. [That is the basic concept.]

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6."

Paragraph 3 is important:

"3. The continental margin comprises the submerged prolongation of the landmass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

And then there is in paragraph 4 a definition:

"4. *(a)* For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope".

Mr. President, I do not really need to read anything more except the statement:

"*(b)* In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base . . ."

My learned friend Professor Weil will deal with the legal implications of that definition in due course.

It is evident from this definition that the existence of a geological fault system or of the geomorphological reflection thereof in a continental shelf will not affect the existence in law of the continental shelf. The natural prolongation of the land territory of a State is deemed to extend to the point at which the slope and the rise descend to the deep ocean floor. But that deep ocean floor is not reached by the troughs and grabens of which Libya speaks in the Rift Zone. Even in the area of the Ionian Sea and the abyssal plain to the east of the Sicily-Malta and Medina Escarpments the thick sedimentary cover which overlies the deep abyssal plain brings it fully within the definition of the continental shelf. Italy and Greece have shown by the southern projection of their agreed continental shelf delimitation that they regard their common continental shelf as extending into depths far greater than those of the troughs mentioned by Libya. The Court will remember that the Italian-Greek line is coming down into this area and ends somewhere in that zone. But as the Court can see the line comes into this area of very deep water and the sea-bed on either side of the line lying beneath that deep water is deemed by both Italy and Greece to form part of their respective continental shelf areas. And even Libya itself claims an entitlement to continental shelf rights in this same area east of the escarpments. The whole of this area stretching from here right over

to here falls within the range of Libya's continental shelf claims. There is this massive area to the east of Ras Zarruq and stretching as far as the Egyptian border. This is all this same deep water which overlies a depth of six to seven kilometres of sedimentary deposits and thus constitutes the area of continental shelf within the definition of the Law of the Sea Convention. So mere falling away of the sea-bed, even to great depths, does not terminate the continental shelf. That is the important point that I seek to make.

This should not be regarded as surprising. It is entirely in accord with the development of modern drilling technology which is now capable of drilling commercial wells to depths of seven and eight kilometres and of doing so in depths of water even as great as two kilometres. (See Michael E. Jones, *Deepwater Oil Production and Manned Underwater Structures* (1981), pp. 9-10). In other words, there is no technical reason why the economic activity principally associated with the continental shelf should not be carried on in great depths of water and in great depths of underlying sedimentary deposit.

The fact that there may be faulting in the subsoil through which the drill passes in no way deprives the area in which the drilling occurs of its continuity as continental shelf or indeed even of its geological continuity. Of this I shall have more to say presently.

But then, the question may understandably be posed: if, as I submit, the presence of even a deep fault does not amount to a fundamental discontinuity in the continental shelf, what does?

There are two elements in the answer.

The first is that the concept of "fundamental discontinuity" is in fact one with which geologists as such are not familiar. In their art they do not have to talk about "fundamental discontinuity". Of course, they may use the word "discontinuity" alone, because that is a purely descriptive word. But scientists need much more than the adjective "fundamental" to identify in satisfactory scientific terms the size or character of a discontinuity. Essentially, the phrase "fundamental discontinuity" is a layman's term. It has no technical geological meaning or relevance.

That being so, we come to the next element in the answer to this question of what could a "fundamental discontinuity" mean. If one is to speak of any discontinuity in a sense which can be recognized by geologists, then the only real discontinuity in the earth's lithosphere — that is to say, the whole of the area between, so to speak, the bottom of the sea and the top of the highly molten area beneath the earth's crust — is where continental crust meets oceanic crust and this happens, for example, at the foot of the continental slope between the Ionian abyssal plain and the African continental shelf. Other discontinuities of comparable magnitude may be found in what are called mid-ocean spreading centres — in the deep ocean — where plates are diverging. Or yet again, one finds such discontinuities in highly active continental margins where plates are converging and creating areas of subduction, as in the Timor Trough. But the so-called "Rift Zone" does not fall into any of these categories. In other words, to have a discontinuity of a kind that is significant you have to have this line between oceanic crust and continental crust.

Mr. President, I now turn to the second main heading of my consideration of the geomorphological and geological technicalities of the Libyan case in relation to the Rift Zone. This is that Libya's interpretation of the basic data is so open to question that the Court should not accept it.

I shall submit that the Libyan suggestion that there is a fundamental discontinuity in the area of the so-called Rift Zone is not established in any sense material to this case. This is in part because the rifting, such as it is, is in the

wrong place — not between Libya and Malta. And I make the point again, that this is where the deepest rifts are, to the north-west of the Straight Line. It is also because the expression of that rifting to the south-east is not such as to make it a dominant sea-bed feature. Moreover, some of the important evidence adduced by Libya is unclear, both in its content and in its significance. And one also has to recall lastly that the features upon which Libya so strongly relies are virtually no more significant than the features upon which it does not rely in the south-east, namely the Jarrafa and the Tripolitanian Furrows which it seeks to reject. In other words if geology and geomorphology are going to play any role in this case, the role must be an evenhanded one. The Court cannot look just at the geology or geomorphology in the north-western part of the region and ignore the significant rifting and furrowing in the south-eastern part of the region.

Now before developing these points I should like to say at the outset that there is one aspect of the Libyan argument which I reserve for my third main heading, namely, its incompleteness which is largely the point I just made to you — its failure to pay due regard to the features of the sea-bed to the south-east. I shall come back to that in due course. Now I shall concentrate on the limitations of the Libyan case relating to the so-called Rift Zone.

I have already made the fundamental point that Libya has failed to define what it means by a "discontinuity" in any manner that is pertinent to this case. To argue about whether something is or is not a fundamental discontinuity when you are not told what "discontinuity" means is rather pointless. What is clear is that in the absence of definition, discontinuity can mean different things to different people. In the absence of definition, all that one can talk about are features which may or may not have some significance, depending entirely on the subjective outlook of the observer.

It is perhaps as well that I should relate this reference to subjectivity to the language which is used in one of the more substantial items of evidence accompanying the Libyan case. There is an article by Dr. Finetti — one of the experts who produced a Technical Annex for the Libyan Memorial — called "Geophysical Study of the Sicily Channel Rift Zone". This appeared earlier this year in an Italian geophysical publication. This article repeatedly uses language of a subjective character. Three of Professor Finetti's favourite words are "huge", "prominent" and "remarkable". But Mr. President, words like this have no meaning unless one identifies the point of comparison: by reference to what other features are the ones which he identifies as "huge", "prominent" or "remarkable" — in what way are they huge and in what manner and in what degree?

Let us analyse but one example. In the first sentence of the article he speaks of the "huge" troughs of Pantelleria, Linos and Malta. These are the three troughs up in the north-west, north-west of the Straight Line. He does not apply this same adjective to the easterly expression of those troughs, the Medina and Malta Channels. In other words the other parts, the features which lie to the south-east in the area between Malta and Libya are not described as "huge". What makes some "huge" and others not? Presumably the Court will be told that it is a matter of difference between respective lengths, breadths and depths. But if it is the hugeness of some which warrants their identification, why should others, not so classed as "huge", be deemed to possess a comparable relevant significance — and I slip away again to another point — especially when there are yet other features, the Jarrafa and the Tripolitanian Furrows further to the south, in every way comparable in size with the non-huge features upon which Libya relies, and over which Libya would like to pass in silence.

I shall have more to say about them later. In the meantime, I am anxious to suggest — with the greatest of respect — that considerable caution must be exercised when reading the descriptive language used by Libya or its experts in order to avoid being swept away by what I may call the "enthusiasm" of the words used.

In the remarks that follow, I shall concentrate on statements made in the Libyan Reply, and will take a number of them in turn, in the order in which they are made.

1. At paragraph 5.19 the Reply *(supra)* states that "the principal point about the Rift Zone that has emerged from the pleadings of the Parties to date is that *its physical existence is acknowledged by both Parties*". That is not a correct statement. As the Libyan Reply itself acknowledges, Malta does not concede that there is an area called "the Rift Zone". Libya has adopted this name for the area which specially interests it. Just as I have adopted the name "the Straight Line" for the line that interests me. But the name "Rift Zone" is not a name which geologists or geomorphologists have attached to this area to distinguish it from other areas. The expression does not have the same connotation as, for example, the words "the Gulf", namely, the area of sea which lies between, principally, Iran and Saudi Arabia. When one speaks of "the Gulf" the words would nowadays be taken as referring only to that area and to no other. But if, in the course of a discussion among geologists, one were to refer to "the Rift Zone", without more, the participants would all look uncertain and would ask: "which Rift Zone? There are so many."

The nomenclature "the Rift Zone" is thus a confection manufactured by Libya for its own purposes in this case.

What Malta acknowledges is that there is an area of rifting between Malta and Libya, but it is not so special as to warrant the attribution to it of an aura of uniqueness by according to it the use of the definite article and the use of the capital letters; nor is it so special or so specific as to warrant identifying it as a relevant discontinuity in the continental margin which falls to be delimited between the two countries; nor is it limited to those features which Libya invokes as "constituting a fundamental discontinuity".

2. In paragraph 5.21 of the Reply *(supra)*, Libya once again refers to seismic profiles in an attempt to support its assertion of the existence of a fundamental discontinuity "between Libya and Malta". This attracts two comments:

(1) First, there is no basis for assuming that because a fault appears on a seismic profile, it necessarily reflects a relevant "fundamental discontinuity". For example, what the profile along line MS 19, as it is called, shows is, of course, that there is faulting in the technical geological sense, that is to say, in the sense that the layers of subsoil have, so to speak, slipped one against another. But the basic continuity of the sea-bed as a physical feature is unaltered. The same geological layers appear in the same vertical sequence; they appear in approximately the same thickness; and they appear with the same sedimentary and fossiliferous content all the way from Libya to Malta.

For all scientific authorities who have worked in this region are agreed that the entire crust beneath the Pelagian Sea and the sediment layers deposited upon it form a geological unity, a definite geological unity. The ages and types of rocks found in Malta and the distinctive fossils contained in them are the same as those which are found in eastern Tunisia and northern Libya. In geological terms the entire crust beneath the Pelagian Sea has formed a platform with essentially the same sediments deposited across its entire area at any given geological time. For example, Dr. Finetti, an expert for Libya, has writ-

ten in an earlier article than the one which I have already cited, namely, his article with Professor Morelli in 1973 (Finetti and Morelli, 1973, *Bolletino di Geofisica*, Vol. 15), that "in the Strait of Sicily there is absolute continuity of the continental African plate from Tunisia/Libya up to the Ragusan massif [that is, the rocks of south-eastern Sicily]" (p. 261). He also said that:

> "there exists an absolute continuity of sediments from southern Sicily to the northern African coasts, and all the sequences involve variable, but always consistent thicknesses of pre-pliocenic Tertiary and Mesozoic [i.e., sediments deposited more than 5 million years ago]" (p. 299).

It is true that, although the entire Pelagian Block forms a geological unity, it has through its history been frequently stretched and faulted. When continental crust is stretched, it breaks along faults because it is brittle. Most areas of continental crust in the world, and particularly those lying near the edges of large plates like the African Plate have numerous faults in them and the Pelagian Block is no exception. When continental crust is stretched it often accommodates the stretching by faulting along two inward-dipping faults, with the crustal block in the middle dropping down to form a valley or graben.

If the stretching motion ceases, a valley will be left. If it is beneath the sea this valley will gradually be filled with sediment deposited in the sea until eventually the sediment completely fills the valley leaving a flat overlying sea-floor. Then one can only determine how much stretching has occurred by mapping the down-faulted layers of rock using seismic reflection profiles (which give a cross-section along the profile).

Libya has drawn attention to a number of disconnected grabens south and south-west of Malta which they refer to as the "Rift Zone". These are relatively young in geological terms, having been formed only over the past 10 to 15 million years. Although according to Dr. Finetti's 1984 paper, the motion has decreased in recent times, the area appears still to remain active and there has not been time for the graben troughs or valleys to be filled with sediments. Therefore they appear as valleys or troughs in the sea-bed. However, the average rate of subsidence, even in these troughs, is less than one millimetre per year.

Now, I must ask to be forgiven if the point which I am about to make is seen as being very elementary — but it is a point which must be borne in mind when there is talk of rifting and faulting. The activity of striking, slipping, stretching, wrenching and rotating is reflected in actual openings and gaps only in the surface of the sea-bed when, in the manner I have already described, a rift, trough or channel may open up and then in due course be coated or filled with sediments. But, Mr. President, it is important to appreciate that underneath the sea-bed, in the subsoil, there are no gaps. Even when there is a fault, the two surfaces or planes on either side of the fault are in constant contact with each other under the pressure of the superjacent water and of the sea-bed itself. So, from the layman's point of view, there is no subsoil physical discontinuity. You could not squeeze a razor blade into the crack.

While I realize that any analogy is bound to be faulty in some respect, perhaps one might liken the sea-bed area between Libya and Malta to a wedge-shaped slice of layer cake with its apex or point lying to the west-north-west of Malta and the rest of it spreading, almost like a fan, towards the east, with one side running past Malta and the other down towards Libya. In a way not dissimilar to the layout of the troughs which appear on Figure 3. I have in mind

(24)

a slice of cake which looks something like that, as a slice of layer cake. It is as if someone had taken a very sharp knife with an extremely fine blade and made some random cuts in the cake and then with his fingers had pressed the top of the cake down unevenly — just as my little son might if he were grabbing for it greedily. As a result, the alignment of the layers is disturbed, but the cake still remains in existence. The cake can still be eaten and, to the extent that it must be equitably divided between some who are affluent and others who are not, the cuts have no *a priori* role in the process. Within the cake there would be no fundamental discontinuity.

Mr. President, a fundamental discontinuity would appear only if the cake were placed alongside a chocolate eclair. Though there would be a continuous line of pastry, one would in fact be speaking of two entirely different kinds of structure — in the same way as one speaks of the difference between the continental crust and the oceanic crust, while the only problem in the present case is although we may have a piece of layer cake we do not also have a chocolate eclair.

(2) The second comment to be made on the reference to seismic profiles in paragraph 5.21 of the Libyan Reply *(supra)* combines with the comment to be made on paragraphs 5.22 and 5.26. All three paragraphs are concerned to develop Libya's contention that there is an elongation of faulting amounting to a fundamental discontinuity which exists not merely in the area to the west of Malta but extends in a south-easterly direction towards the Escarpment. What Libya is really saying is that there is faulting here and that this faulting extends in such a way as to constitute a fundamental discontinuity onwards as far as the Escarpment.

As to this Malta has already pointed out that the deepest area of faulting as expressed in the geomorphology of the sea-bed, lies to the north-west of the Straight Line, that is to say not at all between Libya and Malta. As a result the zone constituted by the Malta, Pantelleria and Linosa Troughs does not on any basis lie between Libya and Malta and cannot have any direct bearing on the delimitation of the area which does lie between Libya and Malta. This can be seen with the greatest clarity on the bathymetric chart of the Pelagian Sea to which I have already referred. True, there is some faulting between Malta and Libya in the area of the Malta and Medina Channels, that is to say, in this area down here — there is no point in denying that there is faulting — there is faulting, but the faulting is much shallower and reflects the fan-like effect of the rotational movement which commences to the north-west and of which the south-eastern channels are the gentler expression.

I wanted to buy a fan in The Hague to show the Court how this fan-like effect works, but unfortunately I could not find one, so I had to make one. That is meant to be a fan and as the Court will observe — and know from its own experience — when you have a fan and you seek to open it, naturally the troughs, if I may so call them, are deeper at the handle end of the fan and get shallower towards the far end of the fan. So this is the situation really, that we have a fan-like situation in the area with the deeper troughs — the Pantelleria, Malta and Linosa Troughs — being up here to the north-west and then the extension of shallower troughs being towards the south-east, *not* limited to the northern part up here but also existent in the southern part. And what has happened has been — though in a way which is too technical to describe in detail — there has been this kind of opening up and rotational movement of the earth's crust which has led to this faulting. But not anything so significant as to create a fundamental discontinuity. Now it is evident that the Parties are not in agreement on the way to describe the degree of south-easterly projection of

the Malta, Pantelleria and Linosa Troughs. Libya invokes the technical paper of Malta's expert, Professor Vanney, in claiming support of the contention that the Malta Trough lies between Malta and Libya.

Two things must be observed. The first is that Libya, having begun by asserting the significance of all three troughs, ends by relying upon one trough only, the Malta Trough, which stretches just to the south of Malta. The second is that the south-eastwards extension of the Malta Trough is only slight in relation to the area of dispute between the two Parties and therefore can hardly serve as an essential factor in establishing the existence of any relevant fundamental discontinuity.

When Libya attempts, in paragraph 5.26 of the Reply *(supra)* to overcome the relative slightness of the intrusion of the Malta Trough into the area lying between the two Parties, it does so by citing a paper written by experts who have assisted the Libyan team (see *supra*, LR, p. 65). Even these experts start from the premise that the area in question forms part of the African margin stretching northwards; and the language used to describe the relevant geological events is hardly that of "fundamental discontinuity", but merely that descriptive of three styles of faulting.

So that, Mr. President, concludes my second comment on the seismic faulting.

3. I should refer next to a further argument which Libya develops in paragraph 5.27 of the Reply *(supra)* as bearing out its contention regarding the discontinuity between Libya and Malta, and as they allege "the continuity of the Rift Zone". In other words, while there is discontinuity here, the allegation is that there is continuity there. The argument which they use in paragraph 5.27 is a quite striking illustration of the type of argument which Libya has been forced to develop.

The argument consists of reliance upon gravity anomaly data along the Rift Zone. Now, what is meant by "gravity anomaly data"? These words refer to the measurement of the force of gravity to determine the thickness and character of the crusts in any particular area. The thinner the crust, the greater the measurement of gravity. Because in a thinner area the measurement is greater than one would expect in a normal or unfaulted area, one speaks of a "gravity anomaly" and hence of "gravity anomaly data". From a study of these gravity anomaly data, Libya seeks to identify a line which it calls an axial ridge of the
(27) Rift Zone. This is illustrated on Map 10 (opposite *supra* LR, p. 66). I am very sorry, we have not put that into the Maltese dossier and it is being prepared so that you may see it, and it will be handed in in due course.

This map, which appears at the moment in the Libyan Reply, is an apparently clear and simple red line which is said to represent "the axial ridge of the Rift Zone where the crust has been stretched to its thinnest point". I hope I will not be accused of deliberately distorting the line but I am going to attempt to draw it into this map so that the Court may see for what Libya is contending. Effectively, Libya is suggesting that there should be a line that goes something like that — it may not be entirely accurate — but something like that.

Mr. President, I am sorry I missed something and my learned Agent has very helpfully recalled this to my notice. May I invite the Court to turn to
(44) Figure 13 in Malta's loose-leaf book and there you will see the axial ridge line. It is a red line drawn in, starting just to the north-west of Pantelleria and apparently passing through Pantelleria, through the Pantelleria Trough then down towards Linosa and then moving through the south-east, and I see happily

coinciding on this map with quite considerable parts of Libya's 1973 proportionality line, and then moving up to the north-east, through the Malta Channel until it reaches the escarpment. I am sorry, it is a very small line to be seen on this map.

Paragraph 5.27 of the Libyan Reply *(supra)* refers to Annex 7 as containing the technical foundation for this line. The first limitation on this approach which has to be appreciated — but is clearly not brought out in the Libyan pleading — is that the residual gravity map, from which that red line is derived, is not a direct or immediate reflection of objectively verifiable elements. Measurements take place, but after the stage of measurement the resulting data have, as I understand it, gone through two stages of modification, each involving the exercise of the author's discretion. Now, what are these two discretionary stages? The first was to use a mathematical procedure to correct the effect which the body of water lying above the sea-bed has upon the measurements of the gravity field. In other words, to get some uniform approach to the measurements, a guess has to be made of the density of the rock below the water, and this has to be followed by a calculation of the quantity of rock of that density which would fill the relevant water column. In that way, one can "even out" all the underlying material, but that all involves a guess. That guess may be an informed guess but the elements in it are not identified, indeed the fact that a guess has been made has not been mentioned.

Then there comes the second discretionary stage. The information, after this first guess has been put into operation, is then "filtered". In Annex 7 of the Libyan Reply, there appears what is called the residual gravity map. I have a copy of this here and it is of that that a copy will be presented by Malta in due course. At the bottom left-hand corner of the residual gravity map there is a reference to "filter length" which appears to be the square root of 10s = 31.6 kilometres, and no explanation was provided, either in Dr. Finetti's article or in the Libyan Reply, of why that length was chosen; and there is no obvious reason for it. What is meant by this concept of a "filter" is that certain points are left out in order to obtain a certain evenness of line. That filter is expressed in terms of distance, 31.6 kilometres, but why this was chosen is not stated. It thus leads one to think that perhaps that is the length which best suits the theory which the production of the map is intended to support. The Court will appreciate what the theory is. That if you can identify this axial ridge line it reflects some kind of break in the crust, so that there is a fundamental discontinuity evidenced by the gravity anomaly.

Apart from the uncertainty relating to that evidence, there is the fact that when one looks at that residual gravity map and at the axial ridge line drawn on the basis of it, one can observe the arbitrary manner and preconceived
(44) character of the line which appears so smoothly drawn in Figure 13 of Malta's loose-leaf book. On the map on page 18 of Annex 7 of the Libyan Reply one can see the so-called axial ridge line, drawn as a pair of black parallel tramlines. What is this line? It is, in fact, nothing more than a line which has been drawn to connect certain highs on the map. The map is expressed as an ordinary contour map, but it is not a map of the contours of the sea-bed, it is a map of gravity anomalies. And so there are certain highs where there is more gravity and therefore, presumably, thinner crust. So, what the axial ridge line is doing is connecting the highs and the line which Libya has drawn is manifest from the map. But one has to look more closely at the map, and when one does this it is evident that there are many highs besides those which Libya has used as the points which are connected by its axial ridge line. These other highs, or plus signs, are marked by two characteristics:

(1) They are no less numerous than those through which the Libyan axial ridge line was drawn.

(2) Those other highs or plusses reflect gravity anomalies of comparable magnitude to those through which the Libyan line is drawn. That is to say, they are marked by contour lines carrying the number 5 and 10. It is both possible and permissible, and indeed, in this case, necessary to connect these other highs by lines in the same way as Libya has connected the highs which it has chosen to underlie its own axial ridge line. But if these other highs are comparably connected, one gets a very different picture. I apologize for the lack of a figure in our dossier, but we shall have one prepared and circulated as Figure 40.

For example, in the western sector of the map, a line could have been drawn running in a generally north-south direction through an eastwards-bending curve. In the southern central part of the map an almost north-south line could have been drawn. Lastly, and perhaps most compellingly of all, in the south-east corner, only a little more than 100 kilometres north of the coast between Tripoli and Misurata, a line could have been drawn roughly parallel to the axial ridge line selected by Libya, but at least 200 kilometres nearer to the Libyan coast. This would have reflected the existence on a comparable scale of gravity anomalies in the Tripolitanian Trough — a subject to which I shall return later.

Now if that is the kind of evidence that is introduced to buttress the Libyan case, I suggest that the validity of that case is, to say the least, seriously compromised. Libya may contend in its reply that the residual gravity map is only a subsidiary argument. That would not meet Malta's criticism. In the first place, Dr. Finetti in his 1984 article (p. 7) expressly claims that the residual gravity anomalies additionally "provide a very important contribution to the understanding of the deep effect of the observed fragmentation". Secondly, even if the gravity anomaly data constituted a subsidiary argument, one could quite properly pose the following dilemma: either the main argument is sufficiently strong to support Libya's case, in which event there is no need to bolster it, or it is not sufficiently strong — and so Libya, apparently, thinks; otherwise it would not have brought in the residual gravity map. And if the main argument is not strong, a persuasive argument cannot be made out of an accumulation of individually weak arguments.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

Having thus identified the weakness of the use of the gravity anomaly data, I should return for a moment to the character of the rifting upon which Libya relies. In paragraph 5.25 of the Reply *(supra)*, in an attempt to meet Malta's observation that the so-called Rift Zone, if it is a discontinuity at all, does not extend to the south and south-east of Malta in any significant way, Libya states "a feature of this size involving pull-apart and shearing motions, is necessarily diffuse". Now, in this manner, Libya effectively concedes Malta's point. Whatever may be the magnitude and nature of the rifting to the west and north-west of Malta, the rifting to the south and south-east of the so-called Rift Zone of Malta is much less intense because of the fan-like character of the feature. The nature of this development is shown in Part II of Annex 2 of Malta's Counter-Memorial (II), the part prepared by Professor Mascle. There he

shows, at pages 47 to 51, the configuration of a zone rifting by an anticlock-
(24) wise rotation of its northern part and Figures 18-2 and 19 demonstrate pre-
cisely what is going on in the relevant area; and Figure 19 is the one which
(24) is reproduced in Malta's loose-leaf book as Figure 3. As is particularly clear from this Figure, once one moves south-eastwards from the zone of deeper rifting west of Malta, which does not lie between Malta and Libya, there is no particular reason why one should adopt as the south-west extension of that rifting only the Malta and Medina Channels. The fan-like spread of rifting also stretches down to include the Jarrafa Trough and, to the south and south-west of that, to include even the Tripolitanian Valley. Professor Mascle concludes with these words:

> "the Pelagian Sea is the seat of extensional faulting which is relatively concentrated in the western region and is on the contrary diffused in the east. In the latter case, locating a structural limit becomes problematic." (**II**, MCM, Vol. II, p. 56.)

Mr. President, if I may just go back to my fan for a moment, the fan illustrates very clearly what Professor Mascle is saying, that the Pelagian Sea is the seat of extensional faulting which is relatively concentrated in the western region — in other words, the faulting is deeper and more concentrated at the handle end of the fan: and is, on the contrary, diffused in the east. So there you are, at the east, and it is spread out and diffused. Now, it does not stop there, but it extends there to include the Jarrafa and the Tripolitanian Furrows.

The Libyan Reply does not contradict this conclusion but pretends rather that it is irrelevant, as may be seen from paragraph 5.28 of the Libyan Reply *(supra)*. Now it is difficult to see what is relevant about an explanation of the structure of the relevant area of sea-bed and subsoil which contradicts the Libyan contention that the Malta and Medina Channels are the exclusive continuation of the so-called fundamental discontinuities, if they are the continuation of it at all.

One of the difficulties that Libya has in discussing its so-called Rift Zone is that this zone is in fact a composite feature of many separate troughs. Its greatest expression, the Pantelleria Trough, is far to the north-west of Malta, well outside the area of delimitation at present under discussion. The Pantelleria Trough in the west is replaced in the east by the two troughs with greatly reduced sea-bed expression, the Malta and Linosa Troughs. Even further eastwards, immediately south of Malta, the troughs are represented by the Malta and the Medina Channels, which exhibit even less sea-bed expression.

The generation of the fault grabens, or troughs, as a result of the large-scale rotation, which has been discussed by Malta, not only satisfies all the scientific data but also explains why there are more troughs in the east of the Pelagian Block than in the west: the reason is that the extension that results from the rotation is greater in the east than in the west, and so it causes more of these grabens, or troughs, to be generated in the east. Furthermore, the Jarrafa and Tripolitanian Troughs in the south of the area are seen to be the result of the same rotational extension as has caused the opening of the so-called Rift Zone in the north.

Measurements have been made of the extension recorded by the grabens
(36) along a profile running northwards from Tripoli in Libya to Ispica (Fig. 4). The extension has been calculated since the end of the Mesozoic period, that is to say during the last 65 million years, because the rock layer deposited at the
(36) end of the Mesozoic is easily identified on seismic profiles (shaded on Fig. 4). Having measured the angle at which the faults dip downwards from the many

seismic profiles, and the amount by which the rocks are displaced by the faults, it is possible to determine what amount of extension has occurred. The results show that the extension of the northern troughs — those of Malta and Linosa — is the same as the extension of the southern troughs — that is to say, Jarrafa and Tripolitania — along that line (Tripoli-Ispica). Thus, the Libyan Rift Zone is not unique. The amount of extension in the southern half, nearest to Libya, is the same as the amount of extension over the last 65 million years in the northern part of the Pelagian Block, the half nearest to Malta. Again, the shallow water area of the Lampedusa Plateau and the Melita and Medina Banks appears as an axis of symmetry dividing equally the extension to the north and the south. In other words, here is the Lampedusa Bank, here are the Malta and Medina Banks, so in a sense you have this row of Banks lying between the faults to the north and the faults to the south, the so-called axis of symmetry.

Libya asserts the belief "confirmed by scientific papers and even by Malta's own experts, that the essential elements of fact which establish the Rift Zone are clear and uncontroversial" (*supra*, LR, para. 5.28). Malta does not share this belief, nor is it confirmed by Malta's own experts. There may be a fair measure of agreement about the elements of the situation, but the interpretations and conclusions of the experts differ considerably.

It is not correct to say, as the Libyan Reply *(supra)* claims in the next paragraph (para. 5.29), that the evidence put forward by the pleadings of both Parties establishes the existence and importance of the Rift Zone. Nor is it true that "this evidence shows that it cannot be regarded as other than a fundamental discontinuity in the sea-bed and subsoil in areas of shelf lying between Libya and Malta". The evidence certainly does not show that the Rift Zone is a "fundamental discontinuity", either as a matter of geological and geomorphological fact or in any legally relevant sense.

Mr. President, I turn now to the third main criticism of Libya's case on the so-called "Rift Zone" — namely its failure to give due weight to other features of the sea-bed in the area between Malta and Libya. I have already hinted at this several times. The point is not always easy to disentangle from the response which Malta has had to make to other Libyan arguments regarding the existence of the Rift Zone in the north. But as the Court will have appreciated, Malta's main contention regarding the southern aspect is that the Libyan arguments have failed to take account of geological and geomorphological features which lie further to the south between Libya and Malta. If any geological or geomorphological features have any bearing on the present case, these southern features certainly have as much relevance as the northern features which constitute, in Libya's contention, the so-called Rift Zone.

Libya has virtually ignored the extensive faulting that is found throughout the entire Pelagian Block south of the so-called "Rift Zone". The continental crust between Libya and Malta is cut by numerous other faults, particularly so south of the 35th parallel. Many of these faults have a similar west-northwest-east-southeast trend to the faults of the "Rift Zone". This faulting has been reviewed by Dr. Mascle in the Technical Annex of Malta's Counter-Memorial. Nonetheless, it is worth emphasizing the complete agreement of all authorities, even Libya's own scientific advisers, on the presence of extensive faulting in the southern Pelagian Sea. Good maps of the faulting in the southern Pelagian Block appear in Figures 15 and 16 in the paper by Professors Jongsma, van Hinte and Woodside, of which a copy was furnished by Libya to the Registry and the figures are included as Figures 38 and 39 in Malta's dossier. Some of the faulting in the south and particularly that near the Libyan coast, has been

present for very long periods, up to 200 million years, in contrast to the more recent faulting in the north of the Pelagian Block and some of these faults in the south have formed grabens or troughs, namely the Jarrafa Trough and the Tripolitania Valley.

I ought perhaps at this point just to observe that the fact that the faulting in the south is older than the faulting in the north does not diminish the validity of the final concept. Things do not all take place at the same time in geological terms. So this happened first — down at the bottom — and as a result of it happening first, as I will explain again in a moment, and by virtue of it being closer to the Libyan shore than is the faulting to the north, the sediments from the continent had been washed down into the sea and therefore there has been more sediment and more time for these troughs in the south to be filled out and thus for the sea-bed to become more level.

Several cross-sections from Libya to Sicily, again exhibiting considerable deeply penetrating faulting, appear as Figure 7 in the paper by Professor Jongsma and his colleagues. The extensive faulting throughout the Pelagian Block has been discussed by Dr. Finetti in his 1982 paper. He writes that: "During the last main extensional phase of the Miocene-Quaternary [i.e., in the last 25 million years] a remarkable stretching and faulting activity affected the whole Pelagian Sea . . ." (p. 255); and that:

> "The Sirte Rise [in the south Pelagian Sea], as well as other geological provinces of the studied area [which was the Pelagian and Ionian Seas] was greatly stretched during the third extensional phase of the Middle Upper Cretaceous." (P. 247.)

Dr. Finetti recognizes several extensional phases which have affected the southern Pelagian Sea. In the Gabes-Tripoli-Misurata Basin, for example, he writes that the basin is the result of the "extensional geodynamic movements which occurred in the Triassic [i.e., about 200-250 million years ago] and before in Palaeozoic [i.e., older than 250 million years]" (p. 253). Following this episode of stretching, several further similar extensional phases occurred, as he describes at page 254:

> "After the Paleozoic-Triassic stretching movements other important extensional geodynamic phases occurred in the Middle Jurassic [*c.* 180 million years] and especially in the Middle-Upper Cretaceous [*c.* 65-100 million years]. With this last one are associated remarkable igneous effusions of a basaltic type. Basaltic layers in the Middle-Upper Cretaceous have been found in several points by drilling exploration. These movements were accompanied by a consistent subsidence of the basin. Extensional and subsidence activities occurred also successively. In the Middle-Upper Miocene to Quaternary [i.e., the last 15 million years], one of the main extensional phases which affected not only and not particularly this area took place."

The Libyan Reply, mindful of the implications of this extensive faulting in the southern Pelagian Sea, did not seek to refute its presence; instead Libya suggested that it should be ignored and attention focused solely on the faulting in the "Rift Zone" for the purposes of delimitation. The main Libyan arguments for this stance are that the faulting in the south Pelagian Sea is outside the area of dispute, and that it is "ancient" with little sea-bed expression, and both these parties can easily be refuted as I will now attempt to do.

First, Libya suggests that the faulting of the southern Pelagian Sea is outside the area of dispute in which they seek a dividing line and so should be ignored

(*supra*, LR, para. 5.33). It is no exaggeration to describe as extraordinary the argument that the faulting of the "Rift Zone" to the south of Malta is a proper topic of discussion just because Libya claims the sea-bed so far north as that, but the faulting in the southern Pelagian Sea, a similar distance from the Libyan coast, should be ignored simply because Malta does not push its claim an equivalent distance southwards. Why does Libya talk at all about the northern faults? They constitute, says Libya, a fundamental discontinuity, but in or of what are they a discontinuity, one must ask? The answer is, presumably, in a claimed natural prolongation of Libya. Well, one is bound to reply, if the natural prolongation of Libya is relevant, is it not equally relevant that there lies between Libya and the claimed area of natural prolongation a feature of a magnitude comparable to the one which is said to terminate the natural prolongation?

The Court may find it helpful at this point to be referred to the passages in its Judgment in the *Tunisia/Libya* case where it dealt with the Tripolitanian Furrow. In paragraph 66 of that Judgment the Court said

> "The only feature of any substantial relevance is the Tripolitanian Furrow; but that submarine valley does not display any really marked relief until it has run considerably further to the east than the area relevant to the delimitation."

Now, of course, the area relevant to the delimitation in the *Tunisia/Libya* case was this area here — and so it is quite understandable that the Court saw no relevance in the structure of the Tripolitanian Furrow which lies here. But even so, the Court then did observe the depths of the Tripolitanian Furrow and use the expression that it did not show any really marked relief until it had run into this eastern and now relevant section.

In that paragraph, therefore, the Court made it clear that the most eastern relevant point on the Libyan coast for the purpose of the Libyan case was Ras Tajoura and said that it could not take into consideration such parts of the sea-bed of the Pelagian Block as lie beyond those limits.

Now, the part of the Tripolitanian Furrow which is relevant to the present case is precisely that part which lies east of Ras Tajoura and which displays this "really marked relief" of which the Court spoke in paragraph 66 of the 1982 Judgment. This can be seen very clearly from the bathymetric chart which I have already mentioned. (LR, Fig. 1, opposite p. 65.)

Mr. President, in fact the most stable, least faulted region of the Pelagian Block is the crust of the Melita-Medina platform which has remained relatively shallow and stable for hundreds of millions of years. The Melita-Medina platform lies midway between Malta and Libya and separates the region of faulting in the "Rift Zone" to the north from the extensive region of faulting of the Gabes-Tripolitania-Misurata Basin to the south. The delimitation line identified by Malta as equitable in fact lies over this stable crustal block.

I turn to the second main Libyan argument for discounting the importance of the faulting in the southern Pelagian Sea. This is the suggestion that it is "ancient" and that the sediments which have been deposited in the region cause the faulting to exhibit reduced sea-floor expression. It is true that much of the extensive faulting in the southern Pelagian Sea was active before the present "Rift Zone" was formed, as I explained a moment ago. As we have already noted, the extensional phases that have affected the whole Pelagian Sea have occurred in episodes.

But that does not mean that because the southern faulting is "old", the northern faulting is "new" and, therefore, in some way better or more relevant.

The extensional phases in the Pelagian Sea have, as elsewhere, taken place in episodes which occur simultaneously in different locations and to different degrees. The fact that there may be active faulting in the north does not exclude the possibility that there may be less active faulting going on in the south; and vice versa. The important point is that if one adds up the faulting in the southern part of the Pelagian Sea, it is as great as the faulting in the northern part, but simply spread over more faults. In other words, you may have a fault which is deep like this — one fault — but elsewhere you may have two faults which are approximately half the size of the first fault, but those two faults half the size of the first add up to the same kind of situation as constituted by the first. Moreover, it is to be noted that the faulting in the "Rift Zone" which started 10 to 15 million years ago has already passed its zenith. In other words, we do not have an area which is going on being active. It does not show acceleration or positive movement to go on, it is something which apparently is already declining. Dr. Finetti notes in his 1984 paper which is reproduced in part in Annex 7 of the Libyan Reply *(supra)*:

> "The first rift movements commenced in the Early Pliocene [5 my ago] (or Late Miocene) [10 my ago] and continued . . . until the Late Quaternary: then they decreased but remain still active at the present time."

So we are on a downward trend. Over the same period, there is certainly faulting in the southern Pelagian Sea, as reported by Blanpied and Bellaiche in the article which has been incorporated as Document A at the back of the Maltese loose-leaf folder (in *Marine Geology*, 1983, Vol. 52, pp. 1 ff.). The faulting in the southern Pelagian Sea may not be so intense as that in the north, but it is there, in the Jarrafa Trough which exhibited "a perennial and active tectonism throughout post Miocene times [i.e. the last 5 my]". The published profiles across the Jarrafa Trough show that the faults there are still actively moving. The same is to be observed on the western part of the Tripolitanian Furrow. The fact that faults in the earth are still active in the Tripolitanian Trough near the Libyan coast is also demonstrated by the fact that an earthquake (of a magnitude of 4.5) has been recorded there. The present-day topographic expression of the troughs in the southern Pelagian Block (Tripolitania and Jarrafa) is not so great as that of the troughs in the so-called "Rift Zone", but this is only because, as I said earlier, these troughs are nearer the mainland, and so closer to the supply of sediment which has filled them in. The sediment has partially filled the valleys, reducing their sea-floor expression. When the original shape of the valley floor, which shows how much faulting has occurred, is examined by seismic profiles it is found that the size of the Tripolitania and Jarrafa Troughs is similar to that of, for example, the Linosa and Malta Troughs, as shown by Figure 7 in the paper by Professor Jongsma and his colleagues.

So far Malta has shown that the faulting of the so-called "Rift Zone" is certainly not unique in the Pelagian Sea, but that there is equally deep-seated faulting across the entire region of continental crust between Sicily and Libya. It is possible to go even further than this. As was shown in the Maltese Memorial, all the troughs in the Pelagian Sea, including those in the south, are the geometric result of the process of extension that has applied to the entire region (including the Tunisian Sahel, the Pelagian Sea, western Libya and south-eastern Sicily). This process of extension has occurred intermittently throughout the last 180 million years, and often the same troughs have been repetitively opened (Finetti, 1982). It can be described by a simple counterclockwise rotation of 10 to 15 degrees during the last 10 million years of the

Iblean Plateau (i.e., the area south-east of Sicily) with respect to the African landmass (south of the Tripolitanian Valley). This rotation is disparaged by Libya as a "rather imaginative discussion" and as a "mere theory", but it is based not just on the pattern of faulting but also on palaeomagnetic measurements published in high-level scientific journals (e.g., Besse *et al.*, 1983, 1984). Libya has ignored these palaeomagnetic data, with which their model does not fit. Since the palaeomagnetic data are relevant and well-established scientific facts the Libyan model of the "Rift Zone" which ignores them must be called into question.

Finally, Mr. President, it is perhaps necessary to refer to the Libyan suggestion that "a 'microplate' may be in formation along the Rift Zone". It should be observed that the authorities cited in support of this suggestion are articles published in the year 1984 by experts who have themselves been directly associated with the Libyan case.

It should be emphasized that even these experts only say that a microplate may be in formation. They do not assert it positively. It is strange that no hint of such a suggestion affects the scientific material presented by Libya in connection with the *Tunisia/Libya* case. Indeed in that case, Libya demonstrated that the Pelagian Block was a unit extending north of Malta. This appears clearly from two figures which the Court may like to examine in the Libyan Counter-Memorial in the *Tunisia/Libya* case. The first is Figure 1 in the Libyan Counter-Memorial, 1981. This shows the Pelagian basin extending north of Malta, in a manner not consistent with the newly deployed Libyan arguments. The second is Figure 6 in the same Counter-Memorial of 1981 which shows the whole of the Pelagian Sea as an aseismic, that is to say, an inactive block, with no hint of the microplate that Libya now contends may be seen in it.

The text of the Libyan Counter-Memorial in the present case also has some bearing on the subject. Having stated that the Rift Zone "clearly ranks among the major and relatively rare rift zones of the world", a footnote to page 52 of the Counter-Memorial (II) states:

> "In somewhat more technical terms, the Rift Zone is an incipient boundary where continental crust has thinned owing to the pull-apart effect of the deep-seated *grabens* noted above. However, the extension of the earth's crust has not evolved to the point at which ocean crust has been created . . ."

The Court will recall my earlier distinction between continental and ocean crust as being the only kind of discontinuity that would really have any meaning. Here they say:

> "However, the extension of the earth's crust has not evolved to the point at which ocean crust has been created. It may be described as the beginning of a continental breakup. At the stage at which the Rift Zone now is, it is characterized by diffuse features."

This is evidently not language descriptive of a microplate. The incipient boundary is many millions of years away and cannot possibly have any relevance to the present case as evidencing the existence now of a fundamental discontinuity. Indeed, it may never come into existence at all since, as I have suggested. there is evidence that the faulting is now decreasing.

So much then for the geology and geomorphology of the sea-bed under the Pelagian Sea. With your leave, Mr. President, I should like to pass on to make a few remarks about the area to the east of the Pelagian Block, the area which Libya has called "the Escarpments-Fault Zone" — this is the escarpment-fault

zone and this of course is the Ionian Sea which lies beyond it. I should correct one remark that I made earlier in the morning. You will recall that I drew the line of the Italian/Greek continental shelf boundary and I terminated it there. I made a mistake, I should have terminated it a good deal further to the south — at this point here — which is the southern point of the deepest part of the Ionian Sea.

The Libyan Reply calls for a few comments. First, in paragraph 5.40 of the Reply *(supra)*, Libya seeks to press the degree of agreement between the experts on the two sides too far by stating that:

> "the Parties are in agreement over the fact that the Escarpments-Fault Zone forming the eastern boundary of the Pelagian Block constitutes a fundamental break in the morphology of the sea-bed and subsoil".

Once again, the problem may appear to be semantic, but its resolution in the bland manner which Libya asserts may create an impression which Malta would not entirely share. The question is, what does Libya intend to convey by the phrase "a fundamental break in the morphology of the sea-bed and subsoil"? In footnote 3 to page 72 of the Libyan Reply *(supra)*, Libya declares that it "has never conceded that Malta's continental shelf rights extend this far to the east". That means as far to the east as here. It has never conceded that. At the same time, Libya, in the same footnote, acknowledges that it is not its position that the continental margin as defined in Article 76 (3) of the 1982 Law of the Sea Convention ends at the Escarpments-Fault Zone. So what is it that it has been saying? That it does not concede that Malta's shelf can extend beyond the line of the escarpments. On the other hand says Libya, it does claim that this area is continental shelf within the meaning of the 1982 definition. Is then the allegation that the Parties are in agreement that the Escarpments-Fault Zone constitutes a fundamental break in the morphology of the sea-bed and subsoil an attempt to imply that in some way Malta agrees that the eastern limit of its continental shelf must be sought at the edge of this zone? If it is, Malta must emphatically repudiate it.

Next, in the same paragraph (5.40) Libya goes on to make the same point in somewhat different language:

> "The point is simply that the Escarpments-Fault Zone represents a fundamental change in the morphology of the sea-bed and subsoil, forming the edge of the continental shelf underlying the Pelagian Sea, often referred to as the 'Pelagian Block'."

Malta does not accept that the change in morphology "forms the edge of the continental shelf underlying the Pelagian Sea". Why? Because the implication of the language used by Libya is that in some way the continental shelf, whether of Malta or of Libya, under the Pelagian Sea is bounded by the limits of the Pelagian Block. I must emphasize that there really is a danger of getting caught up in words here because the concepts are very simple. This area is called, for convenience, the Pelagian Sea, and this area for convenience is called the Ionian Sea, but although the morphology is different, although the shape of the sea-bed is different between this area and this area, the law is that the whole of this area is one continental shelf in the eyes of the law and so this representation, that in some way the escarpment here affects the continental shelf continuity, is wrong. This escarpment or fault where the sea-bed falls down into the depths no more denies Libya the opportunity of coming across up the escarpment in this southern area here, than it denies Malta the right to extend its continental shelf area over the edge of the escarpment. For the pur-

poses of continental shelf delimitation, this is a single area and this feature, although it is prominent, makes no difference.

We have here a situation in which despite the dropping away of the sea-bed to the east of the escarpment, the sediments forming the sea-bed are of such a thickness that they fully satisfy the requirements of the definition of the 1982 Law of the Sea Convention.

The emphasis in the Libyan Reply on the absence of discontinuity between Libya and the Ionian sea-bed to the north of Libya is accompanied by the assertion that the escarpment "cuts across and disrupts . . . the Maltese prolongation to the east" (*supra*, LR, para. 5.40). This may be so in geomorphological terms; it is not so in legally relevant continental shelf terms. Once the essential continental shelf continuity and unity of the whole area is recognized, then there is no reason for according Libya a special advantage simply because there is no drop between one level and another of its continental shelf in this eastern sector.

As is properly pointed out, I mis-expressed myself — there is in truth a drop. The fact is that just as there is a drop from this lighter blue into this darker blue, so here there is a drop from the lighter blue into the darker blue. It is only close in to shore that Libya has the kind of continuity with its continental shelf that it is insisting that Malta must have with Malta's continental shelf.

Mr. President, that brings me to the end of the main points of my argument. No peroration is required. But a summary of my main conclusions may be of some help in drawing together what I have said, and that summary consists of ten points:

1. The task of the Court under the Special Agreement is to identify the relevant principles and rules of international law with the same degree of particularity as these principles were identified in the *Tunisia/Libya* Judgment. This means in effect that the Court should indicate the boundary which in its view would result from the application of the method which it chooses. The Court should not reach a conclusion in terms so general as those proposed by Libya.

2. The Court is not entitled under the Special Agreement from which it derives its jurisdiction in this case to take into consideration the claim identified by Italy except by the terms of what I may call the "without prejudice" statement foreseen by the Court at pages 26 to 27 of its Judgment of 21 March 1984.

3. The task of the Court in terms of the application of law is to apply equitable principles in order to achieve an equitable result.

4. The circumstances relevant to the identification of the equitable result are not limited to ones of a geographical nature. The Court is entitled to weigh all circumstances including, especially, ones of a macro-economic character. The established possession, or lack, of resources by the Parties, relative to each other, is certainly a relevant circumstance.

5. The application of equitable principles in the present case leads to the use of the concept of equidistance. In identifying these equitable principles it is proper and necessary to pay regard to State practice in the conclusion of delimitation agreements as a reflection of what States consider equitable.

6. In the practice of States, equidistance plays a predominant role. Before 1969, 76 per cent and after 1970, 83 per cent of all continental shelf delimitations involved the application of equidistance, even if in some cases this application was to some extent modified or simplified. Even if it cannot be said that this practice reflects a custom accepted as law, it is inconceivable that what has occurred should be regarded by the States concerned as anything other than equitable.

7. Libya's positive case rests upon the assertion of the existence of a fundamental discontinuity in geomorphological and geological terms in the area of the so-called Rift Zone. That is the positive basis on which Libya contends that the boundary should be drawn within and following the general direction of this Rift Zone. This contention is in law quite misplaced. The physical characteristics of the sea-bed and subsoil have no bearing on the situation save in terms of satisfying either the definition of the continental shelf or the definition of the exclusive economic zone as laid down in the 1982 Law of the Sea Convention. There is no doubt that the physical facts render the whole relevant area continental shelf and economic zone in the legal sense.

8. In any event, Libya has not established the existence of any fundamental geomorphological or geological discontinuity in the Rift Zone. In particular, one of its most important pieces of evidence — the gravity anomaly map — is open to severe criticism and can also be used to show another line of equal force in the area of the Tripolitanian Furrow which is much more favourable to Malta and much less favourable to Libya.

9. Generally, in concentrating its arguments in the Rift Zone Libya has failed to give due weight to the Jarrafa Trough and the Tripolitanian Furrow. These — in terms of Libya's own argument — are geomorphological and geological features of a significance comparable to those relied upon by Libya more to the north.

10. The whole of the sea-bed north of the eastern part of Libya and east of the Escarpment is covered by sediments 6 to 7 kilometres thick and is continental shelf, in the legal sense of that term, continuous with that of Malta to the west and Libya to the south. It has so been recognized by Italy and Greece.

Mr. President, that concludes my summary. I repeat my apologies for having had to re-convey to the Court much information it must have already possessed on technical matters and I hope that I have said enough to enable the Court to feel that it may safely set Libya's technical case aside. It remains for me, Mr. President, only to ask you to be so kind as to call upon my learned friend, Professor Weil.

PLAIDOIRIE DE M. WEIL

CONSEIL DU GOUVERNEMENT DE MALTE

M. WEIL: Monsieur le Président, Messieurs les juges, il n'est pas d'usage, lorsqu'un gouvernement vous fait le grand honneur de vous confier la défense de ses intérêts nationaux devant la Cour internationale de Justice, de commencer son intervention par une note personnelle.

La Cour ainsi que l'agent de Malte me pardonneront si je prends cette liberté pour évoquer la mémoire du grand juriste et du grand ami disparu prématurément il y a quelques mois. Il y a peu de temps encore le professeur Antonio Malintoppi était à cette même place, gravement malade déjà, mais tenant, au prix d'un effort surhumain, à assumer ses responsabilités jusqu'à l'extrême limite de ses forces. Que la Cour, qui a souvent eu l'occasion d'apprécier sa science et son talent, me permette de rendre hommage à ce brillant représentant de la grande école italienne de droit international, dont les qualités intellectuelles n'avaient d'égales que les qualités de cœur, et auquel m'attachaient depuis de longues années tant de liens.

Monsieur le Président, dans les affaires de délimitation maritime portées jusqu'ici devant la juridiction internationale, c'était l'application du droit aux faits plutôt que l'énoncé du droit qui était controversée. L'affaire actuellement devant la Cour se caractérise au contraire par l'existence de divergences fondamentales sur le droit lui-même. Ces différences vont bien au-delà de la question de savoir si la délimitation doit se faire dans notre affaire selon la méthode de l'équidistance ou selon quelque autre méthode ou combinaison de méthodes. C'est la quasi-totalité des éléments conceptuels mis en place par le droit international en vue de la construction d'un droit de la délimitation du plateau continental qui se trouve mise en discussion dans la présente affaire.

Les Parties sont d'accord — comment pourraient-elles ne pas l'être? — pour estimer que la délimitation de leur plateau continental doit être effectuée de manière à aboutir à un résultat équitable compte tenu de toutes les circonstances pertinentes. Mais cette convergence sur la finalité à poursuivre ne s'étend pas au cheminement permettant d'atteindre l'objectif recherché. Quel processus juridique de droit international envisage-t-il pour aboutir à une solution équitable compte tenu de toutes les circonstances pertinentes? Telle est en définitive la question; et sur cette question Malte et la Libye professent des vues diamétralement opposées.

L'abîme qui sépare les Parties sur ce problème est d'autant plus profond que la Partie libyenne, au lieu d'exposer une position cohérente, a choisi d'adopter la tactique des thèses multiples; tant et si bien que ce n'est pas à une thèse libyenne que nous sommes confrontés mais à un foisonnement de thèses qui prennent parfois le contrepied les unes des autres. Cette tactique n'est pas de nature à clarifier le débat.

Monsieur le Président, l'identification des composantes de la controverse juridique est difficile parce que ces composantes se croisent et s'entrecroisent en un écheveau malaisé à démêler. Aucun des éléments conceptuels qui composent le droit de la délimitation du plateau continental ne peut s'envisager en faisant abstraction des autres, à l'état pur, si j'ose dire; chacun d'eux ne se rencontre que dans un alliage avec un ou plusieurs autres. Il faut pourtant, pour les

besoins de l'exposé, distinguer quelques thèmes majeurs autour desquels il soit possible d'ordonner les divergences juridiques fondamentales qui s'affrontent devant la Cour.

Après avoir évoqué, dans un premier chapitre, la question des sources du droit applicable, je consacrerai les chapitres suivants aux thèmes majeurs qui constituent, me semble-t-il, le pivot de la controverse.

Le chapitre II portera sur l'opération de délimitation.

Les chapitres III et IV se concentreront sur les deux concepts clés du plateau continental que sont le prolongement naturel et le principe de distance.

Dans le chapitre V, enfin, je m'attacherai à la question de l'équidistance et, plus particulièrement, à celle de la ligne médiane propre à notre affaire.

Quant au problème de la proportionnalité, c'est à mon ami le professeur Ian Brownlie qu'il reviendra de l'examiner.

Je crois devoir préciser, Monsieur le Président, qu'en vue d'alléger mon exposé je ne donnerai aucune référence juriprudentielle ou doctrinale. La Cour et la Partie adverse les trouveront dans le compte rendu, dans lequel figureront également les références aux passages pertinents des mémoires écrits libyens et maltais.

I. Les sources du droit applicable

Quelles sont, dans notre affaire, les sources du droit applicable?

Nous sommes d'accord des deux côtés de la barre pour considérer que la convention de 1958 sur le plateau continental n'est pas applicable, que l'article 6 de cette convention est étranger au débat, et que ce sont en conséquence les principes et règles du droit coutumier qui régissent la présente délimitation.

Au-delà de ce point évident, je crains qu'il ne faille se défendre d'un optimisme exagéré. Même si la Partie adverse a été plutôt discrète sur ce problème du droit applicable, et même si elle n'a pas contesté les positions que nous avons prises à ce sujet (**II**, CMM, p. 45-48, par. 76-82), les divergences demeurent considérables sur un point essentiel.

De l'avis de Malte, les règles de droit coutumier applicables comprennent certaines règles qui ont trouvé expression dans la récente convention sur le droit de la mer de 1982; ce n'est pas, bien sûr, en tant que règles conventionnelles que les dispositions en cause s'appliquent en ce cas, mais parce que ces dispositions peuvent être regardées comme consacrant ou cristallisant des règles de droit coutumier préexistantes ou en voie de formation. De manière plus large, comme l'a fait observer un membre de la Cour dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, c'est à l'ensemble des travaux de la troisième conférence qu'il convient de se référer lorsque l'on cherche à définir l'état du droit coutumier en ces matières (*C.I.J. Recueil 1982*, opinion dissidente de M. Oda, p. 172, par. 26).

En 1974, dans l'affaire de la *Compétence en matière de pêcheries*, la Cour avait, il est vrai, marqué une certaine réticence à tenir compte de ces travaux et des textes qui en sont issus (*C.I.J. Recueil 1974*, p. 23-24, par. 53), et cette réticence avait été partagée par le tribunal arbitral franco-britannique en 1977 (sentence arbitrale, par. 47 et 96). Mais on n'était encore en présence, à ce moment-là, selon les termes mêmes de la Cour, que de «propositions et documents préparatoires ... manifestant les thèses et les opinions d'Etats à titre individuel ... et traduisant leurs aspirations», et non pas de «principes du droit existant» (*C.I.J. Recueil 1974, loc. cit.*).

En 1982, au contraire, dans l'affaire *Tunisie/Libye*, la Cour a estimé que,

puisque «le processus de formation du droit est aujourd'hui beaucoup plus avancé», il lui appartient à présent de «tenir compte d'office des travaux de la conférence», et qu'elle ne saurait en conséquence

> «négliger une disposition du projet de convention si elle venait à conclure que sa substance lie tous les membres de la communauté internationale du fait qu'elle consacre ou cristallise une règle de droit coutumier préexistante ou en voie de formation» (*C.I.J. Recueil 1982*, p. 37 et 38, par. 23 et 24).

Maintenant que le projet de convention est devenu une convention signée, et même ratifiée, par de nombreux Etats, l'analyse de la Cour s'impose avec plus de force encore. Il y a quelques semaines à peine, dans l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine*, la Chambre de la Cour, tout en rappelant que la convention de 1982 n'est pas encore entrée en vigueur, a relevé que certaines de ses dispositions ont fait l'objet d'un consensus et «peuvent être considérées comme conformes actuellement au droit international général en la matière» (*C.I.J. Recueil 1984*, p. 294, par. 94).

C'est dans cette perspective que Malte estime qu'il faut tenir compte, dans la présente délimitation, des règles de droit coutumier qui ont trouvé expression dans l'article 76 de la convention et dans les dispositions de la convention relative à la zone économique exclusive (CMM, p. 47-48, par. 80-82). En raison de l'importance que le paragraphe 1 de l'article 76 présente dans le débat, nous nous permettrons d'en reproduire le texte dans le compte rendu:

> «Le plateau continental d'un Etat côtier comprend les fonds marins et leur sous-sol au-delà de sa mer territoriale, sur toute l'étendue du prolongement naturel du territoire terrestre de cet Etat jusqu'au rebord externe de la marge continentale, ou jusqu'à 200 milles marins des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale, lorsque le rebord externe de la marge continentale se trouve à une distance inférieure.»

L'opinion de Malte à ce sujet s'autorise de la position prise à cet égard par la Cour elle-même dans son arrêt de 1982. Dans cette décision la Cour a déclaré clairement que «la définition du paragraphe 1 de l'article 76 ne doit pas être perdue de vue» *(cannot be ignored)* (*C.I.J. Recueil 1982*, p. 48, par. 47), et que la zone économique exclusive peut être considérée «comme faisant partie du droit international moderne» (*ibid.*, p. 74, par. 100). Le «principe de distance» — c'est le terme employé par la Cour (*ibid.*, p. 49, par. 48) — figure en conséquence parmi les principes et règles du droit international coutumier dont il convient de tenir compte.

Voilà pour la position de Malte: elle est, on le constate, claire et simple.

La position de la Libye sur les règles issues de la troisième conférence est, quant à elle, beaucoup plus difficile à décrire.

Dans son premier écrit, la Libye cherchait à se mettre à l'abri de ces règles, et plus particulièrement du principe de distance, en soutenant que la convention de 1982 n'est pas en vigueur et ne fait pas droit entre les Parties (I, ML, p. 84, par. 6.10, et p. 89-90, par. 6.22). Sauf erreur de ma part, cet argument n'a plus refait surface dans les écrits ultérieurs, et c'est sur un autre terrain que la Libye a porté sa tentative de tenir le principe de distance à l'écart de notre affaire. La Libye cherche à présent à établir que le concept de distance intervient seulement sur le plan du titre juridique et des limites extérieures, par opposition à la délimitation; que même sur le plan du titre juridique et des limites extérieures, il ne joue qu'un rôle subsidiaire; et que la zone économique exclusive, qui est son domaine d'élection, est étrangère à la présente affaire, puisque celle-ci ne

met en cause que la délimitation du plateau continental et ne préjuge pas la délimitation d'une éventuelle zone économique exclusive entre les deux pays.

Faut-il en conclure que désormais la Partie adverse reconnaît le caractère de droit coutumier des règles incorporées dans les dispositions pertinentes de la convention? Peut-être nous éclairera-t-elle là-dessus au cours de la procédure orale.

Ce qu'il me faut en tout cas constater, c'est que la Libye passe complètement sous silence dans ses écrits la profonde évolution subie par les règles coutumières relatives au plateau continental et à sa délimitation. Elle oublie que le droit coutumier n'est pas immuable, et que c'est à la lumière du droit coutumier tel qu'il existe à un moment donné que les concepts relatifs au plateau continental et à la délimitation doivent être compris et appliqués.

Monsieur le Président, la Cour a déclaré: «La notion de prolongement naturel est et demeure ... une notion à examiner dans le contexte du droit coutumier et de la pratique des Etats» (*C.I.J. Recueil 1982*, p. 46, par. 43).

Prenant le contrepied de l'approche dynamique ainsi adoptée par la Cour, la Libye paraît tenir pour nulle et non avenue l'évolution du concept de plateau continental sur lequel la Cour a si fortement mis l'accent; elle ignore le détachement progressif de ce concept des données physiques de la géologie et de la géomorphologie, ainsi que son évolution vers une conception juridique fondée sur une relation spatiale entre les espaces sous-marins et les côtes. En présentant à la Cour une revendication construite sur les caractéristiques du sol et du sous-sol de la mer, la Libye plaide comme on aurait pu le faire il y a quinze ans. Si elle semble admettre le caractère coutumier des règles pertinentes de la convention de 1982, elle ne le fait que du bout des lèvres et sans en tirer de conséquences. La thèse libyenne ne serait pas différente si ces règles n'étaient pas applicables.

Dans la même perspective, la Partie adverse nie en bloc toute pertinence du concept de zone économique exclusive à propos de la délimitation du plateau continental dans la présente affaire. Dans son contre-mémoire, la Libye insiste sur le fait que seule est demandée la délimitation des fonds marins et du sous-sol, à l'exclusion de toute délimitation de la colonne d'eau surjacente et, plus particulièrement, des zones de pêche (II, CML, p. 62, par. 3.14 et note 1; p. 71, par. 3.39). La réplique libyenne adopte une position plus radicale encore: elle passe totalement sous silence le problème; de la zone économique exclusive il n'est tout simplement plus question.

Il est évident, Monsieur le Président, que la Cour n'est saisie dans la présente affaire que de la délimitation du plateau continental; le compromis ne laisse pas de doute sur ce point et nous en sommes d'accord. Ni Malte ni la Libye n'ont d'ailleurs proclamé jusqu'ici une zone économique exclusive, et Malte a proclamé une zone de pêche de 25 milles. On ne saurait toutefois ignorer que l'une ou l'autre Partie, ou les deux, peuvent à tout moment procéder à une telle proclamation. Il ne faut pas oublier que le tribunal arbitral franco-britannique a estimé devoir tenir compte, pour la délimitation du plateau continental des îles Anglo-Normandes, de la possibilité reconnue par le droit international au Royaume-Uni de porter sa mer territoriale, qui était alors de 3 milles, à la largeur de 12 milles autorisée par le droit international (sentence arbitrale, par. 187).

Mais là n'est pas la seule raison interdisant d'évacuer les règles coutumières sur la zone économique exclusive du présent débat, même si celui-ci ne porte directement que sur la délimitation du plateau continental. On ne peut faire abstraction de ce que la zone économique exclusive confère à l'Etat côtier, jusqu'à une distance de 200 milles marins, aux termes de l'article 56 de la convention de 1982, des droits souverains sur les ressources naturelles, non seulement des eaux surjacentes, mais également et en même temps des fonds marins et de leur

sous-sol. On ne peut pas faire abstraction non plus de ce que les droits de plateau continental s'étendent aujourd'hui, comme l'énonce l'article 76, à tout le moins jusqu'à la limite extérieure de la zone économique exclusive. Il existe ainsi une corrélation certaine — je ne dis pas: une coïncidence ou une identité totales — entre les concepts de plateau continental et de zone économique exclusive, et il paraît impossible, aujourd'hui, sous peine de perdre de vue l'évolution du droit coutumier de la mer, d'aborder une délimitation du plateau continental en faisant purement et simplement le silence sur le concept de zone économique exclusive. C'est pourtant là l'attitude que la Partie adverse paraît avoir adoptée.

Il reste, Monsieur le Président, pour compléter ce rapide inventaire des sources du droit applicable, à évoquer l'article 83 de la convention de 1982 sur le droit de la mer intitulé: «Délimitation du plateau continental entre Etats dont les côtes sont adjacentes ou se font face»:

> «La délimitation du plateau continental entre Etats dont les côtes sont adjacentes ou se font face est effectuée par voie d'accord conformément au droit international tel qu'il est visé à l'article 38 du Statut de la Cour internationale de Justice, afin d'aboutir à un résultat équitable.»

Il n'est pas inutile de rappeler que cette disposition a été introduite dans le projet de convention le dernier jour de la conférence, le 28 août 1981, sauf erreur de ma part, à la suite de contacts pris entre des délégations représentant respectivement le président de la conférence et les deux groupes d'Etats qui s'étaient opposés jusque-là au sein du groupe de négociation 7. Son introduction dans le projet de convention suscita des réserves de la part d'une douzaine d'Etats, qui estimaient n'avoir pas eu le temps d'étudier le texte. D'autres délégations, semble-t-il, exprimèrent leurs réticences en privé. Je puise ces indications dans une opinion qui accompagne l'arrêt de 1982 (*C.I.J. Recueil 1982*, opinion dissidente de M. Oda, p. 245, par. 142) dans une étude du professeur Oxman, vice-président de la délégation américaine (*American Journal of International Law*, vol. 76, 1982, p. 14).

Il faut toutefois noter que la conférence n'est parvenue à mettre fin ainsi, *in extremis*, à une controverse qui l'avait divisée pendant des années qu'au prix d'une véritable stérilisation de la substance même du texte.

D'abord parce que la disposition adoptée se borne, selon l'expression du professeur Caflisch, à une «exhortation adressée aux négociateurs» («Les zones maritimes sous juridiction nationale», dans *Le nouveau droit international de la mer*, Paris, Pedone, 1983, p. 102); elle n'énonce aucune règle qui s'adresserait, en l'absence d'accord, au juge ou à l'arbitre international. C'est ce que souligne également le professeur Oxman *(loc. cit.)*.

D'autre part, même en tant que directive destinée à inspirer les gouvernements dans leurs négociations, le texte se révèle comme dépourvu de toute substance réelle. Pour obtenir un semblant de consensus, les rédacteurs du texte ont en effet supprimé toute mention de l'un comme de l'autre des deux concepts qui s'étaient affrontés pendant des années: plus d'«équidistance», plus de «principes équitables». «Dans le nouveau texte, a constaté la Cour, toute indication d'un critère spécifique pouvant aider les Etats intéressés à parvenir à une solution équitable a disparu» (*C.I.J. Recueil 1982*, p. 49, par. 50). Comme le souligne l'opinion que j'ai déjà citée, l'article 83 «ne répond pas à la question de savoir en quoi consiste [la] solution équitable, ni quelle est la méthode à appliquer pour y aboutir»; il énonce, dit la même opinion, «une règle fourre-tout, capable de satisfaire les uns et les autres», et il est difficile d'en «extraire ... un sens positif» (*C.I.J. Recueil 1982*, p. 246 et 247, par. 143 et 144). Les au-

teurs ne s'y sont pas trompés: «a text that says nothing of significance», estime le professeur Oxman (*op. cit.*, p. 15); «illustration saisissante» d'une «ambiguïté délibérée», déclare de son côté le professeur Quéneudec (rapport au colloque de Rouen de la Société française pour le droit international, *Perspectives du droit de la mer à l'issue de la troisième conférence des Nations Unies*, Paris, Pedone, 1984, p. 149).

Tant par les conditions de son adoption que par son contenu, l'article 83 de la convention sur le droit de la mer ne saurait donc être regardé comme constituant à lui seul le *corpus juris* du droit applicable par la Cour en l'absence d'un accord entre les Etats intéressés. S'il indique l'objectif à atteindre, indication précieuse bien entendu, il est muet sur la voie à suivre pour y parvenir. L'article 83 se borne à énoncer un standard et, comme dans tous les ordres juridiques, c'est au juge qu'il appartient de doter ce standard d'un contenu effectif: «texte succinct», observe l'arrêt du *Golfe du Maine*, qui «ouvre la porte à la poursuite du développement résultant de la jurisprudence internationale en la matière» (par. 95).

Par leur compromis, les Parties ont demandé à la Cour de leur indiquer «quels sont les principes et règles de droit international qui sont applicables» à la délimitation de leur plateau continental. Dès lors que les Parties sont d'accord sur la nécessité juridique d'un résultat équitable et que leur différend porte uniquement sur les moyens pour y parvenir conformément au droit international, il appartient à la Cour, de l'avis de Malte, de définir quels sont, selon le droit international, les principes et règles régissant l'opération même de délimitation et non plus seulement le résultat. Et, pour cela, l'article 83, quelque précieux qu'il soit en ce qui concerne la finalité à poursuivre, n'est malheureusement d'aucun secours.

II. L'OPÉRATION DE DÉLIMITATION

J'en arrive ainsi, Monsieur le Président, au second foyer de divergence, à savoir le cheminement juridique conduisant à une délimitation conforme au droit international. C'est ce cheminement que la Cour a désigné en 1969, puis à nouveau en 1982, du nom de «process of delimitation» (*C.I.J. Recueil 1969*, p. 22, par. 18 et 20; *C.I.J. Recueil 1982*, p. 47, par. 44, et p. 77, par. 106). En 1969 le terme était traduit en français par la Cour par «opération de délimitation»; en 1982 il l'a été par «processus de délimitation», mais l'idée est la même dans les deux cas. La Chambre de la Cour a repris le vocable d'«opération de délimitation» dans son arrêt de 1984 dans l'affaire du *Golfe du Maine* (*C.I.J. Recueil 1984*, p. 300, par. 115, et *passim*). C'est sur la structure de cette opération que portent certaines des divergences les plus profondes entre les Parties.

Il me paraît nécessaire d'identifier les positions des Parties sur cette question capitale, avant d'exposer les vues de Malte sur l'opération de délimitation et sur les relations entre le titre juridique et la délimitation.

A ces trois aspects — les positions des Parties, le contenu de l'opération de délimitation, les relations entre titre et délimitation — seront consacrées les trois sections de ce chapitre.

L'audience est levée à 12 h 52

DOUZIÈME AUDIENCE PUBLIQUE (29 XI 84, 10 h)

Présents : [Voir audience du 26 XI 84.]

M. WEIL : Monsieur le Président, Messieurs les juges, comme je l'ai indiqué hier, mon exposé sera articulé autour de quatre des cinq thèmes qui forment, me semble-t-il, les composantes de la controverse juridique, le cinquième — la proportionnalité — devant être traité par mon ami Ian Brownlie.

J'ai examiné brièvement la question du droit applicable par les Parties et j'ai abordé celle de l'opération de délimitation, en précisant que je m'attacherai successivement aux positions des Parties, au contenu de l'opération de délimitation et aux relations entre titre et délimitation.

1. Les positions des Parties

Comment, par quelle voie, parvenir à cette solution équitable qui constitue la finalité indiscutée de l'exercice de délimitation? Sur cette question fondamentale, quelles sont les positions des Parties?

La position de Malte, énoncée avec clarté dans nos écritures (II, CMM, p. 58-61, par. 108-117; p. 74-83, par. 152-176), se résume en quelques mots. L'opération de délimitation doit s'enraciner dans le fondement juridique du titre de l'Etat côtier à des droits de plateau continental, et son point de départ doit, en conséquence, être en rapport avec ce fondement juridique. Ce premier pas n'épuise cependant pas la question, car, pour être conforme au droit international, il ne suffit pas que la délimitation soit ancrée dans le droit, elle doit également aboutir à une solution équitable. C'est pourquoi ce premier pas se prolonge nécessairement par la vérification de l'équité du résultat, vérification qui s'opère par la confrontation du résultat aux circonstances pertinentes de l'affaire, et, s'il y a lieu, par sa soumission au test de proportionnalité. Contrairement à celle de Malte, la thèse de la Libye ne se prête pas à un bref résumé. Nous aurions aimé pouvoir défendre la philosophie maltaise, si j'ose dire, de l'opération de délimitation face à une approche libyenne bien définie. Une controverse à visage découvert est toujours préférable à un combat dans l'ombre. Il nous faut cependant constater, à notre grand regret, que la Partie adverse a choisi la stratégie du brouillard, nous rendant ainsi la tâche particulièrement difficile.

Deux courants contradictoires traversent en effet les écritures libyennes. Dans le mémoire libyen, la délimitation proposée est dominée par le concept qui constitue, selon la Libye, le fondement juridique du titre de l'Etat côtier au plateau continental, c'est-à-dire le prolongement naturel. Dans la réplique libyenne, au contraire, la délimitation demandée est présentée comme dictée par les circonstances de fait, en dehors de toute prise en considération du titre juridique au plateau continental. A partir de là, les conceptions libyennes se ramifient à l'extrême, et ce n'est pas sans quelque scrupule que j'invite la Cour à me suivre dans le labyrinthe — dépourvu hélas! de fil d'Ariane — des thèses adverses.

Avant d'engager la Cour dans les flottements et contradictions des thèses libyennes, je voudrais cependant apporter une précision d'ordre terminologique.

Je vais être amené, comme mes collègues, à utiliser le terme de *Rift Zone*, et je tiens à répéter ce qui a déjà été dit par eux. Même utilisé avec un *R* et un *Z* majuscules, cette expression ne correspond à aucune désignation toponymique

connue ou reconnue. Qu'il y ait eu dans cette région des phénomènes de *rifting* n'autorise pas à désigner cette région par ce vocable à l'apparence scientifique qui peut donner l'impression que l'on serait en présence de *la* zone de *rifting* par excellence. Les mêmes phénomènes de *rifting* se sont produits ailleurs entre Malte et la Libye, et bien entendu ailleurs dans le monde. Je n'emploierai donc, comme mes collègues, le terme de *Rift Zone* que pour apporter la contradiction à la Libye.

C'est pour cette raison que je m'en tiendrai à l'appellation anglaise utilisée par la Partie adverse, sans essayer de la traduire en français.

Une seconde raison milite dans le même sens. J'aurais pu recourir à l'expression «zone d'effondrement», choisie par les traducteurs et par les interprètes de la Cour. Si je ne l'ai pas fait, c'est parce que ce terme évoque pour le profane que je suis un «collapse» d'une certaine envergure, un effondrement, et crée l'image d'une vaste zone dans laquelle le fond marin se serait effondré, laissant la place à un vaste trou. Or, d'après les informations que j'ai recueillies, car je ne suis pas homme de science, l'expression «zone d'effondrement» ne comporte scientifiquement aucune connotation dimensionnelle. Comme le mémoire libyen le précise à juste titre:

> «The terms *rift, rifting, rift valley* and *rift zone* may be understood through the definition of *rift*: a geomorphological term describing a narrow cleft, fissure or other opening in rock, made by cracking or splitting.» (**I**, ML, p. 29, note 3.)

Ce serait une erreur de s'imaginer cette soi-disant *Rift Zone* comme une espèce de gigantesque fosse dans laquelle le lit de la mer se serait effondré. D'abord parce qu'on n'est pas en présence d'une zone homogène, mais d'un assemblage d'accidents naturels divers. Le mémoire libyen n'en fait pas mystère:

> «The *various* features that will be discussed here combine to make up a *rift* zone (hereinafter referred to as the "Rift Zone") — a *feature* of major importance to this case . . .» (*Ibid.*, par. 3.12.) (Les italiques sont de moi.)

Le glissement sémantique ne saurait être plus clair. Ensuite parce que cette soi-disant zone est constituée d'une succession de hauts et de bas, de creux et de crêtes. Les creux les plus profonds — qui ne dépassent pas 1715 mètres — sont ceux des fosses de Pantelleria, Malte et Linosa: ils se trouvent tous, comme mon ami Elihu Lauterpacht l'a montré hier, à l'ouest et au sud-ouest de Malte et, sauf pour l'extrémité de la fosse de Malte, sont étrangers à la délimitation entre Malte et la Libye. Quant aux chenaux de Malte et de Medina, qui, eux, intéressent pleinement notre délimitation, leur profondeur ne dépasse guère 500 mètres: on comprend que leur présence gêne visiblement la partie adverse.

Voilà la seconde raison pour laquelle je n'ai pas cru devoir utiliser la traduction française de «zone d'effondrement».

Troisième raison enfin, qui explique que je conserverai l'appellation libyenne en anglais de *Rift Zone*: le mot anglais *rift* est, paraît-il, utilisé couramment par les scientifiques de langue française, et les traducteurs de la Cour eux-mêmes ont rendu *rift* par *rift* dans la version[1] française du mémoire libyen qu'ils ont préparée à l'intention des membres de la Cour.

Je referme cette parenthèse terminologique, et je prie maintenant respectueusement la Cour de bien vouloir m'accompagner pendant quelques minutes dans le dédale des positions libyennes.

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[1] Non reproduite. *[Note du Greffe.]*

Voyons d'abord la première approche de nos adversaires, qui se dédouble elle-même en deux hypothèses.

Dans cette première approche, qui est celle du mémoire, la Libye aboutit à une revendication axée sur la soi-disant *Rift Zone* à partir d'un processus de délimitation exprimant ce que la Libye appelle la relation conceptuelle entre prolongement naturel et délimitation *(the conceptual relationship between natural prolongation and delimitation)* (I, ML, p. 83, par. 6.09). Selon la Libye, deux situations doivent être distinguées.

Première situation. Lorsqu'on est en présence, comme le mémoire libyen soutient que c'est le cas dans notre affaire, de deux prolongements naturels physiquement distincts, l'opération de délimitation, explique le mémoire libyen, part du titre juridique des parties à un plateau continental, c'est-à-dire, selon la Libye, du concept de prolongement naturel. En l'espèce c'est donc, explique toujours le mémoire libyen, avec l'identification de la séparation naturelle «indiquée» par la soi-disant *Rift Zone* et par la zone des escarpements que le processus commence. Après quoi, nous dit le mémoire libyen, il faut vérifier si cette délimitation conduit à un résultat équitable à la lumière des circonstances pertinentes de l'affaire, et c'est seulement aux termes de cette vérification que la délimitation indiquée par le titre juridique peut devenir la délimitation définitive (*ibid.*, p. 91, par. 6.25; p. 113, par. 6.86; p. 133, par. 8.18; p. 153, par. 9.64; p. 154, par. 10.01).

Dans cette première hypothèse, prétendument réalisée dans notre affaire, d'une séparation entre deux plateaux continentaux physiquement distincts, le processus de délimitation, tel que le décrit le mémoire libyen, présente, on le constate, trois caractéristiques majeures. D'abord, l'opération de délimitation repose sur l'idée que titre juridique et délimitation marchent la main dans la main *(go hand in hand)* (I, ML, p. 83, par. 6.09; cf. II, CML, p. 56, par. 2.84). En second lieu, le processus de délimitation part, à titre de premier pas, de la prise en considération du titre juridique au plateau continental (le prolongement naturel, selon la Libye) et se poursuit avec la vérification de l'équité du résultat grâce à la confrontation avec les circonstances pertinentes. Enfin, troisième trait: c'est la nature qui précise elle-même (*points up*; I, ML, p. 132, par. 8.13) la délimitation à retenir: selon la Libye, une zone frontière divisant les prolongements naturels des parties peut être dans notre cas physiquement identifiée (*ibid.*, p. 134, par. 9.02).

Voilà pour la première hypothèse exposée dans le mémoire.

Seconde situation. La seconde situation envisagée par le mémoire libyen — toujours dans le cadre de l'approche du mémoire — concerne les cas dans lesquels il n'existe qu'un seul plateau continu, qui constitue le prolongement naturel aussi bien de l'un que de l'autre des deux Etats. En ce cas, nous dit-on, les caractéristiques géologiques et géomorphologiques des fonds marins et de leur sous-sol ne revêtent plus le caractère de discontinuité fondamentale indicative par elle-même d'une frontière maritime; elles cessent d'être déterminantes *(determinative, conclusive)* pour la délimitation et sont simplement à prendre en considération comme des circonstances pertinentes parmi d'autres (*ibid.*, p. 83, par. 6.09; p. 91 et 92, par. 6.26 à 6.28; p. 102, par. 6.55).

Dans cette seconde situation le tableau n'est plus le même. D'abord, nous dit-on, titre juridique et délimitation (qui tout à l'heure allaient «hand in hand») n'ont maintenant plus de corrélation nécessaire (I, ML, p. 83, par. 6.09). Ensuite, nous dit-on, il n'y a plus cette fois-ci ni premier pas axé sur le titre juridique ni vérification par la mise en balance des circonstances pertinentes: le processus se réduit à la seule prise en considération des circonstances pertinentes, au sein desquelles les catactéristiques physiques du sol et du sous-sol

trouvent leur place parmi d'autres (**I**, ML, p. 92, par. 6.28). Enfin, et par voie de conséquence, ce n'est plus, cette fois-ci, la nature, mais la mise en balance des circonstances pertinentes, qui indique la frontière (**I**, ML, p. 91 et 92, par. 6.26 à 6.29; p. 102, par. 6.55).

Selon le mémoire libyen, je le rappelle, ce n'est pas cette seconde hypothèse qui se trouve réalisée dans notre affaire, mais la première, celle de l'existence de deux prolongements naturels physiquement distincts (*ibid.*, p. 102, par. 6.54; p. 127, par. 8.01; p. 132, par. 8.13; p. 133, par. 8.17).

Voilà, Monsieur le Président, Messieurs les juges, la première des deux lignes de pensée exposées par la Libye, celle qu'elle a exposée au stade du mémoire.

Dans la réplique libyenne apparaît une seconde approche, très différente.

Dans cette deuxième approche la distinction, présentée par le mémoire comme majeure, entre les situations à plateaux physiquement séparés et les situations à plateau continu est passée sous silence, oubliée, effacée. Dans notre cas, nous dit-on à présent, comme dans tous les autres, titre juridique et délimitations sont toujours fondamentalement séparés. Dans notre cas, nous dit-on, comme dans tous les autres, l'opération de délimitation, loin de comporter un point de départ ancré dans le titre juridique, commence directement par la prise en considération et la mise en balance des faits. Le résultat, c'est-à-dire la délimitation, nous dit-on, est le produit de cette mise en balance (ci-dessus, RL, p. 90, par. 7.15).

En d'autres termes, les caractéristiques physiques des fonds marins, quelle que soit la situation, ne conduisent plus jamais à elles seules à mettre en évidence la délimitation; elles ne sont jamais que des circonstances pertinentes parmi d'autres, et c'est la mise en balance de l'ensemble de ces circonstances qui conduit à *(points to, points towards)* la solution équitable. Voilà ce que l'on nous explique abondamment dans la réplique (par exemple: ci-dessus, RL, p. 7, par. 1.04; p. 81, par. 6.17; p. 84, par. 6.23; p. 98-99, par. 8.15). Dans cette nouvelle optique, on le constate, les circonstances de fait ne remplissent plus jamais la fonction d'une vérification du résultat indiqué par le titre juridique, c'est-à-dire par le prolongement naturel; elles conduisent toujours directement à la solution. C'est toujours par la prise en considération des faits, nous dit-on en toutes lettres, que «l'exercice de délimitation commence» (ci-dessus, RL, p. 88, par. 7.09); ce sont toujours les faits de l'espèce qui constituent «le point de départ» de la délimitation (*ibid.*, p. 98, par. 8.14). Mais écoutons la réplique adverse nous décrire elle-même cette nouvelle approche:

> «Libya examines the facts, opening up the map, observing the coasts of the Parties . . . and all the geographical, geomorphological and geological features. Other factors such as the presence of third States and the conduct of the Parties are examined.» (*ibid.*, p. 96, par. 8.09.)

Après quoi il convient, toujours selon la description adverse, de déterminer, parmi les faits ainsi relevés,

> «which ones are relevant and how much weight should be accorded those that are relevant in order to reach an equitable result. . . . What then remains is for the result that emerges from the facts to be tested by means of the element of proportionality.» (*Ibid.*, *loc. cit.* et p. 99, par. 8.15.)

La *Rift Zone*, la *Rift Zone*, la *Rift Zone*: voilà en quoi se concentre en définitive, par-delà des distinctions et sous-distinctions, la revendication libyenne. Mais, Monsieur le Président, c'est une revendication, ce n'est pas une thèse. Car, pour peu que l'on pose la question: pourquoi — j'entends: pourquoi en

droit — la *Rift Zone*? la consultation des écritures libyennes, je crois l'avoir montré, produit des réponses à peu près aussi claires et cohérentes que celles de la pythie de Delphes.

De contradiction en nuance, de nuance en contradiction, l'analyse conceptuelle — c'est le mot employé par nos adversaires — qui prétend sous-tendre la revendication de la *Rift Zone* finit par échapper à l'entendement.

Pourquoi, Monsieur le Président, pourquoi titre et délimitation marchent-ils «la main dans la main» dans certains cas et évoluent-ils sur des planètes différentes dans d'autres?

Comment comprendre que l'on nous décrive longuement un processus comportant un «premier pas» suivi d'une vérification par les circonstances pertinentes (**I**, ML, p. 113, par. 6.86) et qu'en même temps on proclame avec indignation que «tout le concept d'une «délimitation primaire» est étranger à la pensée de la Libye» (ci-dessus, RL, p. 94, par. 8.03)?

Comment accepter que Malte soit accusée — et sur quel ton! — une fois, dix fois, vingt fois de négliger les faits, de *leap-frog*, de «jouer à saute-moutons» avec eux, de préconiser à la place un schéma purement abstrait dans lequel les faits seraient réduits au rôle subalterne de «facteurs subsidiaires» (ci-dessus, RL, p. 25, par. 3.17)? Mais la Partie adverse aurait-elle oublié que c'est elle — et non pas Malte — qui a exposé dans cette affaire une série de distinctions d'une complexité qui défie le bon sens; que c'est elle — et non pas Malte — qui a la première parlé de «premier pas» et qui a la première introduit dans le débat l'idée d'une délimitation primaire et d'une espèce de présomption; que c'est elle — et non pas Malte — qui a la première proposé à la Cour une délimitation fondée sur la prise en considération du titre juridique et sur la vérification ultérieure de l'équité du résultat par les circonstances pertinentes et le test de proportionnalité (voir **I**, ML, p. 91, par. 6.25; p. 133, par. 8.18; p. 101, par. 6.51; p. 153, par. 9.64)? Avant de nous accabler de ses sarcasmes et de tourner en dérision notre prétendue «abstraction», la Partie adverse aurait dû prendre la précaution de relire ses propres écrits.

Et comment, Monsieur le Président, comment se laisser convaincre par les vertueuses protestations du genre: «La Libye n'a jamais avancé la proposition que la *Rift Zone* constitue *per se* une frontière maritime naturelle entre les Etats» (ci-dessus, RL, p. 82, par. 6.19; cf. p. 7, par. 1.04)? Aurions-nous rêvé lorsque nous avons lu des dizaines de fois, à travers le mémoire, le contre-mémoire et la réplique libyennes que la *Rift Zone* constitue une *«fundamental»*, une *«major discontinuity»* qui *«arrests»* le prolongement naturel des deux pays et qui constitue la limite à la fois de leurs titres et de leurs zones respectives, qui «rompt la continuité du plateau» et qui met en évidence de ce fait «une frontière suivant cette division» (**I**, ML, p. 89, par. 6.21; p. 102, par. 6.54; p. 154, par. 10.01; p. 134, par. 9.02; **II**, CML, p. 23, par. 2.05; p. 86, par. 4.22; p. 166, par. 8.04; p. 167, par. 8.10; ci-dessus, RL, p. 28, par. 3.27; p. 44, par. 4.32)? Aurions-nous été victimes d'un phantasme lorsque nous avons cru voir évoquer une comparaison avec le Rhin et le Mississipi «qui [est-il écrit dans le contre-mémoire libyen] forment des frontières entre des entités politiques» (**II**, CML, p. 53, note 1)? Et avons-nous eu des visions lorsque nous croyons lire, dans les conclusions finales des trois écrits libyens, que

> «there exists a fundamental discontinuity in the sea-bed and subsoil which divides the areas of continental shelf into two distinct natural prolongations extending from the land territories of the respective Parties» (Conclusion n° 4)?

Lorsque la nature indique une séparation et que cette séparation devient par là-

même une frontière, est-ce autre chose, Monsieur le Président, Messieurs les juges, que ce que l'on appelait autrefois une frontière naturelle?

Comment, enfin, appréhender une thèse qui, d'un côté, est bâtie sur l'existence de deux plateaux continentaux séparés physiquement par une «discontinuité fondamentale» et sur la négation radicale de tout «continuum» géologique et géomorphologique, et qui, d'un autre côté, constate — en toutes lettres — que l'ensemble du lit de la mer Pélagienne et de la mer Ionienne relève de la définition que l'article 76 donne de la «marge continentale» (ci-dessus, RL, p. 21, note 2)?

Monsieur le Président, il ne nous appartient pas de diagnostiquer les raisons de cet éclatement de la thèse libyenne. Peut-être dirais-je simplement que la peur du concept de distance ne nous paraît pas étrangère à cette accumulation de contradictions. Pour tenter d'échapper au principe de distance, la Libye a cherché d'abord à le reléguer dans le domaine du titre juridique et des limites extérieures et à ériger un écran coupe-feu entre le monde du titre et celui de la délimitation. C'est seulement dans l'hypothèse où elle aurait pu faire accepter comme titre le prolongement naturel au sens physique du terme qu'elle aurait admis — et avec enthousiasme alors — la corrélation entre titre et délimitation. Mais sans doute était-ce encore trop dangereux à ses yeux. Aussi la Libye suggère-t-elle d'aller plus loin. Elle veut à présent qu'en toute hypothèse titre et délimitation soient séparés, et c'est dans ce but, me semble-t-il, qu'elle réduit à présent l'opération de délimitation à la simple mise en balance des faits sans aucune prise en considération du titre juridique. De cette manière *exit* le titre, *exit* la distance, *exit* la zone économique exclusive: nous sommes dans le monde clos des faits et des circonstances pertinentes, et dans ce monde restreint, espère la Libye, point de place pour les considérations de distance venues du monde lointain du titre juridique.

Peut-être aussi la Libye a-t-elle cherché tout simplement à jouer sur plusieurs tableaux à la fois, espérant ainsi mettre davantage de chances de son côté. A la manière de la chauve-souris de la fable de La Fontaine, elle a peut-être choisi de présenter à la Cour un double visage juridique, l'un qui exprime le titre juridique, l'autre qui ne reflète que les faits:

> «Je suis oiseau; voyez mes ailes...
> Je suis souris; vivent les rats!»

Quoi qu'il en soit, rien ne saurait mieux mettre en lumière la difficulté que nous éprouvons à nous battre contre des thèses qui s'évanouissent aussitôt que nous tentons de les appréhender.

Il existe, écrit la Libye, entre les Parties des «différences fondamentales quant au cadre juridique dans lequel la délimitation doit être effectuée» (ci-dessus, RL, p. 5, par. 12), et la Libye a raison. Mais ce qu'elle oublie de dire, c'est qu'il existe aussi, à presque tous les niveaux, des «différences fondamentales» entre les diverses conceptions juridiques énoncées simultanément par elle-même.

Nul doute, Monsieur le Président, qu'il soit indispensable de mettre un peu d'ordre dans ce débat que les écrits adverses ont à ce point obscurci. Au risque de nous faire accuser à nouveau d'abstraction, je voudrais soumettre à ce sujet quelques observations sur les aspects les plus controversés de la discussion. L'impressionnisme juridique peut servir de tactique ou de rideau de fumée. Il ne suffit pas à faire du bon droit.

C'est dans cette perspective que je me tourne maintenant avec votre permission, Monsieur le Président, vers la structure et le contenu de l'opération de délimitation.

2. Structure et contenu de l'opération de délimitation

Il est certain, Monsieur le Président, que la délimitation du plateau continental doit s'effectuer conformément à des principes équitables en vue d'aboutir à une solution équitable. La Partie adverse croit nécessaire de nous rappeler ce principe à tout moment, comme si nous avions jamais soutenu le contraire. Qu'elle se rassure: nous sommes parfaitement d'accord avec elle sur ce point.

De même sommes-nous d'accord des deux côtés de la barre pour estimer que les principes équitables comportent essentiellement l'obligation de prendre en considération et de mettre en balance les circonstances pertinentes propres à notre affaire. Dans sa plaidoirie dans l'affaire des *Pêcheries*, Maurice Bourquin faisait observer que:

> «Prétendre soumettre toutes les situations à des règles précises et rigoureuses, qui s'appliqueraient uniformément sans tenir compte des réalités..., c'est aller au-devant d'un échec ... parce que c'est poursuivre une idée fausse.» (*C.I.J. Mémoires*, vol. V, p. 511.)

Et un peu plus tard Charles De Visscher évoquait dans le même esprit les «éléments individualisateurs constitutifs de l'équité» (*De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public*, Paris, Pedone, 1972, p. 13). C'est cette même idée que la Cour a récemment exprimée dans une formule frappante:

> «Ce qui est raisonnable et équitable dans un cas donné dépend forcément des circonstances, et à coup sûr il est virtuellement impossible, dans une délimitation, d'aboutir à une solution équitable en méconnaissant les circonstances propres à la région.» (*C.I.J. Recueil 1982*, p. 60, par. 72.)

Il y a quelques semaines l'arrêt du *Golfe du Maine* confirmait cette approche à de nombreuses reprises: «chaque cas concret est finalement différent des autres», énonce-t-il, «il est un *unicum*» (par. 81; cf. par. 163, 219, etc.).

Bref, l'équité, c'est avant tout la prise en considération de la spécificité de chaque cas; ce n'est jamais, comme je me suis déjà permis de le dire ici, la même eau qui coule sous le même pont.

Il est certain, dès lors, comme nous l'avons écrit, que «les circonstances pertinentes sont toujours présentes dans le processus de délimitation» (**II**, CMM, p. 60, par. 114). Jusqu'ici je ne pense pas que la Partie adverse se séparera de nous.

Est-ce à dire pour autant que l'opération de délimitation doive se limiter à la prise en considération des circonstances pertinentes, et que cette dernière l'occupe en quelque sorte tout entière?

C'est ce que soutient la Libye dans la seconde des approches qu'elle a adoptées dans ses écritures, celle exposée dans sa réplique, celle selon laquelle l'exercice de délimitation commencerait immédiatement et directement par la prise en considération des faits de l'espèce, le résultat équitable étant censé émerger directement de ces faits.

Monsieur le Président, Malte ne souscrit pas à une telle approche. Pour Malte les circonstances pertinentes doivent être «prises en considération» par le juge, mais elles ne sauraient être tenues pour un facteur primaire, direct et exclusif de la délimitation.

La mission du juge ou de l'arbitre, telle que Malte la conçoit, ne peut se ramener à celle d'un ordinateur qui tirerait automatiquement des faits de l'espèce une solution prédéterminée. Il n'y a pas, avons-nous écrit, de *diktat* des circonstances pertinentes (**II**, CMM, p. 59, par. 109, et p. 60, par. 113). Pas

davantage ne saurait-il être question de concevoir l'opération de délimitation sous la forme d'une décision purement discrétionnaire que le juge tirerait de l'examen des circonstances de fait. La Cour a fait clairement savoir, en 1969 d'abord, puis en 1982, qu'en préconisant la prise en considération des circonstances particulières de chaque espèce concrète, elle n'envisage ni une décision *ex aequo et bono*, ni l'« exercice d'un pouvoir discrétionnaire ou de conciliation », ni le « recours à la justice distributive » (*C.I.J. Recueil 1969*, p. 48, par. 88; *C.I.J. Recueil 1982*, p. 60, par. 71). La Chambre a noté de son côté, dans l'affaire du *Golfe du Maine*, qu'elle était tenue « non pas de décider *ex aequo et bono*, mais d'asseoir le résultat à atteindre sur une base de droit » (par. 59). C'est ce que la Libye paraît avoir oublié. Partir des faits, comme elle prétend le faire, se tenir aux faits sans les quitter jamais, cela s'appelle statuer *ex aequo et bono*. Des faits ne peut émerger le droit que si l'on applique à ces faits une norme juridique; les faits sont impuissants par eux-mêmes à créer du droit. Même des agissements purement matériels ne sont susceptibles d'entraîner une responsabilité sur la base du droit qu'en application d'une règle juridique préexistante prévoyant les conditions de mise en jeu et les effets de la responsabilité; sinon, c'est d'une décision en pure équité qu'il s'agit, et de rien d'autre.

Certes il importe, la Cour l'a indiqué à deux reprises, que la règle générale soit « adaptée à la diversité des circonstances de fait » (*Pêcheries, C.I.J. Recueil 1951*, p. 133; *Plateau continental de la mer du Nord, C.I.J. Recueil 1969*, p. 51, par. 94); et pour cela il faut, nous en sommes d'accord avec la Libye, examiner les faits, ouvrir la carte, observer les côtes et toutes les données géographiques et autres, prendre en compte la conduite des Parties. Mais cela ne veut pas dire que de ces faits bruts puisse jaillir, par un coup de baguette magique, une solution juridique, à la manière d'une Vénus sortant tout armée des flots.

Le droit de la délimitation du plateau continental ne saurait, selon nous, s'accommoder de la philosophie négatrice de tout principe exprimée par Talleyrand dans une formule célèbre : « Il n'y a pas de principes, il n'y a que des événements; il n'y a pas de lois, il n'y a que des circonstances. » Dans cette matière comme en toute autre, on est en présence, comme l'a observé un membre de la Cour en 1982, d'un

> « dilemme ... qui tient à la nécessité de respecter l'uniformité des principes et règles de droit dans une série de situations que caractérise leur extrême diversité » (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 106, par. 26).

Le droit de la délimitation du plateau continental exige certes que soit pris en considération l'*« unicum »* irréductible de chaque situation. Cela ne signifie pas pour autant que l'on puisse le concevoir comme formé d'une succession de solutions d'espèce, décidées au coup par coup et sans aucun fil directeur.

Les circonstances pertinentes ne sauraient donc, selon nous, suffire à déterminer la délimitation. Leur fonction ne peut être que de servir de réactif permettant de vérifier le caractère équitable (c'est-à-dire adapté aux données particulières du cas) d'une ligne reposant sur un élément objectif et général — pour *tout dire: sur le droit; faute de quoi, la délimitation dériverait inéluctablement* vers le subjectif et, du même coup, vers l'imprévisible.

Monsieur le Président, la démarche suggérée par la Libye dans sa réplique est de celles que peuvent suivre des gouvernements désireux de procéder à une délimitation conforme à des règles de droit, c'est-à-dire tenter d'aboutir à une solution identique à celle qui aurait pu être décidée par un juge ou un arbitre international. C'est ainsi que certains accords récents conclus par la France (la

Cour en trouvera des illustrations dans le compte rendu) font expressément référence au droit international (accords France/Tonga, II, CML, «Annex of Delimitation Agreements», accord n° 63; France/Maurice, *ibid.*, accord n° 65; France/Venezuela, *ibid.*, accord n° 67; France/Sainte-Lucie, *ibid.*, accord n° 69; France/Australie, *ibid.*, accord n° 71). Mais, s'ils le veulent, les gouvernements peuvent s'évader des considérations juridiques et retenir tout tracé leur paraissant équitable sur la base des seules circonstances de fait. L'équité se conçoit dans un tel cadre sous la forme la plus large. Elle peut reposer sur les considérations les plus diverses: économiques, militaires, que sais-je encore? Un gouvernement peut accepter une délimitation défavorable sur l'une de ses côtes en contrepartie d'une délimitation plus favorable sur une autre côte ou en contrepartie d'avantages économiques ou politiques d'ordre différent. Aucune règle de *jus cogens* ne vient restreindre leur liberté contractuelle à cet égard. Les faits peuvent constituer le point de départ de l'exercice de délimitation dans une délimitation conventionnelle.

Dans le cas d'une délimitation par voie judiciaire ou arbitrale la situation n'est plus la même, me semble-t-il. L'équité se conçoit alors d'une manière plus stricte que dans le cas d'une délimitation conventionnelle, car il s'agit d'une équité «within the rules», d'une «notion juridique de l'équité», comme l'a dit la Cour (*C.I.J. Recueil 1969*, p. 48, par. 88, et *C.I.J. Recueil 1982*, p. 60, par. 71). Contrairement à des gouvernements qui procèdent à une délimitation par voie d'accord, le juge ou l'arbitre ne peuvent pas adopter n'importe quelle délimitation qui leur paraîtrait équitable à partir du moment où ils ont ouvert la carte et examiné les faits. Ils ne peuvent pas se placer en marge du droit. Ils sont tenus, pour reprendre l'expression de la Chambre, «d'asseoir le résultat à atteindre sur une base de droit» (par. 59). On peut transposer ici ce que la Cour a déclaré dans un autre contexte:

> «Il ne s'agit pas seulement d'arriver à une solution équitable mais d'arriver à une solution équitable qui repose sur le droit applicable.» (*Compétence en matière de pêcheries, C.I.J. Recueil 1974*, p. 33, par. 78.)

C'est dire que la délimitation ne saurait flotter dans le vide. L'opération de délimitation ne peut pas se borner à extraire directement des faits une solution qui semblerait équitable. Elle doit nécessairement avoir un point d'ancrage dans le droit.

C'est dire aussi que la méthode de délimitation ne doit pas seulement être justifiée *ex post* par le caractère équitable du résultat, mais également *ex ante* par des considérations juridiques de caractère objectif. La séquence normale mène à la ligne de délimitation en partant du droit et de la géographie, et en passant par la méthode qui jette un pont entre eux. Commencer par tracer une ligne regardée comme équitable sur la base des seuls faits, c'est inverser l'ordre normal de l'opération de délimitation.

En refusant avec fermeté de concevoir sa mission comme l'«exercice d'un pouvoir discrétionnaire ou de la conciliation», la Cour a écarté toute approche de la délimitation du plateau continental qui, orientée exclusivement vers le résultat à atteindre, ne justifierait ce résultat que par rapport aux faits individuels et changeants de chaque espèce, sans l'ancrage sécurisant et stable du droit. Le droit ne saurait, selon la Cour, être cantonné dans le résultat à atteindre; il doit être présent également dans le processus qui l'y conduit. Limiter le droit à l'équité du résultat apprécié sur la base directe et exclusive des faits, et évacuer le droit des méthodes a appliquer, priverait la délimitation des espaces maritimes de toute sécurité, de toute prévisibilité. Si deux gouvernements décident de s'en remettre à la Cour internationale de Justice ou à l'arbi-

trage, ce n'est pas pour obtenir une espèce de conciliation obligatoire, mais pour être jugés à l'aune du droit. Toute confusion des genres risquerait de pousser les gouvernements à maximiser leurs revendications ou, plus grave encore, de les dissuader de recourir à la justice internationale. A un moment où il reste des centaines de délimitations maritimes à effectuer, un tel risque ne saurait être pris à la légère.

Monsieur le Président, le déroulement du processus de délimitation s'impose dès lors clairement de lui-même: une ligne de départ reposant sur une méthode enracinée dans le droit; puis une vérification du caractère équitable du résultat, avec les ajustements ou corrections nécessaires pour tenir compte des circonstances particulières à l'espèce. La ligne de délimitation d'arrivée ne coïncidera donc pas forcément avec la ligne provisoire de départ. Ainsi se trouvent respectés les deux pôles de toute délimitation selon le droit international. Car, me semble-t-il, pour être conforme au droit international, une délimitation doit satisfaire à deux conditions, l'une et l'autre nécessaires, sans qu'aucune d'elles ne soit suffisante: elle doit être ancrée dans le droit; elle doit être équitable compte tenu des circonstances particulières propres à l'espèce.

Ainsi que vient de le déclarer la Chambre dans l'affaire du *Golfe du Maine*:

> «il convient d'arrêter d'abord son choix sur une méthode pratique appropriée, à utiliser pour établir provisoirement une délimitation de base, puis de prendre en considération les correctifs que les circonstances spéciales de l'espèce pourront rendre indispensable de lui apporter. Il s'agira donc d'une opération en deux étapes.» (*C.I.J. Recueil 1984*, p. 333, par. 215.)

A une «délimitation provisoirement établie» (par. 185), déclare la Chambre, fait suite une délimitation établie «à titre définitif» (par. 216).

Notre conception de l'opération de délimitation, qui paraît ainsi être également celle de la Chambre, nous a valu des critiques cinglantes de la part de la Libye, qui nous accuse de minimiser le rôle des circonstances pertinentes et de chercher à nous évader des faits pour nous réfugier dans l'abstraction (ci-dessus, RL, p. 24, par. 3.14; p. 25, par. 3.17; p. 31, par. 3.34).

La Partie adverse, je le crains, a dû nous lire un peu rapidement. Ce que nous avons écrit, et que nous *répétons*, c'est que les *circonstances pertinentes ne suffisent pas à elles seules à établir une ligne de délimitation* (**II**, CMM, p. 60, par. 113); mais, loin de leur accorder un rôle subordonné, subsidiaire, nous avons tout au contraire souligné que leur prise en considération occupe une place capitale dans l'opération de délimitation (*ibid.*, p. 58, par. 108; p. 60, par. 112 et 114).

Il est à peine besoin d'ajouter qu'il n'y a pas de hiérarchie de primaire et de secondaire entre les deux aspects de la délimitation, et que l'un n'a pas prééminence sur l'autre. Ces deux aspects ne sont dissociables que pour les besoins de l'analyse et de l'exposé. Dans la réalité ils se confondent en une opération globale et synthétique dont l'objet est de prendre en considération à la fois et en même temps le fondement du titre — élément juridique commun à toutes les délimitations du plateau continental — et les circonstances pertinentes de l'espèce — élément particulier à chaque cas.

Le titre juridique au plateau continental, sans les faits concrets de l'espèce, serait un squelette sans chair; les faits de l'espèce, sans le titre juridique au plateau continental, seraient une chair sans ossature. La conception libyenne privilégie les faits à l'état nu et néglige le droit. La conception de Malte accorde leur juste place et au droit et aux faits.

Monsieur le Président, si les vues des Parties sur l'opération de délimitation divergent aussi profondément que je viens de l'exposer, c'est parce qu'elles se

séparent sur un point précis: pour nous, le fondement juridique du titre de l'Etat côtier au plateau continental a nécessairement une incidence sur l'opération de délimitation; pour la Libye, au contraire, du moins dans la dernière version de ses écritures, titre juridique et délimitation évoluent sur des orbites différentes, et leurs routes ne se croisent pas.

C'est à ce problème précis des rapports entre le titre juridique au plateau continental et la délimitation, problème qui domine, à mon sens, l'ensemble de la controverse et qui en fournit la clé, que je voudrais m'arrêter à présent quelques instants.

3. Titre juridique et délimitation

Si Malte acceptait de situer le fondement juridique du titre au plateau continental dans le prolongement naturel au sens géologique et géomorphologique du terme, la Libye, nous l'avons vu, serait toute disposée à admettre que le titre juridique intervient dans l'opération de délimitation (**I**, ML, p. 83, par. 6.09; cf. **II**, CML, p. 56, par. 2.84). Le problème, pour elle, serait réglé à son avantage, pense-t-elle. Mais Malte estime que c'est le principe de distance qui constitue le fondement juridique du titre de l'Etat côtier au plateau continental. Comme c'est ce principe que la Libye craint par-dessus tout, elle tente à la fois de jeter le doute sur le principe de distance en tant que base juridique du titre — c'est un aspect de la thèse libyenne que j'examinerai plus tard — et elle tente aussi d'ériger une barrière infranchissable entre titre juridique et délimitation. La Libye espère ainsi, au cas où elle ne pourrait empêcher la Cour de voir dans le principe de distance le fondement juridique du titre de l'Etat côtier au plateau continental, parvenir à tout le moins à préserver la délimitation de ce principe tant redouté.

Il n'est pas excessif de dire que la négation de toute corrélation entre titre et délimitation se situe au cœur du cas libyen. Aussi comprend-on l'insistance quasi obsédante avec laquelle ces thèses se trouvent répétées d'un bout à l'autre des trois écrits libyens (**I**, ML, p. 82, par. 6.04 et 6.06; p. 89-90, par. 6.22; **II**, CML, p. 80, par. 4.10; p. 81, par. 4.12; p. 101, par. 4.52; ci-dessus, RL, p. 3-4, par. 9; p. 18, par. 3.03; p. 19, par. 3.05; p. 21, par. 3.08; p. 22, par. 3.10; p. 23, par. 3.13; p. 31, par. 3.33; p. 33, par. 4.02; p. 72, par. 5.40).

Nous avons dénoncé les vices de ces thèses dans nos écritures (**II**, CMM, p. 54-56, par. 96-101; ci-dessus, RM, p. 29-32, par. 48-57). L'importance décisive du problème me conduit néanmoins à en reprendre ici quelques aspects.

Monsieur le Président, il est évident, et nous en sommes parfaitement d'accord, que les concepts de titre juridique — *entitlement* — et de délimitation ne sont pas synonymes et ne se recouvrent pas. La Libye nous fait un procès entièrement imaginaire en nous faisant continuellement grief de les confondre. Nous savons que le titre juridique intéresse la détermination des concepts sur la base desquels un Etat est juridiquement habilité à exercer une certaine juridiction sur les espaces maritimes au large de ses côtes; il se rapporte essentiellement à la fixation des limites extérieures, vers le large. Nous savons aussi que la délimitation, quant à elle, consiste à tracer une frontière entre des Etats voisins lorsque la situation géographique ne permet pas à chacun des Etats intéressés de jouir de son titre jusqu'à son extrême limite. Nous savons enfin que la Cour a fait clairement état de cette distinction entre titre et délimitation, tant dans son arrêt de 1969 (*C.I.J. Recueil 1969*, p. 22, par. 18 et 20; p. 32, par. 86), que dans son arrêt de 1982 (*C.I.J. Recueil 1982*, p. 47, par. 44; p. 61, par. 73).

Tout cela, nous le savons, de tout cela nous sommes d'accord. Le fait que les deux concepts soient distincts, et ils le sont, n'implique cependant pas qu'il ne

puisse pas y avoir de corrélation entre eux. En concluant de la non-synonymie à la non-corrélation, le Libye se livre à un *non sequitur*.

Il nous paraît évident qu'une délimitation de plateau continental ne peut pas s'effectuer de la même manière selon que le titre juridique sur le plateau repose, mettons, sur l'occupation effective ou sur le prolongement naturel au sens physique du terme, ou sur une distance donnée des côtes ou sur quelque autre concept juridique. Une délimitation complètement détachée de la nature juridique du titre, et qui serait la même quel que soit le concept juridique du titre, serait étrangère à tout principe de droit; elle consisterait en une répartition du plateau reposant uniquement sur des considérations d'opportunité. C'est exactement à quoi conduit la thèse libyenne d'une délimitation axée seulement sur les faits, à l'exclusion de toute prise en considération du titre juridique: la délimitation qui «émerge» des faits, pour reprendre le mot de la Libye, serait exactement la même quel que soit le fondement des droits de l'Etat côtier au plateau continental, et quelle que soit l'évolution du droit coutumier en ce domaine. La thèse libyenne conduit en quelque sorte à isoler le droit de la délimitation du plateau continental et de son environnement juridique. Elle implique une sorte d'immobilisme juridique qui contraste avec l'évolution rapide et profonde du droit de la mer.

La position de la jurisprudence sur ce problème capital ne laisse pourtant place à aucune ambiguïté.

Si la Cour a fait, dans son arrêt de 1969, la place que l'on sait au prolongement naturel, c'est parce qu'elle avait auparavant situé la base juridique des droits de l'Etat côtier sur le plateau continental dans le prolongement naturel de son territoire sous la mer (*C.I.J. Recueil 1969*, p. 22, par. 19; p. 31, par. 43). Si le prolongement naturel n'avait pas été au cœur de l'*entitlement* dans l'arrêt de 1969, il n'aurait pas trouvé sa place au cœur de la délimitation.

Dans l'affaire franco-britannique, le tribunal arbitral a rejeté une méthode de délimitation de la région atlantique préconisée par la France, au motif que: «cette méthode ne semble pas au tribunal être compatible avec le régime juridique applicable au plateau continental...» (par. 246).

Mais c'est, bien entendu, dans l'arrêt *Tunisie/Libye* que le lien entre le titre et la délimitation a été mis en lumière de la manière la plus remarquable.

Je me permettrai de rappeler que, dans un *dictum* de principe, la Cour a d'abord déclaré que:

> «les «principes et règles du droit international qui peuvent être appliqués» pour la *délimitation* des zones du plateau continental découlent nécessairement de la *notion* même de plateau continental, telle qu'elle est comprise en droit international» (*C.I.J. Recueil 1982*, p. 43, par. 36). (Les italiques sont de moi.)

Après cela comment affirmer, comme le fait la Partie adverse, que titre et délimitation évoluent dans des mondes différents? Mais ce n'est pas tout. Un peu plus loin dans le même arrêt, la Cour aborde la question du paragraphe 1 de l'article 76 de ce qui n'était alors encore que le projet de convention sur le droit de la mer. Au paragraphe 48 de son arrêt, après avoir rappelé que désormais, «dans certaines circonstances, la distance à partir de la ligne de base, mesurée à la surface de la mer, fonde le *titre* de l'Etat côtier», elle indique que dans ce cas «seule la base juridique des droits sur le plateau continental — la simple distance de la côte — peut être prise en considération comme pouvant influer sur les prétentions des Parties», c'est-à-dire sur les prétentions dans le litige soumis à la Cour, autrement dit en matière de délimitation.

L'incidence du titre sur la délimitation apparaît dans une lumière tout aussi

vive dans un troisième passage de l'arrêt de 1982 dont la Cour me permettra de donner lecture de nouveau:

> «C'est ... en partant de la côte des Parties qu'il faut rechercher jusqu'où les espaces sous-marins relevant de chacune d'elles s'étendent vers le large, ainsi que par rapport aux Etats qui leur sont limitrophes ou leur font face.» (*C.I.J. Recueil 1982*, p. 61, par. 74.)

La prise en considération des côtes — qui est une composante du concept de distance, mais qui est entièrement étrangère à celui de prolongement naturel physique — intervient donc, c'est clair, à la fois pour la fixation des limites extérieures et pour la délimitation.

Les prononcés de 1982 sont tellement dévastateurs pour le postulat libyen de l'incommunicabilité entre titre et délimitation que la Libye a tenté dans sa réplique une opération de dernière chance pour essayer d'en sauver quelque chose. Que nous dit la Libye?

D'abord, allègue-t-elle (ci-dessus, RL, p. 19, par. 3.05; cf. p. 22, par. 3.10), le paragraphe 1 de l'article 76 se réfère aux limites extérieures, et il ne peut avoir aucune incidence sur la délimitation pour une raison très simple. C'est que le même article comprend un paragraphe 10 qui dit:

> «Le présent article ne préjuge pas de la question de la délimitation du plateau continental entre des Etats dont les côtes sont adjacentes ou se font face.»

Puisque l'article 10 précise que rien dans le présent article ne préjuge de la question de la délimitation, cela signifie, explique la Libye, que le paragraphe 1 de l'article 76 ne peut pas être invoqué comme ayant un rapport quelconque avec la délimitation.

L'objection libyenne me paraît sans portée. Si la Cour a jugé utile d'évoquer l'article 76, paragraphe 1, dans l'affaire *Tunisie/Libye*, c'est précisément parce qu'elle estimait qu'il s'agissait là d'une disposition susceptible de «refléter des nouvelles tendances acceptées à prendre en considération en l'espèce» (*C.I.J. Recueil 1982*, p. 48, par. 47): «en l'espèce», c'est-à-dire dans la délimitation du plateau continental entre la Tunisie et la Libye. Pourquoi donc la Cour aurait-elle songé à évoquer ces dispositions si elle avait considéré qu'elles étaient dépourvues de toute pertinence pour l'affaire de délimitation dont elle était saisie? Que l'article 76, paragraphe 1, ait pour objet de définir les limites extérieures du plateau continental vers le large, cela est évident, certain, et nul ne le contestera. Mais la Cour n'a pas pensé qu'il y avait un obstacle à ce que cette disposition relative au titre ait une influence sur la délimitation. Elle a même pensé exactement le contraire. Elle a dit expressément que «cette définition ne doit pas être perdue de vue» (*cannot be ignored*): «perdue de vue», pour quelle fin, si ce n'est celle de la délimitation du plateau continental en cause devant elle? Mieux encore, la Cour a déclaré qu'il ne fallait pas «perdre de vue» cette disposition aux fins de la délimitation, «bien que le paragraphe 10 spécifie que les dispositions de l'article ne préjugent pas de la question de la délimitation» (p. 48, par. 47). Aux yeux de la Cour, le paragraphe 10 de l'article 76 n'a donc pas fait obstacle à la pertinence du paragraphe 1 pour la délimitation. Je ne dis pas comme régissant la délimitation — car il régit la limite extérieure — mais comme pertinent pour l'opération de délimitation. Le premier argument libyen a donc déjà été rejeté par la Cour.

Second argument libyen: la Libye conteste qu'au paragraphe 48 de l'arrêt de 1982, que j'ai analysé il y a quelques instants, la Cour ait véritablement évoqué la délimitation; la Libye n'hésite pas à nous accuser d'avoir fait de ce passage

une citation hors contexte et d'en avoir ainsi dénaturé le sens. C'est une accusation grave (ci-dessus, RL, p. 20, par. 3.06).

Monsieur le Président, le paragraphe 48 est connu de la Cour. Il parle pour lui-même. La Cour n'a-t-elle vraiment pas parlé de délimitation dans le paragraphe 48? La Cour parle dans ce passage de la distance en tant que fondement du titre de l'Etat côtier, et immédiatement après elle se demande comment cette nouvelle base juridique des droits sur le plateau continental qu'est la simple distance des côtes peut influer sur les prétentions des Parties (c'est-à-dire, je le répète, au sujet de la délimitation du plateau continental et non pas sur leur titre juridique ou les limites extérieures du plateau, qui étaient hors de cause dans l'affaire). La position de la Cour est simple: elle déclare qu'en l'affaire dont elle était saisie le principe de distance ne fournit aucun critère de délimitation, puisque les Parties ne s'étaient pas placées sur ce terrain. D'où, *a contrario*, que si les Parties s'étaient placées sur ce terrain, la nouvelle «base juridique des droits sur le plateau continental», à savoir «la simple distance des côtes», aurait pu «influer» — le mot *influer* est de la Cour — sur leurs prétentions.

Prétendre que le paragraphe 48 ne s'intéresse pas à la délimitation ne me paraît dès lors pas conforme au texte clair de ce passage de la Cour.

La Libye avance un troisième pion encore, aussi fragile que les précédents. Elle soutient, et elle a raison, que c'est l'article 83 de la convention qui régit la délimitation du plateau continental, et non pas l'article 76, paragraphe 1 (ci-dessus, RL, p. 22, par. 3.10). Mais, comme je l'ai dit tout à l'heure, le fait que l'article 76 ne régisse pas la délimitation ne signifie pas qu'il n'ait pas d'influence sur elle.

Pour faire justice de cet argument, il suffit d'observer que la Cour a évoqué elle-même l'article 83 immédiatement après avoir fait état de l'article 76 — les deux sont cités par la Cour au paragraphe 47 et au paragraphe 49 (*C.I.J. Recueil 1982*, p. 48, par. 47, et p. 49, par. 49-50). L'existence de l'article 83 n'a donc manifestement pas fait obstacle à ce que la Cour envisage de prendre également en considération, pour la délimitation, l'article 76. La pauvreté — voulue — de la règle énoncée à l'article 83 est telle, j'espère l'avoir montré, que cette disposition ne saurait constituer à elle seule le *corpus juris* des principes et règles du droit international régissant la délimitation du plateau continental. Le recours à l'article 76 pour compléter cette matière a dû paraître d'autant plus normal à la Cour que, pour elle, le titre juridique au plateau continental, objet propre de l'article 76, est pertinent par nature pour la délimitation.

Monsieur le Président, au terme de ces observations, l'existence d'une corrélation inhérente et nécessaire entre le titre juridique au plateau continental et la délimitation me paraît établie au-delà de tout doute. Ce qui signifie que, dans la mesure où le droit international coutumier place aujourd'hui, pour reprendre le langage de la Cour, le «titre de l'Etat côtier», c'est-à-dire la «base juridique des droits sur le plateau continental», dans «la simple distance de la côte» — toutes ces expressions sont de la Cour —, l'opération de délimitation du plateau continental entre Malte et la Libye ne peut pas être menée à bien en se basant uniquement sur les faits et sans que le «principe de distance» soit «pris en considération comme pouvant influer sur les prétentions des Parties». En un mot, le principe de distance *est* pertinent pour la délimitation.

De là une double conséquence.

— Négativement, la délimitation ne peut pas prendre pour point de départ le prolongement naturel au sens physique du terme. Même s'il était établi — et mon ami Elihu Lauterpacht a montré qu'il n'est pas établi — que scientifiquement la *Rift Zone* et la zone des escarpements marquent sur le plan physique la fin du prolongement naturel de Malte respectivement vers le sud et vers l'est,

même alors l'opération de délimitation ne pourrait pas se limiter à s'appuyer servilement sur ces «faits physiques», étrangers au fondement juridique du titre de Malte et de la Libye au plateau continental.

— Positivement, la délimitation doit obligatoirement prendre comme point de départ une méthode en rapport avec le «titre de l'Etat côtier», c'est-à-dire avec le «principe de distance».

A la lumière de ces observations, il est possible à présent, Monsieur le Président, Messieurs les juges, de porter mon attention sur les deux concepts clés de la théorie juridique du plateau continental: le prolongement naturel et le principe de distance.

Tel sera l'objet des deux chapitres qui vont suivre.

III. Le prolongement naturel

J'aborde donc le concept de prolongement naturel, qui constitue l'alpha et l'oméga de la thèse libyenne.

Une remarque terminologique pour commencer.

Comme la Libye, nous prendrons le terme de prolongement naturel «dans son sens traditionnel de concept physique» (**I**, ML, p. 92, par. 6.28) — c'est ainsi qu'elle le définit —, c'est-à-dire dans la signification d'une caractéristique physique susceptible d'une identification scientifique.

Cela dit, le concept de prolongement naturel peut revêtir, même en s'en tenant à ses aspects physiques, des significations très différentes.

Dans l'affaire qui l'opposait à la Tunisie — la Cour s'en souviendra —, la Libye se fondait essentiellement sur la géologie historique des profondeurs et regardait la topographie sous-marine comme secondaire (voir les références dans **II**, CMM, p. 16, note 4); la Tunisie, au contraire, s'attachait essentiellement aux données géomorphologiques et bathymétriques.

Dans notre affaire, au contraire, tenant sans doute compte des indications de l'arrêt de 1982, la Libye a rectifié son tir et, même si les vieux démons de la géologie historique et de la tectonique des plaques refont surface de temps à autre, ce sont cette fois-ci essentiellement les données géomorphologiques et les données géologiques affectant la surface du lit de la mer qui, selon elle, caractérisent le prolongement naturel (voir les références dans **II**, CMM, p. 17, par. 33; *adde*, ci-dessus, RL, p. 59-75, par. 5.15-5.43; p. 76, par. 6.02).

Depuis son contre-mémoire, la Libye a cependant apporté une légère inflexion à cette manière de concevoir le prolongement naturel. La Libye regroupe à présent sous l'expression générique de «facteurs physiques» ou de «faits physiques» *(physical facts, physical factors)* une triade qu'elle définit comme comprenant non seulement la géomorphologie et la géologie, mais aussi la géographie (**II**, CML, p. 23, note 2; ci-dessus, RL, p. 54, note 1). Elle espère ainsi entraîner les facteurs non déterminants de la géomorphologie et la géologie derrière la locomotive des facteurs géographiques, seuls déterminants — j'aurai l'occasion d'y revenir.

Il est clair cependant — je dois le noter tout de suite — que cette nouvelle conception du prolongement naturel, constituée par le triple élément de la géographie, de la géologie et la géomorphologie, est totalement hétérogène. Les indications fournies par les caractéristiques géologiques et géomorphologiques des fonds marins ne vont pas forcément dans le même sens que ceux de la géographie côtière. Il n'y a aucune raison à priori pour que la prise en considération d'une séparation géologique ou géomorphologique du type de la soi-disant *Rift Zone* ou du type de la zone des escarpements reflète la configuration de la

géographie côtière des deux pays. Les deux données se situent sur des plans tellement différents que la coïncidence relèverait du miracle — ou de l'argument d'avocat! C'est de manière tout à fait artificielle, cela saute aux yeux, que la Partie adverse tente ce regroupement contre nature sous le vocable global de «facteurs physiques».

Etant donné que la thèse libyenne de la *Rift Zone* et de la zone des escarpements ne s'appuie en aucune façon sur la géographie côtière — avec laquelle elle n'a rigoureusement aucun rapport —, mais uniquement sur les caractéristiques géologiques et géomorphologiques des fonds marins, c'est au prolongement naturel défini par ces dernières caractéristiques géologiques et géomorphologiques que je m'attacherai ici. Quant à la géographie côtière, qui est partie intégrante du principe de distance et de la méthode de l'équidistance, je me propose de l'évoquer dans les chapitres ultérieurs.

Monsieur le Président, mon ami Eli Lauterpacht a établi que la thèse libyenne est scientifiquement inexacte. On pourrait dire du plateau continental qui s'étend entre Malte et la Libye et des accidents de la soi-disant zone exactement ce que la chambre vient de dire du golfe du Maine et du chenal nord-est:

> «Bien sûr il est possible de discerner sur ce fond unique et uniforme ce qu'on appelle des plateaux, des bancs, des bassins, des chenaux... Il s'agit ... d'un ensemble finalement assez peu significatif d'inégalités de relief...
>
> Même le plus accentué de ces accidents ... ne possède pas les caractéristiques d'une véritable fosse qui marquerait la séparation entre deux unités géomorphologiques distinctes. Il y a là tout simplement un trait naturel de la région.» (*C.I.J. Recueil 1984*, p. 274, par. 45-46.)

Ce que je voudrais à présent démontrer, c'est qu'en tout état de cause — c'est-à-dire même si les descriptions factuelles de la Libye étaient scientifiquement exactes, ce qu'elles ne sont pas — les caractéristiques géologiques et géomorphologiques des fonds marins dont la Libye fait état ne seraient pas de nature à «indiquer», à «désigner» juridiquement une délimitation qui les transposerait du plan de la nature sur celui du droit.

L'audience, suspendue à 11 h 20, est reprise à 11 h 30

Monsieur le Président, l'impuissance des caractéristiques géologiques, géomorphologiques du lit de la mer et de son sous-sol à mettre en évidence une frontière de plateau continental résulte de la conjonction de deux considérations en interaction étroite, à savoir:

Premièrement, l'existence prétendue de deux plateaux continentaux physiquement séparés par une caractéristique naturelle du type de la soi-disant *Rift Zone* est incompatible avec le concept même de délimitation.

Deuxièmement, la prise en considération des caractéristiques géologiques et géomorphologiques des fonds marins comme élément déterminant dans la délimitation du plateau continental est condamnée par le principe de l'égalité des Etats.

Tels sont les deux aspects auxquels je voudrais m'attacher tour à tour.

1. L'existence prétendue de deux plateaux continentaux physiquement séparés par un accident naturel du type de la soi-disant Rift Zone est incompatible avec le concept même de délimitation du plateau continental

Et d'abord l'incompatibilité de la thèse de la *Rift Zone* avec le concept même de délimitation du plateau continental.

Nous avons déjà fait remarquer que le concept libyen d'une délimitation «à l'intérieur de la *Rift Zone* et en suivant sa direction générale» est d'une imprécision telle que, si la Cour suivait les conclusions de la Libye, des dizaines de lignes frontières seraient possibles. Outre que, comme nous l'avons montré dans nos écritures (II, CMM, p. 23, par. 47), les limites orientale et occidentale de cette soi-disant zone sont mal définies, il ne faut pas oublier ce fait très simple que la *Rift Zone* telle que nous la dessinent les cartes libyennes (par exemple la (9) carte 17 du mémoire libyen, p. 160) couvre une étendue large de parfois plus de 100 kilomètres.

Mais là n'est pas le plus important, la Cour le constatera en se reportant à la (44) figure 13 de notre dossier[1], et je voudrais la prier respectueusement de bien vouloir se tourner un moment vers elle.

Dans la conception libyenne, c'est la soi-disant *Rift Zone* dans son ensemble, dans toute sa largeur et dans toute son ampleur, qui sépare le prolongement naturel de Malte, au nord, de celui de la Libye, au sud. Le prolongement naturel de Malte s'arrête à la lisière septentrionale et de la *Rift Zone*; le prolongement naturel de la Libye s'arrête à la lisière méridionale de la *Rift Zone*. Voilà ce que nous dit la Libye.

Si cette description était exacte, Monsieur le Président, eh bien, il n'y aurait tout simplement aucune possibilité de définir quelque ligne frontière que ce soit, et l'on devrait se contenter de prendre acte de la limite extérieure du plateau maltais et de la limite extérieure du plateau libyen! Il n'y aurait tout simplement plus lieu à délimitation puisque, par définition même, la délimitation implique la fixation d'une ligne séparant deux plateaux qui se touchent ou se chevauchent et que, dans l'une des conceptions libyennes au moins, les deux plateaux seraient séparés par un hiatus.

Dans son excellent ouvrage sur *The Legal Régime of Islands in International Law*, mon ami et collègue M. Bowett a fait justement observer qu'il ne peut se poser un problème de délimitation qu'entre des Etats qui bordent un même plateau continental. Si le plateau de chacun des Etats est détaché de celui de l'autre par une séparation physique, la seule chose qu'il y ait lieu de faire c'est de constater jusqu'où s'étend le prolongement naturel de chacun. Et comme il y a une séparation physique entre les deux, il n'y a plus de frontière commune entre les deux Etats:

> «Boundaries between shelves belonging to neighbouring States, be they opposite or adjacent, presuppose that the States share a common shelf, a shelf area likely to be of essential, physical continuity.» (*Op. cit.*, p. 221; cf. p. 144-145.)

Cette observation nous paraît parfaitement exacte.

La Libye ne se lasse pas de répéter que le plateau continental entre Malte et la Libye ne saurait être considéré comme un *continuum* (par exemple, II, CML, p. 44-45, par. 2.57; p. 45, par. 2.58; p. 47, par. 2.63; p. 49, par. 2.69; ci-dessus, RL, p. 28, note 4; p. 59, par. 5.15; p. 67, par. 5.29; p. 79, par. 5.38; p. 72, par. 5.40, etc.), puisqu'il est interrompu, selon elle, par la *fundamental discontinuity* que constitue la *Rift Zone*. Même dans ses conclusions finales, nous l'avons vu, la Libye confirme cette position. Cette conclusion est radicalement

[1] Les dossiers spécialement préparés à l'intention de la Cour par les Parties pour illustrer leurs plaidoiries ne sont pas reproduits. Si une carte ou illustration contenue dans un dossier est reprise dans le volume des cartes de la présente édition (V), elle est dûment signalée en marge du texte. *[Note du Greffe.]*

incompatible avec le concept de délimitation, qui fait l'objet du compromis par lequel l'affaire a été portée devant la Cour.

La Libye a-t-elle pris conscience du caractère autodestructeur de la thèse qui est la sienne d'une zone séparant les deux plateaux continentaux de Malte et de la Libye aux lieu et place d'une ligne les mettant en contact? Je ne sais. Toujours est-il que, sans modifier sa conclusion finale en faveur d'une frontière «within, and following the general direction of, the Rift Zone», elle a entrepris dans sa réplique d'esquisser un embryon de ligne, une espèce de «inchoate line», sous la forme de la soi-disant «Axial Ridge Line» (ci-dessus, RL, cartes 10 et 13) dont a parlé hier mon ami Elihu Lauterpacht.

La Cour trouvera cette ligne reproduite sur la figure 13 de notre dossier. Il s'agirait, la Cour s'en souvient, d'une ligne le long de laquelle la croûte terrestre aurait été amincie au maximum du fait des déchirements survenus en profondeur (ci-dessus, RL p. 65-66, par. 5.27; p. 83, par. 6.20; p. 84, par. 6.22). Le long de cette ligne, nous explique-t-on même, pourrait se produire un jour une séparation des plaques, créant ainsi un nouvel océan. Mais, ajoute prudemment la réplique, cette évolution n'est que «spéculative» (*ibid.*, p. 83, note 2). Nous voici en tout cas rassurés!

Monsieur le Président, même en faisant abstraction du caractère scientifiquement discutable — le mot est faible — de cette invention de dernière minute, dont le moins que l'on puisse dire est qu'on peut la soupçonner d'être quelque peu *pro domo sua*, comment ne pas constater une fois de plus la contradiction interne des thèses libyennes? Si la *Axial Ridge Line* existait, il n'y aurait plus de séparation des prolongements naturels le long des bords nord et sud de la *Rift Zone*. On ne saurait concevoir l'existence simultanée de deux sortes de limites des prolongements naturels entre Malte et la Libye: l'une qui serait formée de deux limites, qui suivraient respectivement, à une grande distance l'une de l'autre — des dizaines de kilomètres — les lisières nord et sud d'une zone dotée d'une certaine épaisseur; l'autre, de caractère linéaire, le long de la prétendue *Axial Ridge Line*. Dans le premier cas les prolongements naturels de Malte et de la Libye ne se toucheraient pas; dans le second ils se toucheraient le long d'une ligne. La thèse de la *Rift Zone* et celle de la *Axial Ridge Line* s'excluent mutuellement. Voilà la vérité, Monsieur le Président.

L'hétérogénéité s'aggrave encore lorsqu'on nous explique que — ô! miracle! — la ligne de plus grand amincissement court à peu près entre les deux séries de fosses et chenaux dont la Libye vient également de découvrir l'existence dans sa réplique de juillet dernier, l'une qui suivrait l'itinéraire de la fosse et du chenal de Malte au nord, l'autre qui suivrait l'itinéraire de la fosse de Linosa et du chenal de Medina au sud (ci-dessus, RL, p. 83, par. 6.21, et p. 84, par. 6.22). Ainsi donc ce n'est plus seulement la ligne du plus grand amincissement qui est mise en avant, mais une espèce de ligne médiane entre deux séries de profondeurs — c'est-à-dire une ligne de crêtes. Ce qui est d'ailleurs tout à fait inexact: si la Cour veut bien jeter un coup d'œil sur la figure 13 de notre dossier, qui reproduit la carte 13 de la réplique libyenne, elle constatera immédiatement que la soi-disant *Axial Ridge Line* ne passe pas du tout *entre* deux séries de fosses situées l'une au nord l'autre au sud, mais en plein milieu *dans* les fosses de Pantelleria et de Linosa.

La Libye nous parle d'une troisième ligne encore, celle qui unit les points terminaux sud des délimitations conventionnelles Italie/Tunisie et Italie/Grèce: une telle ligne, nous dit la Libye, ne s'écarterait pas substantiellement d'une ligne courant à travers la *Rift Zone* (ci-dessus, RL, p. 77, par. 6.05, et p. 84, par. 6.22). Cela fait beaucoup de lignes. La Libye n'a toutefois pas poussé cette idée jusqu'à l'illustrer en compagnie des deux autres: les deux autres figurent sur ces cartes,

pas celle-là. On comprend pourquoi. Si la Cour veut bien se reporter à nos (44)(36) figures 13 et 4 où les lignes de délimitation italo-tunisiennes et italo-grecques sont plus clairement reproduites, elle constatera que la ligne unissant les points terminaux sud de la délimitation conventionnelle Italie/Tunisie et de la délimitation conventionnelle Italie/Grèce n'a pas le moindre rapport avec la *Axial Ridge Line* ou avec la ligne qui court à mi-chemin entre les deux prétendues séries de fosses et de chenaux.

Les coïncidences miraculeuses ne s'arrêtent d'ailleurs pas là: la proposition libyenne de 1973, exclusivement fondée, cela a été dit par la Libye, sur la proportionnalité des longueurs côtières, cette proposition libyenne de 1973 est à son tour présentée comme proche de la ligne de plus grande minceur de la croûte terrestre et de la ligne de crête qui sépare les séries de plus grandes pro- (30) fondeurs (ci-dessus, RL, p. 84, par. 6.22, et carte 13). Que de coïncidences!

On se défend mal de l'impression que, sensible peut-être aux critiques maltaises, la Partie adverse a tenté l'impossible, mais vraiment l'impossible, pour évoquer une *ligne*, à la place d'une *zone* séparative de plusieurs dizaines de kilomètres d'épaisseur. Mais, ayant fait cela, la Libye n'a pas eu le courage, comme diraient les psychanalistes, de passer à l'acte. La ligne de délimitation en est demeurée à l'état de velléité, puisque les conclusions finales restent fidèles, je l'ai indiqué tout à l'heure, à la zone frontière — «a boundary within, and following the general direction of, the Rift Zone» — autrement dit à la non-frontière.

2. La prise en considération de caractéristiques géologiques et géomorphologiques des fonds marins comme élément déterminant dans la délimitation du plateau continental est condamnée par le principe de l'égalité des Etats

J'en viens à présent, Monsieur le Président, à la seconde raison qui s'oppose à la prise en considération des données géologiques et géomorphologiques des fonds marins comme élément déterminant dans la délimitation du plateau continental: le droit international a écarté cette prise en considération parce qu'elle s'est avérée incompatible avec le principe de l'égalité des Etats.

L'égalité des Etats intervient en effet à un double niveau pour écarter une délimitation fondée sur les caractéristiques physiques des fonds marins et de leur sous-sol.

C'est l'égalité des Etats, d'abord, qui a constitué l'élément moteur de l'effacement du prolongement naturel et de l'émergence du principe de distance dans le droit du plateau continental. C'est l'égalité des Etats ensuite, qui est à la racine des principes de non-empiétement et de non-amputation dans la délimitation du plateau continental.

Je me propose d'examiner ces deux aspects l'un après l'autre.

L'évolution du droit international du prolongement naturel vers le principe de distance

L'évolution du droit du plateau continental a été dominée par la préoccupation de réduire les inégalités entre Etats côtiers selon que la nature les a dotés d'un plateau continental plus ou moins large répondant au critère physique de prolongement naturel. Telle est la première constatation que l'on peut faire à cet égard.

Cette évolution, qui a commencé «très tôt», pour reprendre l'expression de la Cour — c'est-à-dire dès la convention de 1958 et ses travaux préparatoires à la

Commission du droit international — a été relatée par la Cour dans son arrêt de 1982 (*C.I.J. Recueil 1982*, p. 45-49, par. 41-50), ainsi que dans plusieurs opinions jointes à cet arrêt. Nous l'avons nous-mêmes retracée dans nos écritures (**II**, CMM, p. 63-74, par. 122-151; ci-dessus, RM, p. 36-41, par. 65-71). Le silence complet observé à ce sujet par la Libye dans sa réplique m'oblige à revenir ici sur certains aspects de cette évolution d'une importance capitale, au risque de rappeler des données connues de tous.

En 1953 déjà, l'attention de la Commission du droit international avait été attirée par certains de ses membres sur le cas des Etats qui, n'ayant pas de plateau continental au sens physique du terme, pouvaient être défavorisés par une conception exclusivement physique du plateau; et la suggestion avait été émise dès ce moment-là — il y a trente ans déjà! — de définir le plateau continental par une certaine distance de la côte, quelle que soit la profondeur (*Annuaire de la Commission du droit international*, 1953, vol. II, p. 9). Le concept de distance, la Cour voudra bien nous l'accorder, n'est ni une découverte récente ni le fruit de l'imagination de Malte!

C'est dès ce moment-là également que l'attention de la Commission avait été attirée sur le cas de fosses situées à proximité de la côte de certains Etats et qui risquaient de priver ces Etats de leurs droits sur des fonds marins peu profonds situés au-delà de ces fosses. La Commission avait estimé que de tels fonds, bien que séparés de la côte par une fosse, devaient faire partie du plateau continental de l'Etat riverain (*ibid.*, p. 214, par. 66).

C'est dès ce moment-là encore que le critère de profondeur a été complété par celui de l'exploitabilité, ce qui conférait au concept de plateau continental une potentialité d'extension à une distance de plus en plus grande vers le large au fur et à mesure des progrès de la technique. Par là était amorcé, comme la Cour le notera en 1982, «cet élargissement du concept [de plateau continental] à des fins juridiques» (*C.I.J. Recueil 1982*, p. 45, par. 41) qui n'a cessé depuis lors de caractériser l'évolution du droit du plateau continental.

On comprend dès lors que la Cour ait noté dès cette époque reculée une «absence d'identité entre la notion juridique de plateau continental et le phénomène physique que les géographes désignent par la même expression» (*C.I.J. Recueil 1982*, p. 46, par. 42; cf. opinion individuelle de M. Jiménez de Aréchaga, p. 112, par. 44), et que, tirant les conséquences de cette conception juridique sur le plan de la délimitation, elle n'ait pas «considéré comme synonymes une délimitation équitable et la fixation des limites des prolongements naturels» (*ibid.*, p. 46, par. 44).

Il ressort par ailleurs de l'arrêt de 1969 que la Cour n'a pas entendu remettre en cause les droits reconnus à la Norvège par les accords de délimitation qu'elle avait conclus avec d'autres Etats riverains de la mer du Nord et qui ne tenaient pas compte de l'existence de la fosse norvégienne (*C.I.J. Recueil 1969*, p. 32, par. 45).

Dès 1969, on le constate, le lien entre la délimitation et les faits physiques des fonds marins a commencé à se distendre.

La sentence arbitrale de 1977 marque une nouvelle étape dans cette évolution. Elle note que:

> «Le fait même qu'en droit international le plateau continental est un concept juridique signifie que son étendue et ses modalités d'application ne sont pas déterminées exclusivement par les facteurs physiques de la géographie mais aussi par les règles juridiques.» (Par. 191.)

De cette constatation sur le plan du *entitlement* le tribunal tire immédiatement la conséquence sur le plan de la délimitation: «on ne règle pas» toujours, dit le

tribunal, la question de l'attribution d'une partie du plateau à l'un ou à l'autre des Etats intéressés «en se référant simplement au principe du prolongement *naturel du territoire*» (par. 192), et il faut faire appel aux «règles de droit qui forment le concept juridique de plateau continental» (par. 194).

Il n'est pas surprenant, dans ces conditions, que le tribunal arbitral ait écarté l'idée, que lui avait soumise le Royaume-Uni, de faire coïncider la ligne de délimitation avec la fosse centrale et la zone de failles de la fosse centrale. Les passages clés méritent d'être relus une fois encore:

> «Le Tribunal ne considère pas que la fosse centrale et la zone de failles de la fosse centrale soient des caractéristiques géographiques qui puissent avoir une influence réelle sur la détermination de la limite...
>
> ... il ne semble y avoir aucun motif juridique d'écarter la méthode de l'équidistance ou toute autre méthode de délimitation pour lui préférer simplement un accident tel que la fosse centrale ou la zone de failles de la fosse centrale...
>
> ... L'axe de la fosse centrale et de la zone de failles de la fosse centrale se trouve là où il est par un simple accident de la nature, et il n'y a en soi aucun motif pour que cet axe constitue la limite...» (Par. 107 et 108.)

Monsieur le Président, ne pourrait-on substituer les mots «Rift Zone» et «Escarpments-Fault Zone» à ceux de «fosse centrale et de zone de failles de la fosse centrale»?

C'est à juste titre, on le constate, que le professeur Bowett a relevé que le tribunal franco-britannique a trouvé le concept de prolongement naturel «de peu d'assistance» *(of little assistance)* (*op. cit.*, p. 168). Le profeseur Bowett voit là un «développement salutaire» *(a salutary development)*:

> «One of the more welcome features of the Court of Arbitration Award is that it has decreased, or corrected, the excessive emphasis of geological factors and emphasized rather more the geographical factors, in particular the coastal configuration of the Parties.» (*Op. cit.*, p. 221.)

Et le professeur Bowett précise que l'on peut considérer comme probable que dans l'avenir le «prolongement naturel se référera davantage aux configurations géographiques qu'aux facteurs géologiques». Le même point de vue se trouve exprimé dans l'article bien connu que le professeur Bowett a donné au *British Year Book of International Law* (1978, p. 16).

L'évolution ainsi déjà largement amorcée allait être accélérée considérablement par les travaux de la troisième conférence sur le droit de la mer. Pour corriger l'inégalité dont pâtissaient, sous l'empire de la conception antérieure, les Etats dotés par la nature d'un plateau étroit, on en vint à accorder à tout Etat côtier des droits de plateau continental sur le sol et le sous-sol des espaces maritimes adjacents à ses côtes jusqu'à une distance de 200 milles marins au moins de ces dernières, quelle que soit par ailleurs la configuration physique de ces fonds marins. La fixation d'une largeur uniforme de 200 milles pour tous les Etats côtiers aurait toutefois désavantagé les quelques Etats dont le plateau continental, au sens physique du terme, s'étend vers le large plus loin que 200 milles marins de leurs côtes. Pour éviter de faire perdre à ces quelques Etats l'avantage que leur assurait l'ancien critère des 200 mètres de profondeur, il fut décidé de leur conserver le bénéfice du critère du prolongement naturel jusqu'au rebord externe de la marge continentale. Cette extension n'était toutefois pas indéfinie: elle s'arrêterait, fut-il décidé, soit à une distance de 350 milles marins des lignes de base, soit à une distance de 100 milles marins de l'isobathe de 2500 mètres.

Monsieur le Président, l'égalité qui a été poursuivie — et obtenue grâce à ce compromis de la troisième conférence — n'implique évidemment pas que tous les Etats aient désormais un plateau continental: c'est une égalité qui a été établie entre les seuls Etats côtiers. Et encore ne s'agit-il pas d'accorder à tous les Etats côtiers des superficies égales de plateau continental; les zones de plateau continental relevant de chaque Etat côtier seront fonction de la configuration de ses côtes — chaque Etat côtier ayant une configuration différente aura donc une superficie différente de plateau continental. L'égalité qui a été recherchée à la troisième conférence a pour seul objet d'écarter les facteurs d'inégalité qui peuvent être provoqués par les caractéristiques des fonds marins telles que profondeurs plus ou moins grandes atteintes à des distances plus ou moins grandes de la côte, ou présence de fosses qui séparent la côte de zones peu profondes situées plus au large. C'est cette inégalité-là, et nulle autre, que l'on a écartée, et cela grâce à un critère spatial, qui opère indépendamment de toute caractéristique physique ou naturelle. C'est seulement au-delà de 200 milles marins que le prolongement naturel reprend une connotation physique; mais même là ce sont des critères d'ordre spatial qui fixent la limite extérieure des droits élargis de plateau continental.

La Libye reproche étrangement au critère de distance de conduire à ce qu'elle appelle une «theory of leap-frogging features of the sea-bed» (ci-dessus, RL, p. 97, par. 8.11). Mais oui, Monsieur le Président, c'est là très exactement la raison d'être du changement apporté par la troisième conférence à la conception du plateau continental et du recours à la distance pour définir les droits du plateau continental: le but recherché était effectivement de sauter par-dessus les inégalités provoquées par les caractéristiques des fonds marins!

C'est cette évolution-là qui a trouvé son expression dans l'article 76 de la convention sur le droit de la mer, auquel, comme je l'ai indiqué, s'attache aujourd'hui une valeur de droit coutumier.

La Cour a pris acte de ces données nouvelles du droit international dans son arrêt de 1982. Elle constate le divorce entre le concept de prolongement naturel physique et celui de plateau continental: «Le concept juridique, déclare la Cour, bien que fondé sur le phénomène physique, a évolué à part» (*C.I.J. Recueil 1982*, p. 46, par. 42). Avec l'article 76, observe la Cour, «la notion juridique du plateau continental reposant sur une «espèce de socle» est ... modifiée ou au moins complétée» par le critère de la distance de 200 milles, puisque ce critère «s'écarte du principe suivant lequel ce serait le prolongement naturel qui en constituerait la seule base» (*ibid.*, p. 48, par. 47-48). Ainsi, précise la Cour, se trouve menée à son terme l'évolution qui a conduit à inclure dans le plateau continental

> «toute étendue du fond des mers se trouvant dans un rapport particulier avec la côte d'un Etat voisin, *qu'elle présente ou non les caractéristiques exactes qu'un géographe attribuerait à un «plateau continental»* (*ibid.*, p. 45, par. 41). (Les italiques sont de moi.)

De cette évolution sur le plan du titre juridique la Cour tire une fois encore les conséquences sur le plan de la délimitation. La position prise par la Cour retient d'autant plus l'attention que, dans cette affaire *Tunisie/Libye*, les deux Parties s'étaient appuyées, l'une et l'autre, sur le prolongement naturel au sens physique du terme. La Cour déclare que, même si l'identification de la limite des prolongements naturels des deux Etats était scientifiquement possible (ce qui n'était pas le cas dans cette affaire), cette identification ne serait pas forcément

> «suffisante ni même appropriée en elle-même pour préciser l'étendue

> exacte des droits d'un Etat par rapport à ceux d'un Etat voisin» (*C.I.J. Recueil 1982*, p. 46, par. 43),

c'est-à-dire pour la délimitation, et elle déclaré qu'elle

> «ne peut ... faire sienne la thèse libyenne suivant laquelle, «une fois que l'on a déterminé le prolongement naturel d'un Etat, la délimitation ne consiste plus qu'à se conformer aux exigences de la nature» (*ibid.*, p. 47, par. 44).

Deux opinions jointes à l'arrêt jettent une vive lumière sur ce décrochage, par rapport au prolongement naturel physique, tant du concept juridique de plateau continental que du droit de la délimitation du plateau continental (*ibid.*, opinion individuelle de M. Jiménez de Aréchaga, p. 110, par. 39; p. 114, par. 51; p. 117, par. 59 et 61; p. 121, par. 73; opinion dissidente de M. Oda, p. 222, par. 107, et p. 257, par. 160).

Dans le droit fil de cette jurisprudence, l'arrêt de la Chambre dans l'affaire du *Golfe du Maine* observe ce qui suit:

> «le «titre juridique» sur certaines étendues maritimes ou sous-marines est toujours et uniquement l'effet d'une opération juridique. Il en va de même pour la limite jusqu'à laquelle ce titre s'étend. C'est d'une règle de droit que cette limite découle, et non d'une quelconque vertu intrinsèque que posséderait le fait purement physique.» (*C.I.J. Recueil 1984*, p. 296, par. 103.)

Ayant ainsi refusé de fonder le titre juridique de l'Etat côtier sur les faits physiques, la Chambre ne pouvait que refuser de considérer ces mêmes faits physiques comme un élément décisif pour la délimitation. C'est ce qu'elle a fait. Les Etats-Unis s'étaient appuyés massivement sur ce qu'ils appelaient la *natural boundary*, la «frontière naturelle» du chenal Nord-Est pour demander à la Chambre de tracer la frontière maritime unique le long de cet accident physique dans lequel ils voyaient la seule rupture significative *(the only significant break)* dans le plateau continental de la région (*C.I.J. Mémoires, Délimitation de la frontière maritime dans la région du golfe du Maine*, vol. II, mémoire des Etats-Unis, par. 13, 296; *ibid.*, vol. V, réplique des Etats-Unis, par. 213). La Chambre a écarté cette thèse avec une fermeté toute particulière. Elle a refusé de voir dans le chenal, comme je l'ai déjà indiqué, autre chose qu'un «trait naturel de la région» et a considéré ce «trait naturel» comme dépourvu de toute pertinence pour la délimitation. Elle a rappelé que

> «la présence d'accidents beaucoup plus accentués, tels que la fosse centrale et la zone de failles géologiques présentes dans le plateau qui faisait l'objet de l'arbitrage franco-britannique, n'a pas empêché le tribunal arbitral de conclure que les failles en question n'interrompaient pas la continuité géologique dudit plateau et ne constituaient pas [je me permets d'insister sur ce passage] des facteurs utiles pour arrêter la méthode de délimitation» (*C.I.J. Recueil 1984*, p. 274, par. 46).

Rarement, Monsieur le Président, Messieurs les juges, a-t-on été en présence d'une jurisprudence aussi concordante et aussi nettement affirmée.

Quant à la doctrine, elle a, de son côté, pris acte de cet effacement du critère du prolongement naturel, fondé sur les caractéristiques physiques des fonds marins, au profit du concept égalitaire et uniformisant de la distance mesurée à la surface de la mer.

La Partie adverse a fait état dans ses écritures (**II**, CML, p. 107, note 4) des travaux du colloque de la Société française pour le droit international, tenu à

Rouen, en 1983, sur le sujet suivant: «Perspectives du droit de la mer à l'issue de la troisième conférence des Nations Unies», et elle a reproduit deux pages extraites de la communication faite à ce colloque par M. Guillaume, directeur des affaires juridiques au ministère des relations extérieures français. Cette communication a été publiée *in extenso* il y a quelques mois dans le volume imprimé qui reproduit les rapports et discussions du colloque. Selon M. Guillaume, il n'existe que deux méthodes de délimitation acceptables, parce qu'elles respectent la nature, à savoir:

> «— soit prendre en compte les profondeurs, les structures géologiques, bathymétriques ou géomorphologiques du plateau continental, mais [c'est M. Guillaume qui parle] cette méhode ne vaut pas pour la zone économique et elle pose même problème au regard de la nouvelle définition du plateau continental donnée par l'article 76 de la convention des Nations Unies sur le droit de la mer, du moins jusqu'à une distance de 200 milles. Aussi le déclin du critère géologique, déjà amorcé dans la sentence arbitrale franco-britannique, est-il très perceptible à la lecture de l'arrêt de la Cour internationale de Justice de 1982;
>
> — soit [c'est toujours M. Guillaume qui parle], seconde solution, prendre en compte la surface, à partir de la géographie, donc de la configuration générale des côtes» (Paris, Pedone, 1984, p. 281).

Déclin du critère de la profondeur, fondé sur la géologie et la géomorphologie, au profit du critère de la surface, qui part de la géographie, donc de la configuration côtière: voilà résumée en quelques mots, de manière particulièrement frappante, l'évolution que j'ai retracée trop longuement.

En présentant, aujourd'hui, à la Cour une revendication centrée tout entière sur les données physiques des fonds marins, la Libye invite la Cour à un retour, non seulement au passé, mais à la préhistoire du plateau continental. Ce n'est plus seulement de l'immobilisme juridique; c'est du véritable passéisme.

La Libye était plus à jour, si j'ose dire, de l'évolution du droit international il y a quelques années, puisque dans l'affaire qui l'opposait à la Tunisie elle exposait que «le critère de profondeur ou bathymétrie a cessé d'avoir toute pertinence pour la définition du plateau en deçà de 200 milles de la ligne de base» (*C.I.J. Mémoires, Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, vol. II, contre-mémoire libyen, par. 317). Or ici nous sommes, aussi bien pour la *Rift Zone* que pour la zone des escarpements, en deçà de 200 milles de la ligne de base.

Monsieur le Président, Messieurs les juges, l'enseignement à tirer de cet effacement du prolongement naturel physique dans le droit du plateau continental est clair: le droit international interdit de ramener la délimitation du plateau continental à l'identification d'une frontière naturelle sous-marine.

Si Malte était située en plein milieu de l'océan, loin de tout autre pays, ses droits de plateau continental ne seraient pas arrêtés par une configuration naturelle du type de la *Rift Zone* située à une quinzaine de milles marins de ses côtes; ils sauteraient, si j'ose dire, par-dessus elle et s'étendraient au moins jusqu'à 200 milles vers le large. Ce n'est pas parce que Malte est située à proche distance de la Libye que ses droits de plateau continental devraient soudainement être arrêtés par une telle configuration sous le prétexte que celle-ci constituerait une frontière naturelle entre les fonds marins des deux pays.

Mon ami Elihu Lauterpacht a rappelé que les accidents de la soi-disant *Rift Zone*, comme ceux de la zone des escarpements, ne marquent pas le rebord externe de la marge continentale de Malte et n'arrêtent donc pas ses droits de plateau continental. En serait-il même autrement, à supposer même que la

marge continentale de Malte s'arrête à la *Rift Zone* et à la zone des escarpements les droits de plateau continental de Malte ne seraient quand même pas bloqués par ces accidents, puisqu'ils s'étendraient, en vertu de la règle de droit coutumier dont j'ai retracé l'évolution et qui est exprimée aujourd'hui à l'article 76, jusqu'à 200 milles de ses lignes de base.

Je voudrais exprimer cette constatation élémentaire sous une autre forme. De deux choses, l'une: ou bien les accidents physiques de la soi-disant *Rift Zone* et de la zone des escarpements ne marquent pas physiquement le rebord externe de la marge continentale de Malte — ce qui est le cas —, ou bien ils le marquent. Dans le premier cas, les droits de plateau continental de Malte s'étendent au-delà, jusqu'au rebord externe de la marge continentale. Dans le second cas, ces accidents étant situés à moins de 200 milles marins des lignes de base de Malte, les droits du plateau continental de Malte s'étendent ici encore au-delà de ces accidents, jusqu'à 200 milles marins des lignes de base.

En un mot, comme en cent, le concept de frontière naturelle n'a aucune place dans le débat compte tenu de l'évolution du droit international en cette matière.

La Partie adverse se défend, il est vrai, dans sa réplique, d'avoir jamais soutenu que la *Rift Zone* constitue *per se* une frontière maritime naturelle (ci-dessus, RL, p. 7, par. 1.04; p. 82, par. 6.19; p. 94, par. 8.03). Elle n'emploie pas le mot, c'est exact, mais c'est pourtant bien de cela qu'il s'agit, puisque la Cour est invitée à placer la délimitation exactement là où la nature a, à en croire la Libye, situé la séparation physique entre les prolongements physiques respectifs des deux pays. Lorsque la nature désigne le cours d'une frontière, lorsqu'on évoque une frontière «physiquement identifiée» (I, ML, p. 234, par. 9.02), cela, je le répète, porte un nom: cela s'appelle une frontière naturelle.

Monsieur le Président, Messieurs les juges, le concept même d'une frontière que le droit emprunterait à la nature est étranger au droit international de la mer. Il serait inconcevable que les frontières de plateau continental séparant des Etats dont les côtes se font face ou sont adjacentes se situent obligatoirement là où les hasards de la nature ont placé des accidents topographiques ou géologiques sous-marins. L'égalité des Etats, car c'est d'elle qu'il s'agit, serait gravement compromise si la nature pouvait imposer aux gouvernements et aux tribunaux internationaux des frontières génératrices d'empiétements. A quoi s'ajoute que, en admettant même que les «exigences de la nature» *(the dictates of nature)*, pour reprendre l'expression que la Libye avait utilisée dans son litige avec la Tunisie (*C.I.J. Mémoires, Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, vol. I, p. 487, par. 89), puissent dicter le droit, l'identification du «trait naturel» à ériger en frontière n'irait pas toujours de soi. La nature ne parle pas toujours d'une voix parfaitement claire. Dans le cas présent, par exemple, pourquoi les accidents de la prétendue *Rift Zone* s'imposeraient-ils avec plus de force contraignante à la Cour que les accidents similaires situés plus au sud, tels que la fosse de Jarrafa ou la vallée (ou sillon) tripolitain dont a parlé hier mon ami Elihu Lauterpacht? Ces accidents, il n'est pas sans intérêt de le noter — la fosse de Jarrafa et le sillon tripolitain — sont mentionnés en (11) toutes lettres sur la carte bathymétrique internationale de la Méditerranée sur laquelle la Partie adverse déclare s'appuyer dès le début de son mémoire (I, ML, p. 26, par. 3.03), qu'elle a analysée dans l'annexe technique de son mémoire et dont elle a placé une copie réduite dans la pochette du volume III de son mémoire. Le nom de ces deux accidents a toutefois disparu sur toutes les cartes des écrits libyens destinées à représenter le «General Morphological Setting», tandis que les noms des fosses et chenaux de la soi-disant *Rift Zone* y sont soigneusement reproduits. La Cour pourra s'en convaincre si elle veut bien (2) se reporter à la carte 6 du mémoire libyen, à la carte 4 du contre-mémoire

(28)(29)(30) libyen, aux cartes 1, 11, 12 et 13 de la réplique libyenne. Dans la même perspective, pourquoi les accidents en creux de la prétendue *Rift Zone* s'imposeraient-ils avec plus de force contraignante à la Cour que la ligne de crêtes formée par les bancs de Medina et de Melita qui se rapprochent du niveau de la mer, à 146 et 86 mètres de profondeur à peine?

La Libye fait valoir, je ne l'ignore pas, que l'«élément de hasard» que nous avons avancé à propos des accidents géologiques et géomorphologiques affecte l'ensemble des facteurs géographiques de chaque situation concrète, et pas seulement les accidents sous-marins (ci-dessus, RL, p. 29, par. 3.29). Pourquoi, semble dire la Libye, la délimitation devrait-elle s'incliner devant la nature — comme nous le prétendons du côté maltais — lorsqu'il s'agit de la géographie, mais ne devrait-elle pas s'incliner devant la nature lorsqu'il s'agit de la géologie ou de la géomorphologie sous-marines?

La question est intéressante; la réponse me semble-t-il est claire.

Il aurait certes été possible de concevoir les droits maritimes des Etats du monde comme dominés par le principe d'une répartition totalement et strictement égalitaires: les Etats sans littoral auraient joui de droits identiques à ceux des Etats côtiers, et les Etats côtiers auraient eu tous les mêmes superficies maritimes indépendamment de la configuration de leurs côtes. Cela aurait été concevable, mais ce n'est pas cette conception que le droit international a consacrée. La philosophie du droit international a été différente. Les droits maritimes sont réservés aux Etats côtiers à peu d'exceptions près — M. Quéneudec a très justement mis l'accent sur ce qu'il appelle l'«aspect militant ... de la doctrine du «côtiérisme» (*op. cit.*, p. 132) — et les droits de chaque Etat côtier sont fonction de sa géographie côtière.

«Il est ... nécessaire de regarder de près la configuration géographique des côtes des pays dont on doit délimiter le plateau continental», déclare la Cour dans l'affaire du *Plateau continental de la mer du Nord* (*C.I.J. Recueil 1969*, p. 51, par. 96). «La méthode de délimitation à adopter doit être en rapport avec les côtes des Parties qui bordent effectivement le plateau continental», répète la sentence franco-britannique (par. 240). «C'est ... en partant de la côte des Parties qu'il faut rechercher jusqu'où les espaces sous-marins relevant de chacune d'elles s'étendent ... par rapport aux Etats qui leur sont limitrophes ou leur font face», confirme la Cour en 1982 (*C.I.J. Recueil 1982*, p. 61, par. 74). «Une ligne de délimitation à tracer dans une aire déterminée est fonction de la configuration des côtes», proclame la Chambre dans l'affaire du *Golfe du Maine* (par. 205).

En un mot comme en cent, la «nature» qu'il faut respecter, la nature qu'il ne faut pas «refashion», c'est la géographie côtière. Ce n'est pas la structure géologique ou la topographie des fonds marins et de leur sous-sol. La frontière qu'indique la géographie de surface, celle des côtes, oui. La frontière que désignent la géologie et la géomorphologie des profondeurs, celle des fonds marins, non.

La pratique des Etats a-t-elle montré plus d'enthousiasme que la jurisprudence pour les frontières naturelles sous-marines? Certainement pas. L'observation en a été faite par le tribunal franco-britannique dès 1977 (sentence arbitrale, par. 107), et elle demeure valable aujourd'hui. Nous avons examiné la totalité des accords de délimitation qui figurent dans l'annexe produite par la Libye, et nous avons constaté que des fosses et dépressions parfois très importantes ont été ignorées complètement par les gouvernements intéressés. Des exemples ont été cités par mon ami M. Mizzi, parmi lesquels une place particulière doit être faite à deux accords intéressant des zones proches de la nôtre, à savoir les accords de délimitation entre l'Italie et la Tunisie et entre l'Italie et la

Grèce (cf. II, CMM, p. 70-74, par. 144-151; ci-dessus, RM, p. 39-41, par. 70-71).

A cette pratique massivement contraire à la frontière naturelle sous-marine, et dans les détails de laquelle je crois tout à fait inutile d'entrer ici, une exception, probablement la seule: la fameuse fosse de Timor. L'agent de Malte a fourni à ce sujet des explications détaillées. Et nous en avons également parlé dans nos écritures. Nous avons cru pouvoir écrire à ce sujet que le fait que deux Etats peuvent délimiter leur plateau continental selon un accident de la nature du type de la fosse de Timor — ils le peuvent certainement — ne signifie pas qu'une juridiction internationale soit obligée en droit d'adopter une délimitation fondée sur un tel critère (II, CMM, p. 68, par. 137, et p. 71, par. 145). Cette observation nous paraissait exprimer une vérité évidente. Elle a pourtant suscité l'ironie cinglante de la Partie adverse qui n'hésite pas à nous accuser de «casuistique» (ci-dessus, RL, p. 29, par. 3.28). Pour justifier notre point de vue, je me permettrai de rappeler que, selon un membre de la Cour, les facteurs physiques et géologiques ne figurent pas

> «parmi les règles juridiques qui régissent ou déterminent la délimitation ... mais parmi les facteurs que les Parties [peuvent] prendre en considération en négociant la délimitation qui les intéresse» (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 117, par. 60).

Et l'auteur de cette opinion d'ajouter que, entre la délimitation conventionnelle et la délimitation judiciaire ou arbitrale, «la différence est énorme» *(there is a world of difference)*. En droit, c'est-à-dire pour le juge ou l'arbitre, écrit-il:

> «Les caractéristiques physiques — dépressions, chenaux, contours du fond des mers, structures géologiques, etc. — ne sauraient suffire à déterminer les limites du plateau continental.» (*Ibid.*, par. 61.)

En un mot: que deux Etats négocient la délimitation de leur plateau continental en tenant compte d'une fosse, dépression, chenal ou canyon, est une chose — et encore ne le font-ils quasiment jamais. Que le juge ou l'arbitre leur imposent une telle délimitation au nom du droit en est une autre. Voilà, Monsieur le Président, pour la «casuistique».

Dans son plus récent écrit, la Partie adverse semble avoir changé son fusil d'épaule en ce qui concerne les enseignements à tirer de la pratique des Etats en matière de configurations sous-marines. Au lieu de soutenir, comme elle l'avait fait dans son mémoire et dans les commentaires de son annexe sur les accords de délimitation, que les données physiques du sol et du sous-sol ont joué un rôle important dans les délimitations conventionnelles — car c'est cela qu'elle soutenait à ce stade-là — elle reconnaît à présent que tel n'est pas le cas; mais elle ajoute immédiatement que les accords n'expriment pas toujours clairement les raisons de la délimitation retenue et que l'on ne saurait donc en tirer des conclusions précises (ci-dessus, RL, p. 30, par. 3.30). Nous en sommes d'accord, mais alors pourquoi — je me permets de poser la question — pourquoi la Libye a-t-elle jugé bon d'assortir certains des commentaires de son annexe sur les accords de délimitation de la mention que la frontière adoptée suit tel ou tel accident sous-marin? Commentaires aventureux de son propre aveu, d'autant plus aventureux d'ailleurs que dans un des cas au moins cette interprétation est formellement contredite par le texte même de l'accord qui déclare la délimitation fondée sur l'équidistance (accord Cuba/Mexique, annexe 47; cf. ci-dessus, RM, p. 41, par. 71).

Mais il y a mieux encore. Cherchant à faire contre mauvaise fortune bon cœur, la Libye explique à présent que l'absence de précédents dans la pratique

conventionnelle elle-même ne fait que mettre en relief le caractère hautement spécial et exceptionnel de notre affaire et l'originalité particulièrement marquée de la *Rift Zone* (II, RL, p. 30, par. 3.30-3.31). Si j'ai bien compris cet argument, la *Rift Zone* constituerait l'accident sous-marin le plus significatif du monde. Des autres fosses ou dépressions qui existent sur le globe, les Etats ont légitimement pu faire abstraction, tellement elles sont insignifiantes; de la soi-disant *Rift Zone* — celle qui mérite les majuscules — la Cour ne saurait faire abstraction, tant elle est remarquable. La Cour appréciera la valeur de l'argument...

Monsieur le Président, de même que la dangereuse doctrine des «frontières naturelles», que Rousseau a condamnée en faisant observer «qu'elles aboutissaient à faire de l'ordre politique l'ouvrage de la nature», a été écartée par le droit international en matière de frontières terrestres, ainsi que l'a noté un membre de la Cour en 1982 (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 117, par. 61), de même le droit international de la mer n'accepte pas que les frontières de plateau continental soient «l'ouvrage de la nature». Comme vient de le déclarer la Chambre:

> «une délimitation, qu'elle soit maritime ou terrestre, est une opération juridico-politique et ... rien ne dit que, là même où une frontière naturelle apparaît, la délimitation doive nécessairement en suivre le tracé.» (*C.I.J. Recueil 1984*, p. 277, par. 56.)

Comme les frontières terrestres, les frontières maritimes sont le fruit de la volonté politique des Etats ou de la décision juridique du juge international; et ni les gouvernements ni le juge international ne bornent l'exercice de leur pouvoir à un constat scientifique. *Res judicata pro veritate habetur*, dit-on depuis des siècles. C'est à la *veritas* juridique que ce vieil adage se réfère, et non pas à la *veritas* scientifique. La mission de la Cour est celle d'un organe judiciaire chargé de dire le droit; elle n'est pas, contrairement au rôle que voudrait lui faire jouer la Partie adverse, celle d'un collège scientifique qui viendrait, à la manière d'un expert ou d'un superexpert, conférer une force de vérité légale à un prononcé de caractère scientifique.

Une dernière observation encore si vous me le permettez au sujet des frontières naturelles sous-marines.

Si l'on avait pu à la rigueur accepter de tenir compte des accidents physiques sous-marins à une époque où le plateau continental n'intéressait que l'exploration et l'exploitation des richesses des fonds marins, il en va différemment aujourd'hui. A présent les limites extérieures et les frontières du plateau continental coïncideront dans bien des cas avec celles de la zone économique exclusive. Comment imaginer que des limites extérieures et des frontières entre Etats voisins intéressant la colonne d'eau puissent être dictées aux gouvernements et à fortiori au juge international par les caractéristiques physiques du lit de la mer et du sous-sol telles qu'une fosse ou une dépression?

Inconcevable en elle-même, une solution de ce genre ne ferait qu'étendre aux eaux surjacentes l'impact des hasards naturels auxquels on a précisément cherché à porter remède à la troisième conférence sur le plateau continental, en aggravant leur effet inégalitaire par l'adjonction d'un coefficient multiplicateur.

Monsieur le Président, Messieurs les juges, «le plateau continental est une institution du droit international qui, bien que restant liée à un fait naturel, ne s'identifie pas au phénomène désigné par la même expression dans d'autres disciplines»; il n'y a pas «identité entre la notion juridique de plateau continental et le phénomène physique que les géographes désignent par la même expression»; «le concept juridique, bien que fondé sur le phénomène physique, a

évolué à part»; «la notion de prolongement naturel est et demeure une notion à examiner dans le contexte du droit coutumier et de la pratique des Etats» (*C.I.J. Recueil 1982*, p. 45-46, par. 42-43): par ces prononcés clairs et décisifs la Cour a pris position, me semble-t-il, sur plusieurs des points qui se trouvent aujourd'hui en discussion devant elle. La tentative de la Partie adverse de les remettre en question dans notre affaire est ma seule excuse — et je prie la Cour de bien vouloir l'accepter — pour avoir si longuement repris le thème, à vrai dire tout à fait banal, de l'érosion des critères physiques au profit de critères juridiques dans le droit de la délimitation du plateau continental.

L'égalité des Etats n'a pas seulement constitué le moteur de l'effacement du prolongement naturel physique au profit du principe de distance. Elle se traduit également sous la forme d'un principe capital en matière de délimitation du plateau continental: celui de non-empiétement.

C'est à ce second aspect du rôle du principe d'égalité des Etats en cette matière que je voudrais m'attacher à présent.

Egalité des Etats et principe de non-empiétement

Par définition, un problème de délimitation surgit seulement lorsqu'il n'existe pas d'espaces maritimes suffisants pour que chacun des Etats puisse se projeter jusqu'à l'extrême limite de ses droits et que chacun des deux Etats doit donc accepter un sacrifice. L'amputation est inhérente au concept de délimitation. Mais encore faut-il que cette amputation soit équilibrée et raisonnable et qu'elle ne privilégie pas de manière inéquitable l'une des côtes au détriment de l'autre, en accordant, par exemple, un effet déraisonnable à une configuration mineure de l'une des côtes au détriment de l'autre. C'est cela, me semble-t-il, que signifie très exactement le principe de non-amputation ou de non-empiétement.

Cette exigence fondamentale de l'équité, une délimitation qui reposerait sur les facteurs physiques de la géologie ou de la géomorphologie n'a aucune raison logique d'y satisfaire autrement que par l'effet de hasard heureux ou d'une coïncidence due à la chance. Une caractéristique sous-marine, fût-elle même d'une grande ampleur, est située là où elle est par un «accident de la nature» *(a fact of nature)*, selon l'expression du tribunal franco-britannique; elle constitue un «trait naturel de la région», selon l'expression de la Chambre. Mais, Monsieur le Président, la nature peut mal faire les choses. Si l'«accident de la nature» se situe très près des côtes de l'un des Etats, et très loin des côtes de l'autre, cette caractéristique physique ne pourrait être retenue comme indicative d'une frontière de plateau continental qu'au prix d'une amputation déséquilibrée, donc inéquitable, des droits de l'un des Etats. Il suffit, par exemple, d'évoquer la fosse du cap Breton près de la côte espagnole, ou la fosse norvégienne près de la côte norvégienne, ou le sillon tripolitain près de la côte libyenne. Chaque fois que la prise en considération d'une caractéristique des profondeurs conduirait à placer la frontière du plateau continental à une trop grande proximité de la côte de l'une des parties, amputant ainsi la projection maritime de cette dernière de manière déséquilibrée, une atteinte grave serait portée à l'un des éléments constitutifs de la conception même du plateau continental, à savoir le droit inhérent, *ipso facto* et *ab initio*, de chaque Etat côtier à l'extension maritime engendrée par ses côtes.

La Libye n'ignore rien de ces opérations. Le fait de ne pas avoir tenu compte de la fosse norvégienne dans la délimitation entre le Royaume-Uni et la Norvège lui paraît tout à fait justifié:

«otherwise [écrit-elle, si on en avait tenu compte], the United Kingdom

would have acquired a grossly disproportionate share of the continental shelf of the North Sea between the two States if the boundary line had followed the Norwegian Trough which runs close to the Norwegian Coast.» (I, ML, p. 101, par. 6.51.)

Pourquoi ce qui est valable pour la fosse norvégienne entre la Norvège et le Royaume-Uni cesserait-il de l'être pour la soi-disant *Rift Zone* entre Malte et la Libye? Y aurait-il donc deux vérités?

Et si la nature avait eu l'idée de placer la *Rift Zone*, ou même une dépression beaucoup plus marquée — quelque sillon tripolitain multiplié par dix, par exemple — à quelques milles marins seulement de la côte libyenne, la Libye accepterait-elle que ses droits de plateau continental s'arrêtent à cette dépression et que de l'autre côté de cette fosse, vers le nord, le plateau continental tout entier appartienne à Malte, ou à d'autres Etats? Encore une fois, y aurait-il donc deux vérités?

Dans l'affaire *Tunisie/Libye*, la Libye s'était montrée très attentive à ce problème. Elle avait fait valoir que le principe du non-empiétement trouve sa raison d'être dans le souci de chaque Etat côtier de ne pas voir une puissance étrangère exercer des droits d'exploration et d'exploitation des fonds marins directement devant ses côtes, et elle évoquait à cet égard des «considérations de sécurité et de praticabilité» *(considerations of security and practicability) (C.I.J. Mémoires, Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, vol. IV, réplique libyenne, p. 59, par. 130, cité dans **II**, CMM, p. 12, par. 21).

La Libye aurait-elle oublié ce qu'elle exposait avec tant de force — et tant d'exactitude — hier?

Si la limite extérieure du plateau continental a été repoussée vers le large jusqu'à une distance d'au moins 200 milles marins, c'est essentiellement, comme je l'ai rappelé, afin de ne pas établir une inégalité entre les Etats côtiers selon le caprice des configurations naturelles; mais c'est aussi pour une autre raison, c'est pour mettre chaque Etat à l'abri de l'exploration et de l'exploitation des ressources de ses fonds marins à une trop grande proximité de ses côtes (cf. *C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 119-120, par. 70). C'est pour cette raison également que le droit international ne tient compte aujourd'hui, pour fixer les limites extérieures du plateau continental vers le large, ni d'une chute du fond marin vers les profondeurs en deçà d'une distance de 200 milles marins, c'est-à-dire à une brève distance des côtes, ni de la présence d'une fosse ou dépression en deçà de cette même distance. Dès lors que les droits de plateau continental de l'Etat côtier s'étendront au moins jusqu'à une distance de 200 milles marins, l'Etat côtier sera assuré qu'aucun Etat tiers ne pourra venir explorer ou exploiter les ressources du sol et de son sous-sol à une si brève distance de ses côtes.

Le principe du non-empiétement ne fait que transposer et exprimer cette préoccupation majeure sur le plan de la délimitation entre Etats voisins. Il s'agit, bien sûr, d'assurer à chacun des Etats un espace suffisamment large pour lui permettre l'exploration et l'exploitation des ressources naturelles des fonds marins, mais il s'agit aussi de veiller à ce que l'un des deux Etats ne puisse pas procéder à l'exploration ou à l'exploitation des ressources des fonds marins à une distance trop rapprochée des côtes de l'autre Etat.

Préoccupation économique au premier chef, sans nul doute. Mais comment nier que des considérations politiques au sens large du terme, des préoccupations de souveraineté en quelque sorte, se profilent en filigrane derrière les préoccupations purement économiques? La Libye s'insurge lorsque Malte fait état de telles considérations. Je me permettrai de rappeler ce que disait ici à

cette même place, il y a quelques mois à peine, l'agent des Etats-Unis dans sa déclaration finale dans l'affaire du *Golfe du Maine*:

> «[The] issue of cut-off . . . raises the most fundamental questions of sovereignty. The question of cut-off posed in this case, not only in a geographic sense, but in a political sense as well, affects the interests of all States. For all our hopes that the customary law of coastal-State rights will now stabilize, no State knows with any certainty what the future of the economic zone régime will hold.» (*C.I.J. Mémoires*, vol. VII, p. 266.)

Le souci de garder l'autre Etat suffisamment éloigné de sa propre côte se situe ainsi au cœur même du principe du non-empiétement. Le lien est éclatant entre ce principe et le concept de distance.

Il n'est pas douteux, nul ne le contestera, que la violation du principe de non-empiétement, expression particulière du principe général de l'égalité des Etats, conduit à écarter dans certains cas la méthode de l'équidistance. Cela est acquis. Et pourquoi alors la violation du principe de non-empiétement ne condamnerait-elle pas également, pour les mêmes raisons, une délimitation fondée sur les données géologiques et géomorphologiques des fonds marins? Le déséquilibre dans les amputations infligées aux projections respectives des deux Parties ne saurait être critiquable dans le cas où il serait imputable à l'application de la méthode de l'équidistance, et devenir acceptable dans le cas où il serait dû à la prise en considération des caractéristiques physiques des profondeurs sous-marines.

Par sa nature même, je le répète, le principe du non-empiétement a un caractère essentiellement spatial. Il complète et corrobore le déclin du prolongement naturel, ainsi que l'émergence parallèle du concept de distance, en vue d'assurer le respect de l'égalité des Etats dans le droit de la délimitation du plateau continental.

Pleinement consciente, je l'ai noté, de cet aspect du problème lorsqu'il s'agit de la fosse norvégienne ou de ses propres droits de plateau continental, la Libye y devient insensible lorsqu'il s'agit des droits de Malte. Qu'une délimitation fondée sur les prétendus faits physiques de la *Rift Zone* et de la zone des escarpements conduise à empiéter massivement sur la projection maritime de Malte et à amputer massivement cette projection ne semble pas gêner la Libye. Comment ne pas être frappé pourtant par l'effet d'enclave rapprochée que provoquerait une frontière de plateau continental conforme aux vœux de la Libye, c'est-à-dire une frontière qui passerait à quelque 15 milles marins seulement des côtes maltaises vers le sud et qui bloquerait la projection maritime de Malte à quelque 60 milles marins des côtes maltaises vers l'est? Une frontière de ce genre passerait juste sous les fenêtres de Malte, si j'ose dire, lui faisant perdre le contrôle d'espaces sous-marins directement adjacents à ses côtes, alors que l'extension maritime de la Libye s'épanouirait largement. Rarement un Etat aura-t-il formulé une revendication aussi déraisonnable et inéquitable, et ce n'est pas parce qu'elle se fonderait sur les facteurs physiques de la géologie et de la géomorphologie sous-marines qu'elle deviendrait plus acceptable. Un (44) coup d'œil sur l'une quelconque des cartes libyennes ou sur la figure 13 de notre dossier en dit plus long là-dessus que toutes mes explications.

J'ai prononcé le mot d'enclave. Au début de la procédure, le Libye hésitait quelque peu, semble-t-il, à parler d'enclave, même si l'idée en était incontestablement présente, ainsi que nous l'avons immédiatement relevé dans notre contre-mémoire (**II**, CMM, p. 13, par. 23). Les deux derniers écrits libyens font preuve de moins de réserve à ce sujet.

Le contre-mémoire libyen évoque discrètement l'enclavement de deux îles

yougoslaves dans l'accord italo-yougoslave, l'enclavement partiel des îles italiennes dans l'accord italo-tunisien, et l'enclavement partiel de certaines îles dans les accords relatifs au Golfe (**II**, CML, p. 129, par. 5.77; p. 130, par. 5.79; p. 133, par. 5.91) — comme si l'on pouvait assimiler le cas de Malte, Etat souverain, à celui d'îles appartenant à l'un des deux Etats continentaux voisins!

Dans sa réplique la Libye revient à l'idée d'enclavement en évoquant à deux reprises l'enclavement des îles Anglo-Normandes par la sentence arbitrale franco-britannique de 1977 (ci-dessus, RL, p. 47, par. 4.42, et p. 80, note 1). La Libye aurait-elle oublié que l'un des motifs invoqués en faveur de cette solution par le tribunal arbitral a précisément été que ces îles doivent être considérées «comme des îles du Royaume-Uni, et non pas comme des Etats semi-indépendants jouissant d'un titre particulier à leur plateau continental vis-à-vis de la République française» (sentence arbitrale, par. 186)? Contrairement aux îles Anglo-Normandes, Malte est un Etat indépendant qui jouit à coup sûr d'un titre particulier à son plateau continental vis-à-vis de la Libye. En outre, comme le relève également le tribunal arbitral franco-britannique, les îles Anglo-Normandes ont cette particularité d'être situées «du côté français de la ligne médiane tracée entre les territoires terrestres des deux Etats», c'est-à-dire «du mauvais côté de la ligne médiane» (*ibid.*, par. 183 et 199): ce trait, mis en avant à juste titre par le professeur Bowett dans l'ouvrage que j'ai cité (p. 203), ne s'applique sûrement pas à Malte.

Mais c'est dans un autre passage de la réplique que la Libye lève complètement le masque au sujet de ses intentions d'enclavement de Malte:

> «The fact that Malta is a group of small islands necessarily leads to another result that seems to have eluded Malta — it is bound ultimately to be enclaved, whatever means of delimitation are agreed between Malta and its neighbours.» (Ci-dessus, RL, p. 57, par. 5.10.)

Si la Libye veut dire par là que le plateau continental de Malte connaîtra fatalement, faute d'espace suffisant en Méditerranée, certaines limites dans toutes les directions, elle ne fait qu'énoncer sous une forme élégante une vérité d'évidence. Cette vérité s'applique à vrai dire tout autant à la Libye, car, bien que n'étant pas une île et bien que n'étant pas petite, la Libye doit elle aussi accepter une réduction de ses projections maritimes vis-à-vis de Malte. Mais si la Libye laisse entendre par là que les droits de Malte doivent être réduits en raison de sa double nature d'Etat insulaire et d'Etat de faible superficie, et non pas en raison du manque d'espace en Méditerranée, elle formule une proposition juridiquement inacceptable. La Libye ne proclamerait alors, en substance, rien de moins que le principe de la soustraction des petits Etats et des Etats insulaires — et à plus forte raison des Etats qui ont le malheur d'être à la fois petits et insulaires — à la garantie que leur apporte le principe du non-empiétement, expression du principe fondamental de l'égalité des Etats.

Exagération, caricature, nous objectera la Partie adverse. Certes, mais si peu! Combien de fois ne nous a-t-on pas expliqué que dans cette Méditerranée si étroite, si serrée, si confinée, le Lilliput maltais doit modérer ses appétits face à ceux du Gulliver libyen et se contenter de la portion congrue tandis que la part du lion reviendrait à la Libye (par exemple, **I**, ML, p. 136, par. 9.07; p. 155, par. 10.05)! La réplique libyenne s'indigne et s'énerve de ce que nous ayons présenté la thèse libyenne sous la forme raccourcie de *Malta disregarded*; et elle ajoute que la Libye comparaît devant la Cour «sur un pied d'égalité avec Malte» et qu'«il n'y a aucun problème quant à l'existence de Malte» *(there is no issue as to the existence of Malta)* (ci-dessus, RL, p. 1-2, par. 3). C'est vrai, la thèse libyenne du prolongement naturel, ne prive pas Malte de tout droit à un

plateau continental. Mais comment ne pas voir que ces thèses n'accordent pas à Malte, mais alors pas du tout, le traitement équitable que réclame le principe de non-amputation? Peut-on considérer comme raisonnable une frontière de plateau continental qui passerait, je le répète, à certains endroits à une quinzaine de milles marins de Malte — c'est-à-dire à 3 milles marins seulement de la limite extérieure de sa mer territoriale — alors qu'elle passerait à plus de 150 milles marins de la Libye? La réponse est claire.

Le caractère excessif, déraisonnable, inéquitable de la revendication libyenne apparaît dans une lumière particulièrement vive lorsque l'on prend conscience de ce que la Libye réclame, vis-à-vis de Malte, une frontière de plateau continental se situant plus au nord — et donc plus favorable à la Libye — que la ligne médiane tracée entre la Libye et l'Italie en faisant abstraction de l'existence de Malte. Même avec *Malta disregarded* la Libye ne pourrait espérer pousser aussi loin vers le nord ses droits de plateau continental! J'ai tracé approximativement sur la carte derrière moi les contours de la *Rift Zone*, donc du *claim* libyen, la ligne médiane entre l'Italie et la Libye ne donnant pas d'effet à Malte, et la ligne médiane entre Malte et la Libye revendiquée par Malte. Pour la commodité de la Cour et de la Partie adverse, nous nous proposons de reproduire ces indications sur notre carte de base et de l'ajouter à notre dossier dès que possible. Ces cartes montrent, en tout cas, je le rappelle, que la Libye revendique, vis-à-vis de Malte, une ligne qui est située plus au nord que la ligne médiane entre l'Italie et la Libye, faisant abstraction de l'existence de Malte. Nous sommes donc même au-delà de *Malta disregarded*.

Monsieur le Président, Messieurs les juges, le moment est venu de conclure ces développements sur le prolongement naturel.

Si vous le permettez, je le ferai en ramenant à quelques phrases les conclusions qui me semblent s'imposer:

1) Les droits de l'Etat côtier sur les fonds marins et leur sous-sol ne sont plus liés aujourd'hui aux caractéristiques géologiques et géomorphologiques (sauf le cas de marges continentales se prolongeant au-delà de 200 milles des lignes de base). Ces droits s'étendent à une distance de 200 milles des lignes de base quelles que soient la structure géologique, la configuration ou la topographie des fonds marins: une chute rapide vers les profondeurs ne les arrête pas; une fosse ou une dépression, quelle que soit son importance, ne les interrompt pas.

2) Cette règle du droit international coutumier, qui a trouvé expression dans l'article 76, paragraphe 1, de la convention sur le droit de la mer de 1982, a pour objet essentiel d'assurer l'égalité entre les Etats côtiers indépendamment des caractéristiques géologiques et géomorphologiques des fonds marins et de leur sous-sol adjacents à leurs côtes. Positivement, cette règle assure à tous les Etats côtiers le droit d'exploration et d'exploitation des fonds marins et de leur sous-sol jusqu'à une distance minimale de 200 milles de leurs lignes de base. Négativement, elle interdit aux Etats tiers d'exercer de tels droits à une distance inférieure à 200 milles des lignes de base d'un Etat côtier quelconque.

3) L'étendue des droits de plateau continental de chaque Etat côtier dépend essentiellement de la configuration de ses côtes, c'est-à-dire de facteurs géographiques. Le principe demeure que la terre domine la mer et que le plateau continental constitue l'extension de la souveraineté territoriale sous la mer.

4) La nature du titre juridique de l'Etat côtier sur le plateau continental a des incidences directes sur la délimitation du plateau continental entre Etats voisins dont les côtes sont adjacentes ou se font face.

5) Pas plus que la fixation des limites extérieures, la délimitation du plateau

continental ne peut dépendre des hasards des caractéristiques géologiques et géomorphologiques des fonds marins et de leur sous-sol. Comme la fixation des limites extérieures, la délimitation du plateau continental dépend essentiellement de la géographie côtière et repose sur la prise en considération d'une certaine distance par rapport aux côtes.

6) Faire dépendre la délimitation du plateau continental des hasards de caractéristiques géologiques et géomorphologiques des fonds marins et de leur sous-sol conduirait à des empiétements et des amputations générateurs d'inéquité. Le principe du non-empiétement est de nature essentiellement spatiale: il tend à assurer à chacun des deux Etats voisins un espace raisonnable — en termes de distance des côtes — sur lequel il puisse exercer ses droits souverains et dont il puisse écarter l'autre Etat. Seule la prise en considération de la géographie côtière et du facteur de distance par rapport aux côtes permet de satisfaire à cette exigence.

7) La délimitation du plateau continental ne peut donc pas prendre pour point de départ, en tant que titre juridique du plateau continental, les données géologiques et géomorphologiques du sol et du sous-sol, ni accorder d'une autre manière à ces données un rôle prééminent dans la délimitation.

8) En conséquence, la thèse libyenne construite tout entière, comme elle l'est, sur les caractéristiques géologiques et géomorphologiques des fonds marins, se révèle — indépendamment même des inexactitudes factuelles sur lesquelles elle s'appuie — comme contraire au droit international. La soi-disant *Rift Zone* et la zone des escarpements sont dénuées de tout caractère déterminant dans la délimitation du plateau continental entre Malte et la Libye. Ces configurations des profondeurs sous-marines ne reflètent en aucune manière la configuration de la géographie côtière des deux pays, et leur prise en considération aux fins de la fixation de la frontière de plateau continental entre Malte et la Libye conduirait, en raison de leur situation, à une violation grossière du principe de non-empiétement et, par là même, à une violation du principe de l'égalité des Etats.

Monsieur le Président, si la revendication libyenne se trouve condamnée parce qu'elle est fondée sur une conception erronée du prolongement naturel et sur une méconnaissance du principe de distance, la revendication maltaise est, quant à elle, conforme au droit international puisque, sans faire référence aux structures géologiques et géomorphologiques sous-marines, elle repose sur le principe de distance.

C'est donc vers ce principe que je me propose, avec votre autorisation, de me tourner demain matin.

L'audience est levée à 13 heures

TREIZIÈME AUDIENCE PUBLIQUE (30 XI 84, 10 h)

Présents: [Voir audience du 26 XI 84.]

M. WEIL: Monsieur le Président, Messieurs les juges, après avoir examiné dans mes précédents développements les sources du droit applicable, l'opération de délimitation et le prolongement naturel, je me tourne à présent vers le principe de distance.

IV. Le principe de distance

L'expression «principe de distance», que j'emprunte à la Cour (*C.I.J. Recueil 1982*, p. 49, par. 48) se réfère essentiellement à un élément spatial, à savoir une certaine distance exprimée numériquement.

C'est cette distance qui permet de déterminer jusqu'où s'étendent, aussi bien vers le large que par rapport aux Etats voisins, les droits et juridictions maritimes de l'Etat côtier, et en particulier ses droits de plateau continental.

Le principe selon lequel la terre domine la mer, et selon lequel les droits et juridictions de l'Etat côtier sur les espaces maritimes adjacents à ses côtes sont l'extension et l'accessoire de la souveraineté territoriale, trouvait naguère son expression, en ce qui concerne le plateau continental, dans le concept de prolongement naturel. Il la trouve aujourd'hui dans le principe de distance qui lui confère un contenu concret et aisément déterminable.

Le principe de distance constitue dès lors la traduction moderne de l'idée fondamentale d'adjacence sur laquelle l'arrêt de la Chambre dans l'affaire du *Golfe du Maine* vient d'attirer l'attention (*C.I.J. Recueil 1984*, p. 296, par. 103).

Mais une distance ne se définit pas dans l'absolu, elle se mesure par rapport à quelque chose, en l'espèce par rapport aux côtes. Le principe de distance comporte donc, outre l'élément spatial, une seconde composante: la notion de côtes. C'est la liaison entre ces deux paramètres: côtes et distance, qui forme le principe de distance.

Le rapport entre la géographie côtière et l'élément spatial a été mis en lumière dans l'arrêt de 1982. Il faut relire une fois de plus les formules de la Cour, tant elles sont riches de substance:

> «Le lien géographique entre la côte et les zones immergées qui se trouvent devant elle est le fondement du titre juridique de cet Etat...» (*Plateau continental (Tunisie/Jamahiriya arabe libyenne), arrêt, C.I.J. Recueil 1982*, p. 61, par. 73.)

> «Dans la mesure ... où ... dans certaines circonstances la distance à partir de la ligne de base, mesurée à la surface de la mer, fonde le titre de l'Etat côtier ... seule la base juridique des droits sur le plateau continental — la simple distance de la côte — peut être prise en considération comme pouvant influer sur les prétentions des Parties.» (*Ibid.*, p. 48, par. 48.)

De l'avis de Malte, c'est dans le principe de distance, conçu comme un rapport entre les côtes et la distance, que réside le titre juridique qui doit nécessairement être pris en considération comme point de départ du processus de délimitation.

Aussi voudrais-je me pencher tour à tour sur chacune de ces deux composantes.

Et d'abord, les «côtes».

1. Les «côtes»

Il serait tout à fait inutile de revenir sur l'importance primordiale du concept de côtes, proclamée par une jurisprudence unanime et reconnue par la Libye, si la Partie adverse ne s'était livrée à une succession de glissements injustifiables et d'assimilations arbitraires qui la conduise, tout en proclamant son attachement à la primauté de la géographie côtière, à en dénaturer le sens.

J'ai déjà eu l'occasion de dénoncer la tentative adverse de mettre sur le même plan, sous le couvert du vocable générique de «facteurs physiques», la géographie côtière, d'une part, la géologie et la géomorphologie, d'autre part.

Sans doute la Libye espère-t-elle, grâce à cet amalgame de concepts hétérogènes, faire bénéficier les faits non pertinents de la géologie et de la géomorphologie sous-marines du pavillon juridique flatteur de la géographie côtière. Il faut le répéter une fois encore, une frontière dictée par les accidents sous-marins de la soi-disant *Rift Zone* et de la zone des escarpements ne serait en aucune manière le fruit ou même le reflet de la géographie des côtes de Malte et de la Libye.

Ainsi apparaît un premier aspect d'une tentative de vaste envergure tendant à ne proclamer l'importance des côtes que pour exorciser ce problème et mieux s'en débarrasser.

Un second aspect de cette tactique consiste à glisser subrepticement du concept de «côtes» à celui de «masse territoriale derrière les côtes» *(landmass behind the coasts)*. Nous avions déjà relevé ce glissement dans les deux premiers mémoires libyens (voir ci-dessus, RM, p. 42, par. 76). Il s'est confirmé avec éclat dans la réplique libyenne, où l'on peut lire, entre autres, ceci:

> « What determines the appropriate method of delimitation is the relationship of the two landmasses and the two coasts . . . the shelf area is "generated" by the respective landmasses and coasts . . . » (Ci-dessus, RL, p. 45, par. 4.36.)

Ou encore ceci:

> «good sense would require that an equitable delimitation should reflect the landmass behind the coast in terms of the "weight" of its natural prolongation» (*ibid.*, p. 88, par. 7.10).

On retrouve ainsi le thème qu'un Etat de dimensions considérables comme la Libye jouit d'un prolongement naturel plus «intense» et plus «naturel» — ce sont les mots employés par les écritures libyennes — qu'un petit Etat comme Malte (**II**, CML, p. 41, par. 2.48).

Nous avons dénoncé dans nos écritures cette tentative inadmissible de se servir de la primauté des côtes pour faire venir sur le devant de la scène les superficies respectives des territoires des deux Etats (ci-dessus, RM, p. 43-46, par. 77-82) qui sont derrière les côtes. M. Mizzi a déjà évoqué cette question et M. Brownlie y reviendra plus en détail.

Je me bornerai pour ma part à une seule observation: la thèse libyenne porte une fois de plus atteinte à l'égalité des Etats. L'idée, cent fois exprimée tout au long des écrits libyens, que, dans le processus de délimitation, l'énorme *«landmass»* libyenne doit peser plus lourd que la *«small size»* de Malte (par exemple, ci-dessus, RL, p. 91, par. 7.16) fait intervenir un facteur de discrimination qui est aux antipodes du droit international.

Aucun accord de délimitation conclu à ce jour ne vient confirmer la thèse selon laquelle un Etat côtier bénéficerait d'un surplus de «poids» du fait de l'étendue de son *hinterland* terrestre, pas plus qu'elle ne confirme cette autre thèse qu'un Etat côtier devrait accepter une *capitis deminutio* du fait que son *hinterland* terrestre est un peu profond. Les côtes, certainement oui; l'étendue des terres qui se trouvent derrière les côtes, certainement non.

L'idée que la masse terrestre se projetterait en mer en sautant en quelque sorte par-dessus les côtes est juridiquement inacceptable. Elle l'est aussi politiquement, car elle tend à remettre en cause et à ébranler les fondements mêmes du droit de la mer.

Non, Monsieur le Président, les côtes libyennes n'ont pas plus d'«intensité» pour engendrer les droits du plateau continental ni plus de «poids» pour fixer une délimitation que les côtes maltaises. La dimension de l'Etat, la dimension terrestre de l'Etat est tout simplement en dehors de la question.

Non contente d'affecter aux côtes des Parties un pouvoir générateur de plateau continental plus ou moins intense en fonction de la dimension du territoire terrestre qui en constitue le *hinterland*, la Libye introduit entre les côtes maltaises et les côtes libyennes une nouvelle discrimination, en fonction cette fois-ci du caractère insulaire ou continental du territoire des deux Etats. Ce qui signifierait, à en croire la Libye, que le pouvoir générateur du plateau continental des côtes maltaises se trouverait mutilé du fait d'une double infirmité: la dimension réduite de Malte, d'une part, son caractère insulaire, de l'autre.

La thèse libyenne d'une gradation dans le pouvoir générateur des côtes défie le bon sens. Il est évident — j'y reviendrai — qu'un Etat insulaire de petite taille, s'il est situé au milieu de l'océan, engendre des droits de plateau continental jusqu'à 200 milles marins au moins de ses côtes: son pouvoir générateur d'espaces maritimes vers le large n'est donc pas mutilé du fait de son insularité ou de sa petitesse. Si Malte était située à plus de 400 milles — ou même exactement à 400 milles marins de la Libye — Malte engendrerait une ceinture de 200 milles marins au moins de plateau continental tout autour de ses côtes, bien qu'elle soit une île, bien qu'elle soit petite. Et malgré sa dimension considérable et malgré son caractère continental la Libye serait exactement dans la même situation. Bref, Malte et la Libye auraient un pouvoir générateur du plateau continental égal, et la Libye ne pourrait pas contester à Malte le droit d'avoir les mêmes projections qu'elle-même.

Pourquoi cette égalité dans l'intensité du pouvoir générateur de droits de plateau continental disparaîtrait-elle comme par enchantement lorsque, comme c'est le cas, Malte et la Libye sont trop proches l'une de l'autre pour que leurs droits puissent s'exercer vers le large dans leur intégralité? Et pourquoi Malte aurait-elle soudain un pouvoir générateur de plateau continental moins intense que la Libye? On retrouve ainsi, par une autre voie, les observations que j'ai faites précédemment au sujet de la relation entre le principe de non-empiétement et celui de l'égalité des Etats.

Pour tenter de faire admettre une thèse aussi inattendue, la Libye nous explique que dans la pratique des Etats et dans la jurisprudence la question des petites îles a toujours soulevé des difficultés, qu'elles ont été ignorées, enclavées ou dotées d'un effet réduit (ci-dessus, RL, p. 38, par. 4.12; p. 80, note 1; p. 88, par. 7.10). En un mot, nous dit-on «the size of the island will virtually always be a relevant factor in the delimitation» (*ibid.*, p. 88, par. 7.10).

Sans doute la Libye reconnaît-elle — comment pourrait-elle nier une évidence juridique aussi éclatante? — que, conformément à la règle coutumière exprimée dans l'article 121 de la convention sur le droit de la mer, les îles doivent être traitées comme tout autre territoire terrestre (I, ML, p. 111, par. 6.82;

cf. p. 110, par. 6.79). Mais ce qu'elle déduit de là, c'est la proposition surprenante que les îles — ou les Etats insulaires — ne bénéficient pas d'un statut privilégié par rapport aux autres territoires (**I**, ML, p. 142, par. 9.22; **II**, CML, p. 33, par. 2.31; p. 73, par. 3.36; p. 78, par. 4.01; p. 93-98, par. 4.34-4.45). Car Malte est accusée, tout au long des écrits libyens, de soutenir qu'un petit pays insulaire doit bénéficier de règles juridiques plus favorables qu'un Etat continental de dimension plus grande. L'accusation est tellement ridicule, la dénaturation de notre position est tellement grossière que ne ne sais quoi répondre. Ce que nous soutenons, c'est que Malte, bien que petite et bien qu'insulaire, jouit de droits égaux à ceux de tout autre Etat côtier. Malte réclame le droit à l'égalité. La Libye traduit: «Malte réclame un privilège.»

Monsieur le Président, l'argumentation libyenne est dominée tout entière par une confusion, qui la dévore de l'intérieur, à la manière d'un ver dans un fruit. Je veux parler, la Cour l'aura deviné, de la confusion systématiquement entretenue entre deux situations essentiellement différentes: celle des îles qui sont rattachées politiquement à un Etat continental, et celle des îles qui forment par elles-mêmes des entités étatiques souveraines.

Lorsqu'il s'agit d'îles dépendantes, c'est vrai, le droit international leur attribue un effet variable dans la délimitation du plateau continental, et il tient compte à cet égard, c'est vrai, de leur dimension, ainsi d'ailleurs que de leur population, de leur économie et de leur situation à proximité ou non de la côte de l'un des Etats, du «bon» ou du «mauvais» côté de la ligne médiane.

On fait souvent référence à ce sujet à une intervention du Commander Kennedy, représentant du Royaume-Uni devant la quatrième commission de la conférence de Genève, le 9 avril 1958. Après avoir indiqué qu'«au nombre des circonstances spéciales dont il pourrait y avoir lieu de tenir compte on peut mentionner l'existence d'une île, petite ou grande, dans la zone à répartir», le Commander Kennedy suggérait que «pour tracer une ligne de démarcation, on tienne compte de l'étendue des îles» (*islands should be treated on their merits*, selon le texte original). Il a suggéré aussi que l'on néglige de «très petites îles» situées sur le plateau continental continu et en dehors de la mer territoriale (*Première conférence des Nations Unies sur le droit de la mer, Documents officiels*, vol. VI, p. 112; texte anglais, p. 93). Monsieur le Président, il s'agissait manifestement, dans l'esprit de M. Kennedy, de petites îles appartenant à l'un des Etats et se trouvant dans la zone à délimiter.

Depuis lors l'idée qu'aux fins de la délimitation du plateau continental il y a îles et îles — je paraphrase, vous l'aurez remarqué, la célèbre formule de Gidel: «il y a détroits et détroits» — cette idée a été reprise par une abondante doctrine et confirmée par la pratique des Etats, mais dans la doctrine comme dans la pratique des Etats, c'est toujours, comme dans la déclaration du Commander Kennedy, d'îles dépendantes qu'il s'agit, jamais d'Etats insulaires.

Je n'infligerai pas à la Cour une revue exhaustive de la doctrine. Je me bornerai à noter que, si certaines études écartent implicitement le cas des Etats insulaires pour ne viser que celui des îles dépendantes — par exemple, celles de MM. Ely et Goldie (Ely, «Seabed Boundaries between Coastal States: The Effect To Be Given Islets as "Special Circumstances"», *International Lawyer*, vol. 6, 1982, p. 219 et suiv., notamment p. 219, 223, 231, 234, 236; Goldie, «The ICJ's "Natural Prolongation" and the Continental Shelf Problem of Islands», *Netherlands Yearbook of International Law*, vol. IV, 1973, p. 237 et suiv., notamment p. 247) — d'autres sont au contraire tout à fait explicites. Je pense, par exemple, à un récent article de M. Karl («Islands and the Delimitation of the Continental Shelf: A Framework for Analysis», *American Journal of International Law*, vol. 71, 1977, p. 642 et suiv.), dans lequel l'auteur

déclare ne se préoccuper que des îles dépendantes et ajoute «it is assumed that independent insular States should be treated no differently from mainland States» (p. 642, note 3; cf. p. 667, note 99, et p. 668, note 108). Je pense également à un article déjà un peu plus ancien de M. Delin («Shall Islands Be Taken into Account when Drawing the Median Line According to Article 6 of the Convention on the Continental Shelf?», *Nordisk Tidsskrift for International Ret*, vol. 41, 1971, p. 205 et suiv.). Je citerai aussi dans le même ordre d'idée une thèse de doctorat française, intitulée *L'emprise maritime de l'Etat côtier*, dans laquelle l'auteur, M. Apollis, souligne l'importance du statut politique de l'île et précise ce qui suit:

> «on sait, que les conditions imposées aux îles pour obtenir une emprise côtière normale ne concernent pas les Etats insulaires et les Etats archipels et n'affectent que les îles appartenant à un Etat côtier» (Paris, Pedone, 1981, p. 75, note 176).

Mais c'est à une remarque de l'ancien géographe du département d'Etat des Etats-Unis, M. Hodgson, que je me référerai surtout, en raison de l'expérience et de l'autorité de ce spécialiste des délimitations maritimes: les petits Etats insulaires, écrit-il, doivent bénéficier des mêmes attributs qu'un Etat continental. Il poursuit: «It is difficult to conceive of such a small State being deprived justifiably of shelf . . . merely on the basis of size.» Et il ajoute qu'avec le mouvement d'accession à l'indépendance des petites îles les questions de délimitation impliquant de petits Etats insulaires vont se multiplier. La Cour trouvera un extrait de l'étude de l'éminent géographe dans notre mémoire (**I**, MM, p. 57, par. 174).

La pratique conventionnelle confirme pleinement les indications de cette littérature. S'il est vrai, et il est vrai, que les accords de délimitation n'accordent parfois qu'un effet réduit à certaines îles, compte tenu de leur taille, situation ou population, cela ne concerne jamais, jamais des îles jouissant du statut étatique, mais toujours des îles dépendantes. Nous avons cité dans nos écritures de nombreux accords de délimitation reconnaissant la plénitude de leurs droits de plateau continental à des Etats insulaires, parfois tout petits (**I**, MM, p. 61-78, par. 185-187). Jamais un Etat insulaire, fût-il petit, n'a vu ses droits réduits parce qu'il aurait eu la malchance d'être insulaire et petit; aucun exemple contraire n'a pu être fourni par la Partie adverse. Bref, les délimitations conventionnelles — dans lesquelles pourtant les Etats pèsent parfois d'un poids concret inégal — infligent un démenti éclatant à la théorie discriminatoire que la Libye voudrait ériger en règle juridique.

Lorsque la Libye allègue que le «poids» à attribuer à des petites îles varie selon leur dimension, leur situation ou d'autres facteurs (**I**, ML, p. 90, par. 4.30), c'est exact — mais c'est exact seulement dans le cas d'îles dépendantes. Pour les îles-Etats, aucune discrimination de ce genre n'est faite ni par la doctrine ni par la pratique.

Aussi n'est-ce pas sans quelque surprise qu'on lit dans les écrits adverses que le droit international est indifférent au statut politique d'une île en matière de titre juridique ou de délimitation de plateau continental; le statut politique d'une île, soutient en toutes lettres la Libye, est sans pertinence en cette matière (**II**, CML, p. 72, par. 3.42; p. 96, par. 4.42), et Malte se voit reprocher d'attacher une importance injustifiée au fait qu'elle n'est pas seulement une île, mais un Etat insulaire: *not just an island but an island State* (**II**, CML, p. 73, par. 3.45).

Pour avancer une interprétation aussi inattendue du droit international, la Libye croit pouvoir s'appuyer sur la sentence arbitrale franco-britannique. Dans cette affaire, soutient-elle, le statut politique des îles Anglo-Normandes n'a joué

aucun rôle significatif, et toute supposition que nous pourrions faire que ces îles auraient été traitées différemment si elles avaient constitué des Etats indépendants serait pure conjecture (**II**, CML, p. 92-93, par. 4.35).

Reprenons donc un instant la sentence. Que soutenait le Royaume-Uni? Il soutenait que les îles Anglo-Normandes «sont en fait des Etats insulaires jouissant, dans une large mesure, d'une indépendance politique, législative, administrative et économique de longue date» (par. 171). Et que soutenait la France? La France soutenait qu'il s'agit d'îles «qui n'ont pas la responsabilité directe de leurs relations extérieures, ce qui les distingue des Etats insulaires...» (par. 158). Bref, la question du statut politique des îles était clairement posée devant le tribunal par les parties. Cette question a-t-elle été indifférente au tribunal? Certainement pas, puisque le tribunal, loin de s'en désintéresser, a demandé des précisions à ce sujet à l'agent du Royaume-Uni (par. 172) et que, sur la base des renseignements fournis par ce dernier, le tribunal a conclu:

> «qu'il ne doit considérer les îles Anglo-Normandes que comme des îles du Royaume-Uni, et non pas comme des Etats semi-indépendants jouissant d'un titre particulier à leur plateau continental vis-à-vis de la République française» (par. 186).

Les îles Anglo-Normandes, a-t-il précisé plus loin, «sont des îles distinctes du Royaume-Uni, non pas des Etats distincts» (par. 190).

L'interprétation proposée par la Libye ne résiste pas, on le voit, à la lecture de cette sentence.

La doctrine ne s'est pas trompée sur le sens de cette dernière.

Dans son ouvrage *The Maritime Zones of Islands in International Law* (La Haye, Martinus Nijhoff, 1979), M. Clive Symmons, commentant les passages cités, écrit ce qui suit:

> «had the Channel Islands constituted *independent* Island States, their effect as continental basepoints would have been different» (p. 177). (Les italiques sont de moi.)

De même, M. Derek Bowett, tout en relevant les incertitudes quant aux conséquences exactes qu'aurait pu avoir l'indépendance des îles Anglo-Normandes sur la délimitation (*op. cit.*, p. 223), observe que la discussion détaillée du statut politique des îles par le tribunal «clearly suggests that political status is a relevant factor» (*op. cit.*, p. 224, note 59). Et M. Bowett ajoute que la manière dont le tribunal a tranché la question du plateau continental des îles Anglo-Normandes — c'est-à-dire la solution de l'enclave, pour parler clairement — «can have little value, as a "precedent", for island situations where the islands are separate States» (*op. cit.*, p. 226).

Monsieur le Président, j'espère ainsi avoir montré que la confusion entretenue par la Libye entre les îles dépendantes et les îles jouissant de l'indépendance étatique est contraire à la jurisprudence tout autant qu'à la pratique et aux vues de la doctrine. Sans doute l'exemple des îles dépendantes n'est-il pas entièrement dépourvu d'intérêt pour notre affaire, et c'est pour cette raison que nous y avons nous-mêmes fait référence: car il est précieux de noter que même des îles dépendantes de petite taille ont été parfois pleinement prises en compte dans la délimitation du plateau continental. Il n'en demeure pas moins que les deux situations ne sont pas juridiquement assimilables: les nuances et distinctions qui s'appliquent aux îles dépendantes, notamment selon leur taille, sont sans pertinence aucune à l'égard des Etats insulaires.

Si Malte était terre italienne ou terre grecque, on pourrait se demander quel effet il conviendrait de lui attribuer, compte tenu de son caractère insulaire et de

sa petite dimension, dans une délimitation italo-libyenne ou gréco-libyenne. Mais Malte n'est ni territoire italien ni territoire grec. Malte est territoire maltais. Malte est un Etat.

Si un Etat insulaire est une île, il est aussi, et peut-être même avant tout, un Etat. Et à ce titre l'Etat insulaire jouit, quelle que soit sa taille et malgré son caractère insulaire, de la plénitude des droits et attributions de l'Etat. Une fois de plus nous croisons sur notre chemin le principe de l'égalité des Etats.

Ce principe, que nous rencontrons à tous les carrefours, gêne la Partie adverse, on le comprend. Elle ne peut pas en nier l'existence, et elle est condamnée à admettre que «l'égalité des Etats est un principe fondamental du droit international» (**II**, CML, p. 78, par. 4.04). Comment fait-elle alors pour s'en débarrasser? Elle recourt à un procédé qui la séduit malheureusement trop souvent: déformer notre thèse afin de mieux pouvoir la tourner en ridicule. L'égalité des Etats signifierait, dans la conception de Malte telle qu'interprétée par la Libye, que, puisque Malte et la Libye sont des Etats égaux, ils devraient recevoir des superficies identiques de plateau continental. Ce qui signifierait, toujours selon la position de Malte telle qu'interprétée par la Libye, que toutes les délimitations doivent être effectuées sur la base de l'équidistance. Ce qui signifierait enfin, poussé à l'extrême, qu'en vertu du principe d'égalité les Etats devraient avoir tous des territoires de même dimension, des populations égales, des niveaux économiques comparables. Voilà comment, Monsieur le Président, la Partie adverse croit lire l'égalité des Etats dans la pensée maltaise (**II**, CML, p. 79 et 80, par. 4.06 et 4.07).

Le caractère excessivement caricatural de ces descriptions n'appelle pas de longues observations. Nous n'avons jamais dit que l'égalité des Etats exige une répartition égale du plateau continental entre Malte et la Libye. Nous avons tout au contraire fait ressortir que la Libye aurait, même dans le cas de la ligne médiane préconisée par Malte, une superficie de plateau continental considérablement plus grande que celle relevant de Malte (**I**, MM, p. 36, par. 117). Et M. Mizzi s'est longuement expliqué sur ce point.

La remarque libyenne selon laquelle la sentence arbitrale de 1977 aurait «disposé de la prétention maltaise» de façon *«crystal clear»* est hors de propos. Certes, je le sais, la sentence franco-britannique écarte au paragraphe 195 l'argument français fondé sur l'égalité des Etats, mais pourquoi l'a-t-elle fait? Parce que cet argument conduisait à l'attribution de parts égales, de superficies égales, ainsi qu'il ressort clairement de l'analyse de la thèse française qui figure au paragraphe 165 *in fine* de la sentence elle-même. Mais ce n'est pas cela que Malte demande. Ce que Malte demande, sur le fondement de l'égalité des Etats, ce n'est pas du tout, mais pas du tout, un partage égal des superficies du plateau continental, mais la consécration d'une position d'égalité dans l'opération de délimitation du plateau continental — même si l'un des Etats est continental et de taille importante, et l'autre insulaire et de taille réduite. Face au droit de la délimitation maritime, le «small group of islands» qu'est Malte vaut autant et pèse aussi lourd que l'énorme «continental landmass» qu'est la Libye. Voilà la vérité majeure, contre laquelle la Libye tente en vain de s'insurger.

Monsieur le Président, l'Etat maltais n'a jamais prétendu un seul instant bénéficier d'un statut spécial ou privilégié.

Ce que l'Etat maltais soutient, c'est qu'en tant qu'Etat, en tant que membre à part entière de l'Organisation des Nations Unies et des organisations internationales — tout le monde connaît le rôle qu'il a joué dans l'élaboration du droit de la mer — Malte est placée sur un pied d'égalité avec l'Etat libyen aux fins de la présente délimitation.

Affirmer ou impliquer le contraire, comme n'hésite pas à la faire la Libye,

c'est méconnaître un principe fondamental du droit et des relations internationales.

L'inégalité concrète des Etats sur le plan du développement économique a conduit certains à s'élever contre la situation dominante que l'égalité des Etats sur le plan juridique peut assurer aux «grands» vis-à-vis des «petits», et l'idée a été émise — en particulier par mon ami le doyen Colliard — de remédier à cette domination de fait au moyen de ce qu'il a appelé une inégalité compensatrice. La Cour n'acceptera pas, Malte en est persuadée, qu'en matière de délimitation du plateau continental la protection que le principe de l'égalité souveraine des Etats assure aux «petits» soit balayée par des privilèges juridiques exorbitants accordés aux «grands»; faute de quoi l'inégalité compensatrice ferait place à une inégalité aggravatrice.

Ainsi s'effondre, Monsieur le Président, Messieurs les juges, la tentative de la Partie adverse de faire dévier le concept de côtes vers un concept différent, qui n'a rien à voir avec lui. Apparemment la Libye parle «côtes»; en réalité elle veut faire passer sous ce pavillon les masses continentales respectives des deux pays et le contraste entre le caractère insulaire de Malte et le caractère continental de la Libye. Pour Malte, au contraire, les côtes sont les côtes, et pas autre chose; une île-Etat est un Etat comme un autre; et les côtes d'un Etat insulaire ont le même pouvoir générateur de droits et juridictions maritimes et pèsent aussi lourd dans la délimitation du plateau continental que les côtes de n'importe quel autre Etat côtier.

La dénaturation du concept de côtes par la Libye ne s'arrête pourtant pas là.

La Libye lit en effet le vocable de «côtes» comme synonyme pour l'essentiel de «longueur de côtes». Les côtes de Malte étant moins longues que celles de la Libye, elles engendrent des droits moins importants de plateau continental. Voilà ce qu'on peut lire de la première à la dernière page des écrits libyens.

Ce problème intéresse la question de la proportionnalité des longueurs de côtes, déjà évoquée par M. Mizzi et sur laquelle reviendra en détail mon ami Ian Brownlie. Je me bornerai, pour ma part, à évoquer la longueur des côtes dans le contexte d'une controverse un peu spéciale suscitée par la Libye à propos des points de base.

Ainsi que la Cour l'a noté, la Partie adverse nous reproche, à plusieurs reprises, de substituer «points de base» et lignes de base à «côtes». Apparue dans le contre-mémoire de la Libye (**II**, CML, p. 37, par. 2.39; p. 42, par. 2.49, p. 159, par. 7.23), cette accusation occupe une place importante dans la réplique. Malte est clouée au pilori pour avoir confondu points de base et côtes (ci-dessus, RL, p. 44, par. 4.33) et pour avoir oublié que ce sont les côtes, et non pas des points de base en tant que tels, qui engendrent des droits maritimes (*ibid.*, p. 45, par. 4.36; p. 58, par. 5.13).

Ce qu'il y a derrière cette surprenante accusation, c'est la tentative libyenne de réduire la géographie côtière à une longueur côtière mesurée en kilomètres ou en milles, grâce en quelque sorte à un instrument d'arpentage que l'on déroulerait le long des côtes.

La longueur des côtes constitue sans doute l'un des éléments de la géographie côtière, *nul n'en disconviendra; elle ne saurait pour autant être regardée comme* le facteur décisif, et moins encore comme le facteur exclusif, de la géographie côtière au regard de la génération des droits de plateau continental.

La Libye paraît oublier que, selon une règle aujourd'hui bien établie, et dont portent témoignage les articles 57 et 76 de la convention sur le droit de la mer, la largeur de la zone économique exclusive et du plateau continental est calculée par rapport aux «lignes de base à partir desquelles est mesurée la largeur de la mer territoriale», et que ces lignes de base peuvent être des «lignes de base

droites reliant des points appropriés», selon les dispositions de l'article 7 de la même convention. Si c'était la longueur effective des côtes, en tant que telles, qui constituait le facteur générateur des droits maritimes, la technique des lignes de base droites ne serait pas admissible. Au regard du plateau continental et de la zone économique exclusive, comme au regard de la mer territoriale, les lignes de base sont regardées par le droit international comme une expression juridiquement valable des côtes. Ce n'est pas un hasard si l'on parle couramment, par raccourci, de «200 milles marins des côtes», au lieu de dire, ce qui serait plus précis: «200 milles marins des lignes de base à partir desquelles est mesurée la mer territoriale». Cet usage de langage assimilant «lignes de base» et «côtes» est révélateur.

Mais la Libye paraît oublier surtout que, pour la fixation de la limite extérieure de la mer territoriale, le droit international a depuis longtemps abandonné la méthode dite du tracé parallèle, qui consiste à suivra la côte ou les lignes de base dans toutes leurs inflexions, au profit de la méthode dite de la courbe tangente, ou des enveloppes des arcs de cercle, qui repose précisément sur la technique des points de base. Cette méthode consiste, s'il m'est permis de le rappeler, à calculer la largeur de la mer territoriale à partir de quelques points de base seulement et à négliger en conséquence d'autres points de la côte, qui sont ainsi «perdus» pour cette construction. Nous avons donné des explications détaillées sur cette méthode, aujourd'hui érigée en règle de droit par l'article 4 de la convention de 1982, dans notre réplique écrite à laquelle je prie respectueusement la Cour de bien vouloir se reporter (ci-dessus, RM, p. 48-50, par. 89-95). Ce que je retiendrai ici, c'est seulement ceci: le droit international n'a apparemment vu rien de condamnable dans ce que la Partie adverse appelle la substitution de points de base aux côtes. Les points de base sont utilisés, exactement comme le sont les lignes de base, parce qu'ils expriment la configuration réelle de la côte, et dans la mesure où ils l'expriment. Puis-je me permettre de rappeler qu'en décrivant la méthode de la courbe tangente en 1951, à une époque où cette méthode était déjà répandue en pratique mais n'était pas encore obligatoire en droit, la Cour a déclaré que «son but est d'assurer l'application du principe que la ceinture des eaux territoriales doit suivre la ligne de la côte» (affaire des *Pêcheries, C.I.J. Recueil 1951*, p. 129)? Côtes, lignes de base et points de base sont des aspects d'une seule et même réalité géographique.

La leçon qui se dégage de ces observations est claire: en essayant d'établir une opposition entre le concept de côtes, d'une part, et la méthode des points et lignes de base, d'autre part, la Libye mène un combat d'arrière-garde: d'ores et déjà le droit international lui a donné tort.

Il est assez piquant, au demeurant, de voir la Libye s'en prendre ainsi à la ligne de délimitation préconisée par Malte au nom d'une prétendue non-représentation des côtes qui serait due, à en croire la Libye, à l'utilisation de la technique des points de base. En quoi — on aimerait le savoir — une ligne qui suivrait la direction de la soi-disant *Rift Zone* serait-elle représentative de la configuration côtière des deux pays?

C'est sans doute parce qu'elle est consciente du caractère désespéré de sa tentative que la Partie adverse, dans un ultime sursaut, se plaint de ne pas vraiment connaître les points de base sur lesquels Malte s'appuie (**I**, ML, p. 47, note 5; **II**, CML, p. 37, note 2; ci-dessus, RL, p. 58, par. 5.13).

Monsieur le Président, dans son premier écrit déjà, Malte a indiqué que les lignes de base droites à partir desquelles est mesurée la largeur de sa mer territoriale — et donc calculée sa ligne médiane — joignent vingt-six points et que ces lignes étaient illustrées sur la carte n° 2 annexée au *mémoire* (**I**, MM, p. 16,
(42) par. 31-32). La Cour trouvera ces mêmes lignes reproduites sur la figure 11 de

notre dossier. Ces lignes, que la Libye connaissait donc, ont été notifiées à la Libye en 1972 et ont été utilisées en 1973 pour l'octroi des licences d'exploration. La Libye a élevé certaines objections contre l'utilisation comme point de base du rocher de Filfla, comme l'a rappelé mon ami, M. Mizzi (cf. ci-dessus, RM, p. 10, par. 11; RL, p. 35, note 1). L'ignorance dans laquelle la Libye se plaint d'avoir été maintenue au sujet des lignes de base de Malte est d'autant plus inattendue que la Libye a fait état de notre carte n° 2 dans ses propres écri-
(14) tures (**II**, CML, p. 35, par. 2.35).

Voilà, Monsieur le Président, pour le prétendu «mystère» qui, à en croire la Partie adverse, affecterait les points et lignes de base de Malte (**I**, ML, p. 13, par. 1.11). De «mystère», il n'y en a certainement pas.

La tentative de la Partie adverse de faire dériver le concept de géographie côtière vers celui de longueurs côtières s'effondre ainsi d'elle-même. La longueur des côtes est un élément de la configuration côtière, parmi d'autres; elle n'exprime pas à elle seule la configuration côtière. Glisser de la proposition: les droits de plateau continental sont engendrés par la géographie côtière, et leur étendue dépend de la géographie côtière des deux pays concernés, à la proposition: les droits de plateau continental sont engendrés par les longueurs côtières, et leur étendue dépend des longueurs côtières des deux pays concernés, reviendrait à prétendre que, si un kilomètre de côtes de l'un des Etats engendre une étendue donnée de plateau continental, dix kilomètres de côtes de l'autre Etat *engendrent une étendue dix fois supérieure de plateau continental. Ce serait* faire des longueurs côtières une source directe du titre au plateau continental, une source autonome de délimitation, ce à quoi se refuse la totalité de la jurisprudence, jusques et y compris le récent arrêt du *Golfe du Maine* (*C.I.J. Recueil 1984*, p. 323, par. 185, et p. 334-335, par. 218), tout comme s'y refuse la pratique des Etats.

J'en ai ainsi terminé, Monsieur le Président, Messieurs les juges, avec la première composante du principe de distance, c'est-à-dire le concept de côtes. Les conclusions auxquelles je pense être parvenu sont évidentes; elles le sont même tellement que sans les extraordinaires théories libyennes je ne me serais pas cru autorisé à développer devant la Cour de telles banalités. Le titre juridique au plateau continental de Malte et de la Libye, appelé à intervenir dans le processus de délimitation, ne se trouve ni dans les masses continentales situées derrière les côtes des deux pays, ni dans le caractère insulaire ou continental des deux Etats, ni dans les longueurs de leurs côtes mesurées au cordeau. Il se trouve dans les côtes de Malte et de la Libye telles qu'elles sont exprimées dans les lignes et points de base établis et retenus en conformité avec le droit international.

2. *La «distance»*

Monsieur le Président, nous venons de creuser le concept de «côtes», ou du moins de l'évoquer; il nous reste à tenter de mieux appréhender celui de «distance par rapport aux côtes».

Ce qui me retiendra d'abord, dans le cadre de ces développements, c'est la composante spatiale du principe de distance, c'est-à-dire le fait que l'extension du titre de l'Etat côtier sur le plateau continental et l'étendue de ses droits vis-à-vis d'Etats voisins se définissent par une certaine distance, mesurée à la surface de la mer, par rapport aux lignes ou points de base représentatifs des côtes. L'existence et en tout cas la pertinence de ce concept pour notre affaire sont contestées par la Partie adverse: je m'efforcerai donc d'établir et l'existence et la pertinence de ce concept pour notre affaire à la lumière du droit international

coutumier tel qu'il a trouvé expression dans l'article 76 de la convention sur le droit de la mer.

Après quoi, dans un second temps, je m'attacherai à la manière dont le principe de distance, conçu comme un rapport de caractère spatial avec les côtes est mis en œuvre concrètement. Ce sera pour moi l'occasion d'évoquer le principe et la technique de la projection radiale.

Le concept de distance et l'article 76, paragraphe 1, de la convention sur le droit de la mer de 1982

La position de la Libye à l'égard de la règle exprimée dans l'article 76, paragraphe 1, de la convention sur le droit de la mer est complexe. Si je l'ai bien comprise, elle peut se résumer dans les propositions suivantes:

Premièrement: la Libye semble admettre, comme je l'ai déjà indiqué, que le concept de distance joue un rôle important en matière de zone économique exclusive (**II**, CML, p. 101, par. 4.52), mais elle considère que la zone économique exclusive est étrangère à la présente affaire. Je me suis déjà expliqué sur ce point.

Deuxièmement: en ce qui concerne spécifiquement le plateau continental, la Libye ne paraît plus, dans le plus récent état de sa pensée, mettre en doute, comme elle le faisait dans le mémoire, la valeur coutumière de la règle qui a trouvé son expression dans l'article 76, paragraphe 1, mais peut-être d'autres explications nous seront-elles fournies sur ce point dans quelques jours.

Troisièmement: en vue d'atteindre son objectif primordial, qui est de mettre la présente délimitation à l'abri du principe de distance dans l'espoir de conserver ses chances au prolongement naturel physique, la Libye érige une double ligne de défense.

La Libye soutient d'abord que l'article 76, paragraphe 1, régit seulement la base juridique du titre au plateau continental et la détermination de sa limite extérieure, et qu'il n'intéresse pas la délimitation du plateau continental entre Etats voisins. Cette négation de toute corrélation entre titre et délimitation forme la ligne de défense rapprochée érigée par la Libye dans l'espoir de préserver la délimitation de toute contamination du principe de distance. J'ai évoqué hier cette question des rapports entre titre juridique et délimitation, et je n'y reviendrai pas.

Mais, pour renforcer cette tentative de prophylaxie, la Libye s'en prend, dans un second volet de son argumentation, au principe de distance sur le plan du *entitlement* lui-même. C'est là la ligne de défense éloignée, dont l'objectif est de stériliser sur le plan du titre juridique, à la racine si j'ose dire, le principe de distance tant redouté. Cette mise en question du principe de distance sur le plan du titre juridique prend la forme d'une exégèse complexe et laborieuse du paragraphe 1 de l'article 76, et c'est sur cet aspect précis de l'argumentation libyenne que je voudrais m'arrêter ici.

L'article 76, paragraphe 1, de la convention sur le droit de la mer de 1982 fait-il, ou ne fait-il pas, de la distance l'élément central du titre juridique au plateau continental et le critère déterminant de sa limite extérieure? Nous parlons ici de titre vers le large et non pas de délimitation.

Pour apporter à cette question la réponse négative conforme à ses vues, la Libye propose de lire cette disposition comme confirmant le principe traditionnel du prolongement naturel au sens géologique et géomorphologique du terme en tant que critère «principal» du titre juridique au plateau continental *(main, primary, fundamental, essential)* voilà les mots qu'elle emploie — et c'est seulement à ce titre «subsidiaire» ou «secondaire» *(subsidiary, secondary)* que,

selon la Libye, l'article 76 ferait intervenir le critère spatial de la distance à partir des lignes de base (I, ML, p. 87-89, par. 6.18-6.20; II, CML, p. 98-99, par. 4.47-4.48; ci-dessus, RL, p. 21, par. 3.07-3.08). Cette argumentation destinée, je le répète, à détruire à la racine même, sur le plan éloigné du titre juridique, le principe de distance se trouve exposée dans le mémoire, dans le contre-mémoire et dans la réplique libyens.

A l'appui de cette interprétation minimisante du principe de distance dans l'article 76, la Libye croit pouvoir invoquer la genèse de cette disposition au cours des travaux de la troisième conférence. A en croire la Libye, la troisième conférence aurait cherché par là à donner une importance nouvelle et prééminente au prolongement naturel, et c'est seulement à titre exceptionnel et marginal, à contre-cœur en quelque sorte, qu'elle aurait introduit la distance dans notre disposition. Loin d'avoir été affaibli par l'article 76, le prolongement naturel physique serait sorti renforcé des travaux de la conférence. Voilà ce que voudrait nous faire croire la Partie adverse (I, ML, p. 89, par. 6.20).

Cette lecture de l'article 76 comme ayant insufflé au prolongement naturel physique une sorte de seconde jeunesse ne manquera pas de surprendre. Les travaux de la conférence ne montrent-ils pas, tout au contraire, ainsi que je l'ai rappelé, que la substitution, au critère physique des 200 mètres de profondeur, d'une distance uniforme, indépendante des hasards des caractéristiques sous-marines, a été conçue par la conférence comme un facteur de correction des inégalités, et que c'est seulement en vue de ne pas léser les quelques Etats pourvus par la nature d'une marge continentale particulièrement large que la conférence a conservé — pour eux et eux seuls — le critère du prolongement naturel? Critère «fondamental», «primaire», «essentiel», «principal», nous dit la Libye à propos du prolongement naturel. Mais comment la suivre si l'on connaît le déroulement des travaux de la troisième conférence et comment la suivre alors que, précisément, la conférence n'a pas permis, même pour les Etats à marge continentale large, au critère du prolongement naturel physique de jouer à plein? Car les Etats à large marge continentale eux-mêmes ne peuvent pas exercer leurs droits de plateau continental jusqu'à la limite effective de leur prolongement naturel physique; et chacun sait à quels difficiles débats a donné lieu cette question à la conférence. Pas davantage ne saurait-on oublier que cette limite assignée à l'épanouissement du prolongement naturel physique dans toute sa plénitude, même pour les Etats à marge continentale large, a consisté, précisément, à recourir, même dans ce cas, au critère de la distance — puisque la suite de ce même article 76 arrête les droits de plateau continental en tout état de cause à 350 milles marins des lignes de base ou à 100 milles marins de l'isobathe des 2500 mètres. Monsieur le Président, la limite des 200 milles n'a rien, mais vraiment rien de «subsidiaire» ou de «secondaire». Elle correspond d'abord à la situation la plus fréquente, à la normale en quelque sorte. Elle constitue ensuite la distance de référence par rapport à laquelle se définissent à la fois l'extension des droits de plateau continental plus loin vers le large dans certaines situations et la limite maximale de cette extension. La distance est partout dans cette matière.

L'article 76 énonce une règle en deux parties, sans établir de hiérarchie entre une partie qui serait essentielle et une partie qui serait secondaire. Ces deux parties sont de valeur égale et sont placées sur le même plan. Jusqu'à 200 milles des lignes de base, c'est la distance seule qui fonde le titre juridique de l'Etat côtier. Au-delà des 200 milles l'Etat côtier n'a de titre juridique sur les fonds marins que dans la mesure où sa marge continentale au sens physique du terme s'étend plus loin vers le large, mais même dans ce cas ses droits sont enfermés dans des limites de caractère spatial.

Dans le pénétrant et riche rapport qu'il a présenté au colloque de Rouen déjà cité de la Société française pour le droit international, mon ami et collègue M. Quéneudec a évoqué ce qu'il a appelé «la règle générale des 200 milles». Cette règle, dit-il, a été établie par l'article 57 de la convention comme «un maximum pour la zone économique» et par l'article 76 comme «un minimum pour le plateau continental». D'où il résulte que le plateau continental

> «ne se présente plus seulement comme une notion naturelle englobée dans le concept géologique de «marge continentale», il est également conçu par le texte de la convention comme une *notion artificielle fondée sur un critère de distance*» (*op. cit.*, p. 133-134). (Les italiques sont de moi.)

De critère «principal» et de critère «secondaire», M. Quéneudec ne fait, à juste titre, aucune mention.

Dans l'espoir de prêter un semblant de plausibilité juridique à sa thèse de la hiérarchie entre une disposition principale et une disposition subsidiaire (celle sur la distance étant qualifiée de subsidiaire), la Libye appelle à son aide la Cour elle-même. A l'en croire, en effet, c'est cette thèse du caractère subsidiaire et secondaire de la distance qui se trouverait confirmée par le paragraphe 47 de l'arrêt *Tunisie/Libye* auquel j'ai déjà eu plusieurs fois à me référer (II, CML, p. 99, par. 4.48; ci-dessus, RL, p. 21, par. 3.07).

Que dit donc la Cour dans ce passage?

Elle commence par déclarer que la définition du premier paragraphe de l'article 76 «comprend deux parties, faisant appel à des critères différents». Après quoi la Cour énonce:

> «D'après la première partie du paragraphe 1, c'est le prolongement naturel du territoire terrestre qui est le critère principal. Dans la deuxième partie du paragraphe, c'est la distance de 200 milles qui fonde dans certaines circonstances le titre de l'Etat côtier.» (*C.I.J. Recueil 1982*, p. 48.)

La Libye souligne dans ses écrits le mot «principal» — «*the main criterion*» — et elle en déduit que, puisque le prolongement naturel est le «critère principal», la distance ne peut être que le critère secondaire.

Mais, Monsieur le Président, ce n'est pas du tout cela que la Cour a dit. La Cour n'a pas déclaré: «D'après le premier paragraphe de l'article 76 [le premier paragraphe tout entier], c'est le prolongement naturel qui est le critère principal.» La Cour n'a pas dit cela. La Cour a déclaré: «D'après la première partie [c'est-à-dire la première phrase] du paragraphe 1, c'est le prolongement naturel ... qui est le critère principal», c'est-à-dire lorsque la marge continentale s'étend au-delà de 200 milles des lignes de base, ce qui est tout à fait différent. Il est évident que dans le cas des Etats à marge continentale large c'est le prolongement naturel qui constitue le critère principal. Mais de là à établir une hiérarchie à l'intérieur du paragraphe 1, comme le fait la Libye, il y a un pas que rien n'autorise à franchir. La Cour n'a établi aucune hiérarchie de ce genre; elle a parlé de «deux parties, faisant appel à des critères différents», sans dire en aucune manière que l'une des parties ou l'un des critères serait plus «fondamental» ou plus «primaire» que l'autre.

Une opinion individuelle dans la même affaire *Tunisie/Libye* fait observer que «le critère de distance ... doit être considéré comme cristallisant d'ores et déjà une règle de droit international coutumier» (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 114, par. 52). De critère «secondaire» ou «subsidiaire» il n'est, dans cette opinion, pas davantage question.

La Libye ne peut décidément pas espérer mobiliser la Cour au service de sa

tentative de réduire à un rang mineur, subalterne, le principe de distance dans la philosophie du plateau continental de l'article 76.

Monsieur le Président, au terme de ces observations, le bilan est facile à dresser.

Les efforts tous azimuts déployés par la Libye en vue de minimiser à tout prix la présence de la distance dans la nouvelle conception — et, par voie de conséquence, dans la délimitation — du plateau continental, il ne reste rien. Les faits sont là, et les faits sont têtus. Le titre juridique au plateau continental repose *aujourd'hui essentiellement sur la corrélation spatiale entre* les côtes et les fonds marins adjacents à ces côtes situés à une certaine distance de ces dernières, et l'étendue des droits de plateau continental de l'Etat côtier est dictée par la conjugaison de la géographie côtière et de la distance par rapport à ces côtes.

Le rapprochement du plateau continental et de la zone économique exclusive revient à l'esprit, puisque la zone économique exclusive englobe les juridictions et droits souverains de l'Etat côtier aussi bien sur les fonds marins et leur sous-sol que sur la colonne d'eau et que les limites extérieures du plateau continental et de la zone économique exclusive coïncideront dans la majorité des cas, ou dans bien des cas en tout cas. On comprend que certains soient allés jusqu'à évoquer l'absorption partielle (c'est-à-dire en deçà de 200 milles marins des lignes de base) du plateau continental et de la zone économique exclusive. On lit ainsi dans une opinion jointe à l'arrêt de 1982:

> «il est difficile de nier que, tout au moins pour le plateau continental ne dépassant pas 200 milles, la notion même de plateau continental soit en voie d'être assimilée ou intégrée à celle de zone économique exclusive» (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 115, par. 55; cf. *ibid.*, opinion dissidente de M. Oda, p. 249, par. 146).

Dans le même esprit, M. Quéneudec a observé, dans le rapport déjà cité au colloque de Rouen, que par le jeu de l'article 76

> «un complément est accordé forfaitairement à l'Etat côtier, de manière à faire coïncider la limite extérieure de son plateau continental et la limite de la zone économique exclusive qu'il est en droit d'instituer» (*op. cit.*, p. 134).

Ce rapprochement entre la conception du plateau continental et celle de la zone économique exclusive ne peut pas demeurer sans effet sur le plan de la délimitation. Comme l'a dit une autre opinion en 1982:

> «dans la nouvelle conception du plateau continental comme dans celle de la zone économique exclusive, le critère de distance joue désormais un rôle déterminant dans la détermination de l'étendue des zones respectives... Le critère de la distance ... est appelé à remplacer le prolongement naturel comme critère de délimitation du plateau continental» (*C.I.J. Recueil 1982*, opinion dissidente de M. Oda, p. 257, par. 160, et p. 270, par. 182; cf. p. 249, par. 146).

Ces observations prennent un relief particulier à la lumière d'un passage du récent arrêt du *Golfe du Maine*:

> «il est ... à prévoir [écrit la Chambre] que, avec l'adoption progressive, par la plupart des Etats maritimes, d'une zone économique exclusive et, par conséquent, avec la généralisation de la demande d'une délimitation unique, ... la préférence ira désormais, inévitablement, à des critères se prêtant mieux, par leur caractère plus neutre, à une délimitation polyvalente» (*C.I.J. Recueil 1984*, p. 327, par. 194).

D'où la Chambre tire la double conséquence que le critère de base de la délimitation doit être la géographie des côtes et que les méthodes destinées à le mettre en application doivent être des méthodes géométriques (*ibid.*, p. 327, par. 195, et p. 329, par. 199). Monsieur le Président, Messieurs les juges, je pose la question: quel critère plus neutre, plus géométrique, pour mettre en œuvre le concept fondamental d'adjacence, peut-on imaginer que celui de la distance à partir des côtes?

Il n'y a pas lieu ici d'examiner, et je ne m'aventurerai pas dans ce domaine, le problème de savoir dans quelle mesure la délimitation du plateau continental et la délimitation de la zone économique exclusive doivent ou non coïncider. C'est un autre problème. Il s'agit dans notre affaire, nous sommes d'accord avec la Partie adverse sur ce point, de la délimitation du plateau continental entre Malte et la Libye, et de rien d'autre. La question de la zone économique exclusive doit néanmoins, je l'ai déjà relevé, demeurer présente à l'esprit.

Ayant ainsi établi le rôle du concept de distance, il me reste à m'interroger sur sa mise en œuvre concrète. C'est à cet aspect du problème que je souhaiterais consacrer la fin de mes développements relatifs au principe de distance.

La mise en œuvre du concept de distance: la projection radiale à partir des côtes

La Libye reconnaît que la côte constitue «le point de départ ... de l'exercice de délimitation» (**II**, CML, p. 157, par. 7.18). C'est effectivement, nous l'avons vu, ce que décide une jurisprudence unanime, depuis l'arrêt sur le *Plateau continental de la Mer du Nord* de 1969 jusqu'à l'arrêt de 1984 sur le *Golfe du Maine*. Ce que la Libye omet toutefois de préciser, c'est que le titre de l'Etat côtier sur une certaine étendue de fonds marins tant vers le large que vis-à-vis d'Etats voisins ne se trouve pas dans les côtes prises en elles-mêmes, mais dans une corrélation entre ces côtes et les espaces maritimes adjacents situés devant elles.

Comment, en effet, les droits de l'Etat côtier vont-ils être déterminés concrètement?

Lorsqu'il s'agit de définir les espaces maritimes dans l'absolu, c'est-à-dire vers le large et sans avoir à tenir compte de l'existence d'un Etat voisin, le meilleur moyen consiste à tracer des arcs de cercle de la distance voulue à partir de points de la côte. En ce qui concerne plus précisément la limite extérieure du plateau continental, on commencera donc en pratique par tracer des arcs de cercle d'un rayon de 200 milles, puisque aucun droit de plateau continental n'est aujourd'hui inférieur à 200 milles. Mais même pour les Etats à marge continentale large, il sera nécessaire de commencer par là, puisque l'extension éventuelle de leur plateau au-delà ne pourra s'établir que par référence à cette limite de 200 milles. De manière plus précise, on aura recours à la technique de l'enveloppe des arcs de cercle, mise au point naguère pour la limite extérieure de la mer territoriale et à laquelle je me suis déjà référé (cf. ci-dessus, RM, p. 47-50, par. 87-95). Cette technique, qui prend appui, je le rappelle, sur certains points représentatifs des côtes, les points de base, permet de concrétiser la projection de la côte vers la mer adjacente dans toutes les directions; elle permet de créer cette «ceinture» dont la Cour a parlé à propos de la mer territoriale (*C.I.J. Recueil 1951*, p. 129) et qui se retrouve chaque fois qu'un espace se définit ou se mesure par une certaine distance à partir des côtes. Le mot de «ceinture», la Cour n'aura pas manqué de le noter, est particulièrement approprié dans le cas d'une île: un Etat insulaire, même petit, situé au milieu de l'océan, engendre une vaste ceinture de plateau continental grâce à la projection

radiale et multidirectionnelle à partir des points de base représentatifs de ses côtes. C'est ce qui explique ce phénomène bien connu que des Etats insulaires de dimension réduite puissent attirer un domaine maritime absolument hors de proportion avec leur superficie terrestre. Nous avons cité dans nos écritures l'exemple, que nous avons puisé dans l'ouvrage de M. Lucchini et de M. Voelckel, *Les Etats et la mer*, de l'île de Nauru dont la superficie terrestre de 21 kilomètres carrés engendre une zone économique exclusive près de dix mille fois plus étendue (ci-dessus, RM, p. 44, par. 78).

Dans l'affaire du Golfe du Maine, M. Jaenicke, *conseil du Canada*, s'est exprimé à ce sujet dans les termes suivants:

> «the coastal State's jurisdiction extends into the sea without any predetermined direction; it extends . . . "radially" . . . It may suffice here to call attention to the situation of an isolated insular coast in the ocean. Nobody would deny, for example, the Hawaian islands a radial seaward projection of their coasts in all directions.» (*C.I.J. Mémoires*, vol. VII, p. 46.)

Sur ce premier point, je pense, la Partie adverse ne nous apportera aucune contradiction. Ce qu'elle nous objectera, je le devine, c'est que Malte précisément n'est pas située au milieu d'un vaste océan et qu'il ne s'agit pas dans notre affaire de limites extérieures mais de délimitation.

Il est vrai que la situation respective de Malte et de la Libye ne permet d'accorder à aucun des deux Etats cette «ceinture» — je reprends le mot de la Cour — complète de 200 milles marins au moins de plateau continental à laquelle conduirait l'application de la méthode des arcs de cercle tracés à partir des points de base appropriés de chacun d'eux. L'essence même de la délimitation consiste, je l'ai noté, à amputer les droits de chacun des deux Etats de manière équitable et raisonnable. Le choix de la méthode de délimitation n'est en définitive rien d'autre que le choix de la méthode appropriée pour tracer ce que j'appellerai la ligne d'amputation, c'est-à-dire pour fixer la distance à laquelle chacun des deux Etats devra accepter d'arrêter des projections qui, autrement, auraient pu s'épanouir vers le large jusqu'à une distance de 200 milles au moins.

Pour illustrer ces explications quelque peu abstraites, mais dictées finalement par le bon sens, nous avons préparé une carte, que la Cour trouvera dans le dos-
(43) sier qui lui a été remis sous le numéro 12 et à laquelle je la prie, très respectueusement, de bien vouloir se reporter quelques instants.

Sur cette carte nous avons tracé, à titre d'échantillonnage, en couleur rouge, des arcs de cercle de 200 milles marins à partir de deux points de base pris sur les lignes de base droites de Malte, à savoir les points «m» et «n». Si la Cour
(42) veut bien se reporter à la figure 11, elle constatera que ce sont là deux des trois points de base qui contrôlent la ligne médiane du côté maltais.

(43) Nous avons procédé de même sur la figure 12, en couleur noire, à partir de cinq points pris sur les côtes de la Libye, à savoir les points «a», «c», «h»,
(42) «i», et «j». Ce sont là, comme le montre à nouveau notre figure 11, cinq des douze points de base qui contrôlent la ligne médiane du côté libyen. Il s'agit donc d'un échantillonnage destiné à éclairer mon raisonnement.

Si Malte n'avait en face d'elle que la mer, son plateau continental s'étendrait au moins jusqu'à l'enveloppe de tous les arcs de cercle tracés sur le modèle de ceux qui figurent sur cette carte en rouge. Et si la Libye n'avait en face d'elle que la mer, son plateau continental s'étendrait également au moins jusqu'à l'enveloppe de tous les arcs de cercle tracés sur le modèle de ceux qui figurent sur cette carte en noir.

Mais telle n'est évidemment pas la situation réelle. La situation réelle est que

les projections maltaises et les projections libyennes se chevauchent à certains endroits et que, de ce chevauchement, naît la nécessité d'une délimitation et, par conséquent, d'une diminution des droits de chacun. Il faudra donc déterminer une méthode permettant de stopper les deux projections avant que chacune d'elles n'atteigne son plein épanouissement et de réaliser cette amputation réciproque et mutuelle qui est l'essence même de l'exercice de délimitation.

On mesure, dans ces conditions, à quel point la théorie avancée par la Libye au sujet des côtes pertinentes dans la présente affaire est erronée.

La Libye soutient que seuls sont pertinents pour notre délimitation les segments de la côte maltaise et les segments de la côte libyenne qui se font face directement et sont rigoureusement parallèles.

En ce qui concerne la Libye — la Cour pourra suivre ce raisonnement sur la (42) figure 11 —, la Partie adverse ne reconnaît en conséquence de pertinence, pour la délimitation avec Malte, qu'au segment de la côte entre Ras Ajdir et Ras Zarrouq. Le reste de la côte libyenne, à l'est de Ras Zarrouq, est présenté comme étranger à la délimitation avec Malte, puisque faisant face non pas aux côtes maltaises, mais aux côtes d'Etats tiers, plus précisément aux côtes italiennes et grecques. Les côtes pertinentes libyennes, selon la Libye, s'arrêtent ici.

En ce qui concerne Malte, seuls sont pertinents, d'après la Libye, les segments de la côte maltaise qui font face directement à la côte libyenne, c'est-à-dire les segments orientés plein sud. Les autres segments de la côte maltaise, non orientés plein sud face à la Libye, sont déclarés étrangers à la délimitation avec la Libye. Etant donné le fameux «tild» de Malte, nous affirme-t-on, «seules de petites longueurs des îles maltaises peuvent être regardées comme faisant face directement à la Libye» (ci-dessus, RL, p. 78, par. 6.06). Il s'agit, est-il précisé dans les écritures libyennes, du segment de la côte de l'île de Malte (42) entre Delimara Point et Ras il-Qaws — que la Cour trouvera sur la figure 11 — d'une part, et «peut-être» (nous dit-on) du segment de la côte de l'île de Gozo entre Ras in-Newwiela et Ras il-Wardija, d'autre part. Si l'on se réfère, dit la Libye, aux lignes de base droites de Malte, et non plus aux côtes réelles, le segment pertinent se réduit à la ligne joignant Delimara Point à Filfla, car de Filfla à Ras il-Wardija la ligne de base «ne fait face à aucune côte libyenne mais fait face aux îles italiennes et à la côte de Tunisie» (**II**, CML, p. 35, par. 2.35).

Pour justifier cette thèse, la Libye s'appuie sur un passage de l'arrêt de 1982 sur lequel je reviendrai dans un instant.

Telle est la théorie présentée par la Libye (**I**, ML, p. 156-157, par. 10.08-10.11; **II**, p. 34-35, par. 2.33-2.35; p. 39, par. 2.43-2.44; ci-dessus, RL, p. 78, par. 6.06-6.07).

L'audience, suspendue à 11 h 17, est reprise à 11 h 35

Monsieur le Président, j'ai fait état tout à l'heure de la thèse libyenne relative aux côtes pertinentes, thèse selon laquelle seules sont pertinentes pour notre délimitation: du côté libyen les côtes de Ras Ajdir à Ras Zarrouk, et du côté maltais les petits segments de côtes qui font face au sud sur l'île de Malte et sur l'île de Gozo ou, si l'on prend les lignes de base droites, la ligne de Delimara Point à Filfla.

Cette théorie, Monsieur le Président, repose sur de graves confusions.

Il est de principe que la délimitation doit, pour reprendre les termes bien connus de la sentence arbitrale franco-britannique, être «en rapport avec les côtes des Parties qui bordent effectivement *[actually abutting on]* le plateau continental» de la région en cause (par. 24). Le concept de «plateau continental que bordent effectivement les côtes des Parties» n'a de toute évidence rien à

voir avec la question de savoir si sur tel ou tel segment les côtes des Parties se font face ou non. La notion de côtes se faisant face est en relation avec celle de côtes adjacentes, et les deux notions de côtes se faisant face et de côtes adjacentes ne se situent pas sur le même plan que la notion de côtes qui bordent le plateau à délimiter. Ni la Cour dans aucune des affaires dont elle a été saisie ni le tribunal franco-britannique n'ont jamais découpé les côtes en présence pour ne retenir comme pertinents que les seuls segments des deux côtes qui se font directement face. Dans l'affaire du *Golfe du Maine*, pour m'en tenir à cet exemple récent, la Chambre n'a relevé de «quasi-parallélisme», de «parallélisme presque parfait», entre des segments de la côte des Etats-Unis et des segments de la côte du Canada, que dans une seule des trois parties composant ce qu'elle a appelé l'«aire de délimitation», c'est-à-dire, selon sa définition, «la zone géographique directement concernée par cette délimitation» (*C.I.J. Recueil 1984*, p. 268, par. 28). Il s'agit des segments où les côtes du Massachusetts et de la Nouvelle-Ecosse se font face et se situent dans un «rapport d'opposition frontale» (par. 32, 189, 206, 216). Mais la Chambre n'a pas refusé pour autant de considérer comme «directement concernées par la délimitation» les autres parties de l'«aire de délimitation», celles dans lesquelles les côtes américaines et canadiennes ne présentent plus aucun élément de parallélisme.

Le «tilt» des îles maltaises — qui, selon la Libye, empêcherait la quasi-totalité des côtes maltaises de faire face aux côtes libyennes — n'a en conséquence rien à voir avec notre problème. Ce n'est pas parce que le segment de la ligne de base droite de Malte entre Filfla et Ras il-Wardija est orienté vers le sud-
(42) ouest plutôt que vers le sud, comme il apparaît à la figure 11 de notre dossier, que ce segment ne pourrait se projeter que dans la seule direction sud-ouest
(14) illustrée par les flèches sur la carte 2 du contre-mémoire libyen. Et ce n'est pas non plus parce qu'elle est orientée vers l'est-sud-est plutôt que vers le sud que la côte maltaise au nord de Delimara Point devrait être récusée. Pour les mêmes raisons, ce n'est pas parce que la côte libyenne à l'est de Ras Zarrouk n'est pas orientée plein nord, face directement à Malte, qu'elle ne serait pas pertinente pour la délimitation entre la Libye et Malte: dans la mesure où les projections à partir de points pris sur cette côte chevauchent des projections maltaises, cette côte à l'est de Ras Zarrouk est au contraire directement pertinente tout autant que celle située à l'ouest de Ras Zarrouk. Or un coup d'œil sur la carte figurant
(43) sur notre figure 12 permet de constater que des projections issues de certains points de la côte libyenne à l'est de Ras Zarrouk chevauchent des projections effectuées à partir de points maltais.

La confusion commise par la Partie adverse a une racine profonde. La Libye ne conçoit pas les projections maritimes comme s'étendant radialement dans toutes les directions, mais comme s'effectuant frontalement dans le sens — et uniquement dans le sens — de l'orientation de chaque segment de côte, autrement dit perpendiculairement à la direction générale de chaque segment. Entre Ras Ajdir et Ras Zarrouk, la côte libyenne se projetterai frontalement vers le nord, et seulement vers le nord, rencontrant ainsi les projections maltaises à l'ouest du méridien de 16°, mais pas à l'est de celui-ci. Au-delà de Ras Zarrouk la côte libyenne se projetterait également vers le nord, et seulement vers le nord, ne rencontrant ainsi aucune projection maltaise. Quant aux côtes maltaises, elles ne sauraient, à en croire la Libye, que se projeter vers le sud, à partir des rares segments des côtes (ou des lignes de base) de Malte orientés plein
(42) sud, et qui apparaissent sur la figure 11 de notre dossier, et seules ces projections-là seraient capables de rencontrer des projections libyennes en provenance du segment de la côte libyenne compris entre la frontière tunisienne et Ras Zarrouk; les autres segments des côtes de Malte se projetteraient dans d'autres

directions et ne seraient donc pas pertinents pour la délimitation entre Malte et la Libye.

En d'autres termes, c'est chaque fois dans le sens de la perpendiculaire à la direction générale du segment de côte considéré, et dans ce sens seulement, que se réaliserait la projection dudit segment.

Mais, Monsieur le Président, ce n'est pas ainsi que les choses se présentent. Toutes les côtes libyennes, quelle que soit leur orientation, et qu'elles soient à l'est ou à l'ouest de Ras Zarrouk, se projettent en mer dans toutes les directions, et pas seulement frontalement ou perpendiculairement; et toutes les côtes maltaises font de même. Les côtes à prendre en considération sont celles dont les projections se rencontrent et se chevauchent, appelant par là même une délimitation, c'est-à-dire une amputation, une diminution. C'est cela très exactement que dit le passage de l'arrêt de 1982 invoqué par la Libye. Je me permets de le relire ici, tant il est important et clair:

> «pour délimiter le plateau entre les Parties, il n'y a pas à tenir compte de la totalité des côtes de chacune d'elles; tout segment du littoral d'une Partie dont, en raison de sa situation géographique, le prolongement ne pourrait rencontrer celui du littoral de l'autre Partie est à écarter... Les cartes mettent en évidence, sur la côte de chacune des deux Parties, l'existence d'un point au-delà duquel ladite côte ne peut plus avoir de lien avec les côtes de l'autre Partie aux fins de la délimitation des fonds marins. Au-delà de ce point, les fonds marins au large de la côte ne peuvent donc pas constituer une zone de chevauchement des extensions du territoire des deux Parties et, de ce fait, n'ont aucun rôle à jouer dans la délimitation.» (*C.I.J. Recueil 1982*, p. 61-62, par. 75.)

L'expression «zone de chevauchement» des projections des deux côtes, il n'est pas sans intérêt de le noter, se trouvait déjà utilisée dans l'arrêt de 1969 *(an overlapping of the areas)* (*C.I.J. Recueil 1969*, p. 52, par. 99), et elle apparaît à de nombreuses reprises dans l'arrêt de la Chambre dans l'affaire du *Golfe du Maine* (par exemple, par. 115, 195, 209). Le concept de zone de chevauchement peut ainsi être regardé comme une constante de la jurisprudence. Il existe ainsi, on le constate, un lien étroit entre les concepts de projection radiale, de côtes pertinentes, de zones de chevauchement et de délimitation.

Dans l'affaire du *Golfe du Maine* les Etats-Unis avaient illustré leur conception de la projection maritime par une carte (mémoire des Etats-Unis, figure 31 — *C.I.J. Mémoires*, vol. VIII, carte 37). Pour mettre en évidence l'erreur qui était à la racine de cette conception de la projection frontale, le Canada avait établi un croquis sur lequel apparaissaient les conséquences d'une telle approche dans le cas d'un Etat insulaire, indépendamment de tout problème de délimitation (contre-mémoire du Canada, carte 41A — *C.I.J. Mémoires*, vol. VIII, carte 70); la carte américaine et le croquis canadien figurent dans notre dossier sous les numéros 14 et 15. Au cours de la procédure orale l'un des conseils du Canada, M. Jaenicke, avait illustré la conception des Etats-Unis à l'aide d'une carte que nous avons reproduite dans notre dossier sous le numéro 18; et il avait opposé à cette carte deux autres[1], illustrant la projection radiale; ces deux cartes, présentées par M. Jaenicke pour illustrer la projection radiale et combattre la projection frontale ou perpendiculaire, sont reproduites dans notre dossier sous les numéros 16 et 17. Dans son arrêt la Chambre a procédé à la délimitation du secteur intérieur du golfe du Maine sur la base d'une «divi-

[1] Voir *C.I.J. Mémoires, Délimitation de la frontière maritime dans la région du Golfe du Maine*, vol. VIII, cartes 240, 241 et 242. *[Note du Greffe.]*

sion ... de la zone de chevauchement créée par la superposition latérale des projections maritimes des deux Etats» (*C.I.J. Recueil 1984*, p. 331-332, par. 209). Elle a ainsi implicitement rejeté la conception de la projection frontale et perpendiculaire des côtes américaines du fond du golfe préconisée par les Etats-Unis, au profit de la conception canadienne de la projection radiale et omnidirectionnelle.

Si je me suis permis de me référer à ce précédent, c'est parce qu'il permet une comparaison qui ne manque pas d'intérêt dans notre affaire.

La projection de Malte, pas plus que celle des Etats-Unis dans l'affaire précédente, ne s'effectue frontalement du nord au sud, perpendiculairement au segment de la côte maltaise orientée plein sud et en direction des segments de la côte libyenne orientée plein nord. La côte maltaise engendre des extensions maritimes dans toutes les directions, et un problème de délimitation surgit chaque fois que des extensions de Malte rencontrent l'extension de la côte d'un autre Etat: la libye dans certains cas, la Tunisie ou l'Italie dans d'autres.

La tentative libyenne de concevoir la présente affaire comme celle d'une délimitation frontale entre les seuls segments de la côte maltaise orientés plein sud et le seul segment de la côte libyenne orienté plein nord face à Malte s'explique, je le suppose du moins, par une préoccupation de caractère tactique et de portée lointaine. Il s'agit sans doute pour la Libye de confiner la délimitation entre elle et Malte à la zone située à l'ouest du méridien de 16°, c'est-à-dire, approximativement à la hauteur de Ras Zarrouq et de la zone des escarpements. Les cartes sur lesquelles la Libye illustre sa revendication sont (9) significatives à cet égard. Je pense par exemple à la carte 17 du mémoire libyen (28)(29)(30) ou aux cartes 11, 12 et 13 de la réplique libyenne; cette dernière est reproduite sur la carte 13 de notre dossier. La vision que la Libye cherche à accréditer, la manière dont elle souhaiterait que la Cour conçoive le problème ressortent clairement de ces cartes. Comme la Cour le constatera, ces cartes arrêtent la revendication de la délimitation à la hauteur du méridien de 16°. La délimitation proposée par la Libye ne tient pas compte de la côte libyenne à l'est de Ras Zarrouq, bien que la projection de certains points de cette côte — les points «i» et «j» — se chevauche avec les projections de la côte maltaise, ainsi qu'il (43) apparaît clairement sur notre figure 12. La délimitation proposée par la Libye ne tient pas compte non plus du fait — qui saute aux yeux sur cette même figure 12 — que la projection de tous les points maltais s'effectue bien au-delà du seizième degré de longitude, auquel la Libye prétend la bloquer.

Monsieur le Président, Messieurs les juges, Malte ne saurait accepter que le problème soumis à la Cour soit ainsi amputé d'une partie importante de sa substance. De l'avis de Malte, la mission de la Cour est de répondre aux questions posées dans le compromis sur toute l'étendue de la zone de chevauchement des projections des côtes des deux Parties. Cette zone de chevauchement s'étend largement à l'est du méridien de 16° de longitude. Malte ne saurait accepter que sous le couvert d'une définition arbitrairement réduite des côtes pertinentes et de l'aire de délimitation, il lui soit infligé une mutilation injustifiée de ses droits de plateau continental en direction de l'est.

L'objectif libyen apparaît ainsi une fois de plus en pleine lumière: réduire le plateau continental de Malte à la quasi-insignifiance.

La Cour apportera à cette prétention, nous en sommes confiants, la réponse qu'elle mérite.

Les observations que je viens de présenter conduisent à une autre constatation encore: la longueur de chacune des côtes mesurée en kilomètres n'a rien à voir avec la création d'une zone de chevauchement et la nécessité d'une délimitation. C'est la configuration des côtes, dont la longueur ne constitue qu'un élé-

ment parmi d'autres, qui crée les points de base aussi bien sur la longue côte libyenne que sur la petite côte maltaise, points de base d'où partent les projections utiles engendrant les zones de chevauchement, et non pas leur longueur en tant que telle et *per se*.

J'en ai ainsi terminé, Monsieur le Président, de ces longs développements relatifs au principe de distance.

V. L'ÉQUIDISTANCE

Monsieur le Président, Messieurs les juges, l'analyse des thèmes autour desquels se cristallisent les différences majeures séparant les Parties ne saurait être complète sans que soit abordé ce qui constitue sans nul doute l'une des questions les plus disputées dans notre affaire: je veux parler, la Cour l'aura deviné, de la question de l'équidistance.

Une remarque préliminaire, d'abord.

Dans le chapitre introductif, et puis à nouveau dans le dernier paragraphe du chapitre de conclusion de sa réplique, la Libye écrit que c'est l'«insistance» de Malte en faveur d'une délimitation fondée sur l'équidistance qui constitue le principal obstacle à une solution équitable (ci-dessus, RL, p. 3, par. 8, et p. 99, par. 8.17).

Bien sûr, Monsieur le Président, si Malte ne réclamait pas une ligne médiane et s'inclinait devant la revendication libyenne, le différend serait réglé. Comment la Libye réagirait-elle si nous venions dire à la Cour que c'est l'insistance mise par la Libye à réclamer une frontière le long de la *Rift Zone* qui entretient le conflit et met obstacle à une solution équitable?

Si j'ai soulevé cette question, en soi mineure, c'est parce qu'elle illustre le manque de mesure et de modération qui caractérise la manière dont la Partie adverse aborde le problème de l'équidistance. Dès qu'il est question de l'équidistance, les écrits adverses quittent le ton de la critique sereine pour se réfugier dans le procès d'intention.

C'est en effet contre une thèse maltaise imaginaire — taillée sur mesure pour faciliter la critique — que la Libye mène l'attaque. Nous sommes accusés bien sûr, d'ériger l'équidistance en «principe absolu» et d'y voir une règle de «caractère obligatoire». Mais nous sommes accusés surtout de regarder l'équidistance comme «synonyme de résultat équitable», ce qui nous permettrait, à en croire la Libye, de demander à la Cour une délimitation équidistante sur la foi de la seule «vertu abstraite» de cette méthode et sans nous être assurés au préalable de l'équité de cette délimitation au regard des circonstances concrètes de l'affaire; bref, par notre «adhésion dogmatique» à l'équidistance nous chercherions à «contourner les faits», à nous évader en quelque sorte des données spécifiques de la situation (II, CML, p. 102, par. 5.01; p. 103, par. 5.05; p. 104, par. 5.09; p. 107, par. 5.18; p. 112, par. 5.33; ci-dessus, RL, p. 25, par. 3.17; p. 33, par. 4.01; p. 48, par. 4.43; p. 50, par. 4.50; p. 53, par. 4.55-4.56; p. 55, par. 5.05; p. 95-96, par. 8.07; p. 97, par. 8.10-8.12).

Tout ceci, nous l'avons déjà souligné, mais il me faut le répéter, dénature complètement notre pensée (ci-dessus, RM, p. 53, par. 101). Nous n'ignorons rien de l'évolution du droit international à ce sujet. Nous savons que l'évolution qui a conduit de l'article 6 de la convention de 1958 à l'article 83 de celle de 1982 reflète, comme l'a relevé un membre de la Cour dans l'affaire *Tunisie/Libye*, une certaine tendance à diminuer dans le cadre conventionnel *(tone down)* le rôle de l'équidistance (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 109, par. 35). Nous ne considérons pas que

l'équidistance constitue en elle-même la méthode de délimitation «imposée par le droit», et nous ne regardons pas l'équidistance comme «synonyme de résultat équitable». Nous sommes pleinement conscients, faut-il le redire, pour reprendre les termes de l'arrêt sur le *Golfe du Maine*, que l'équidistance «n'est pas ... devenue une règle du droit international, une norme découlant logiquement d'un principe juridiquement obligatoire du droit international coutumier» (*C.I.J. Recueil 1984*, p. 297, par. 107). L'analyse que nous avons proposée du processus de délimitation est dépourvue, je l'espère, de toute ambiguïté: c'est seulement en tant que point de départ provisoire que la prise en considération de l'équidistance s'impose en vertu du titre juridique au plateau continental. Il n'y a pas synonymie entre équidistance et solution équitable, et la délimitation définitive ne sera équidistante que dans la mesure où l'équidistance apparaîtra, à la lumière des circonstances concrètes de l'affaire, comme conduisant à un résultat équitable et raisonnable. J'espère que cela mettra fin à ce procès d'intention.

Je voudrais, avec votre permission, Monsieur le Président, m'arrêter quelques instants sur l'équidistance comme point de départ de l'opération de délimitation. Après quoi je me propose d'examiner les rapports entre équidistance et équité tant sur un plan général qu'au regard des données spécifiques de la présente affaire.

L'équidistance comme point de départ de l'opération de délimitation

Comme j'espère être parvenu à en faire la démonstration, l'opération de délimitation ne peut pas se réduire à la détermination d'une frontière équitable en partant des seules circonstances de fait de la situation. A moins d'envisager une décision *ex aequo et bono*, l'équité ne peut pas s'apprécier dans le vide; l'équité doit se vérifier par rapport à une ligne donnée, fondée sur un élément objectif, en rapport avec le concept juridique de plateau continental. Il est indispensable, si je puis me permettre cette expression, de commencer par quelque chose, autrement dit de disposer d'un point d'amarrage qui empêche l'opération de délimitation de dériver vers le subjectif et l'arbitraire.

C'est cela, et rien d'autre, que nous avons voulu exprimer en parlant de «point de départ», de «premier pas» ou de «délimitation primaire».

De l'avis de Malte, la méthode appropriée pour servir de méthode de référence est celle de l'équidistance. De toutes les méthodes, c'est celle qui permet le mieux d'intégrer les deux composantes du titre juridique de l'Etat sur le plateau continental, à savoir les côtes et la distance. De toutes les méthodes c'est celle qui répond le mieux aux impératifs de «neutralité» et de «géométrie» qui — l'arrêt du *Golfe du Maine* vient de le souligner — caractérisent de plus en plus les délimitations maritimes dans le droit de la mer contemporain (*C.I.J. Recueil 1984*, p. 327, par. 194, et p. 329, par. 199).

«Le choix de la méthode à utiliser est essentiellement fonction de la géographie»; la méthode à retenir doit se prêter à être utilisée «sur la toile de fond de la géographie», a déclaré la Chambre dans l'affaire du *Golfe du Maine*, en précisant que «par géographie, il faut entendre ... essentiellement la géographie des côtes» (*ibid.*, p. 301, par. 119; p. 327, par. 195, et p. 333-334, par. 216). Comment douter que la méthode de l'équidistance — qu'elle conduise à une ligne d'équidistance latérale ou à une ligne médiane entre côtes se faisant face — réponde pleinement à cette exigence? La nature même de cette méthode la fait reposer sur la configuration côtière. Il s'agit, comme la Cour l'a indiqué en 1982 dans les termes les plus clairs, d'une méthode «où la ligne de délimitation est directement fonction de points sur les côtes en cause» (*C.I.J. Recueil 1982*,

p. 62, par. 76) et qui, dit toujours la Cour, «a l'avantage — peut-être aussi l'inconvénient — de reproduire presque toutes les irrégularités des côtes prises comme base» (*ibid.*, p. 88, par. 126).

Il est difficile, dans ces conditions, de comprendre l'argument libyen selon lequel la méthode et l'équidistance ne serait pas susceptible, par sa nature même de refléter la géographie côtière (ci-dessus, RL, p. 152, par. 7.04). S'il est *un* mérite que tous s'accordent à reconnaître à l'équidistance, c'est bien celui de refléter les côtes en présence.

Il est exact en revanche que la méthode de l'équidistance ne reflète pas les circonstances de caractère non géographique, telles la géologie et la géomorphologie des fonds marins ou la conduite des Parties, et qu'elle ne tient pas compte de la superficie relative des deux Etats et de la longueur comparée de leurs côtes (**I**, ML, p. 53, par. 4.24; p. 124, par. 7.11; **II**, CML, p. 23, par. 2.04; p. 151-152, par. 7.04-7.05).

Mais ce fait, invoqué par la Libye, ne saurait disqualifier l'équidistance comme méthode de premier pas, puisqu'elle reflète la configuration des côtes, et que c'est la configuration des côtes qui, selon la jurisprudence, est le seul facteur qu'il faille mettre en rapport avec la distance pour établir le titre juridique de l'Etat au plateau continental avant de procéder à la vérification du résultat. «Méthode purement cartographique», s'écrie la Libye pour critiquer l'équidistance. Mais c'est là, très précisément, la raison pour laquelle cette méthode «géométrique», dont l'utilisation se déroule «sur la toile de fond de la géographie», exprime le fondement juridique du titre des Etats côtiers au plateau continental. La Libye ne s'est-elle pas rendue compte qu'en proférant ce qui est à ses yeux une accusation, elle décernait à la méthode de l'équidistance ses lettres de noblesse?

J'espère ainsi avoir établi que la méthode de l'équidistance intègre la composante côtière du fondement juridique du titre au plateau continental. Incorpore-t-elle également la composante spatiale de ce principe? Là encore, la réponse affirmative me paraît hors de doute.

Par définition même, est-il nécessaire de le répéter? la méthode de l'équidistance consiste à tracer une ligne dont chaque point est à égale distance des points les plus proches sur les lignes de base de la mer territoriale des deux pays. Lorsque les espaces sous-marins sur lesquels les deux pays ont un titre juridique se chevauchent, faute de distance suffisante entre les deux côtes, la méthode de l'équidistance ampute la projection potentielle de chacun des deux Etats d'une distance identique et permet ainsi à chacun des deux Etats d'exercer ses droits de plateau continental à une aussi grande distance de sa côte que l'autorise le respect des droits d'égale valeur de l'autre Etat. Du même coup se trouvent sauvegardés le principe du non-empiétement et celui de l'égalité des Etats.

Tel est, en tout cas, l'avantage que l'on peut attendre de la méthode *prima facie*. Car il est évidemment possible que, dans certains cas particuliers, le résultat apparaisse inéquitable: une particularité mineure peut, par exemple, faire dévier la ligne à une trop grande proximité de l'une des côtes; d'autres facteurs propres à la situation concrète de l'espèce peuvent également conduire à ne pas considérer le résultat comme raisonnable. Mais c'est là, précisément, le rôle assigné à la seconde phase de l'opération, à savoir la vérification de l'équité du résultat, suivie le cas échéant des corrections nécessaires. Equidistance n'est pas forcément synonyme d'équité; et ce dont il est question, pour le moment, ce n'est rien de plus que de prendre la ligne d'équidistance en considération provisoirement, à titre de premier pas, parce qu'elle intègre le double paramètre de «côtes» et de «distance», et qu'elle reflète le fondement juridique

du titre au plateau continental. On ne saurait nier, me semble-t-il, que l'apparition du principe de distance comme fondement principal du titre juridique de l'Etat côtier au plateau continental confère un intérêt nouveau à l'équidistance en tant que méthode de délimitation à envisager comme point de départ.

L'équidistance reflète ainsi le binôme côtes/distance: cette raison d'ordre purement juridique serait peut-être suffisante pour exiger que ce soit la ligne d'équidistance qui constitue le point de départ du processus de délimitation.

A cette première raison s'en ajoute une autre, qui milite dans le même sens: l'extrême simplicité et commodité de cette méthode, qu'admet d'ailleurs la Partie adverse (**II**, CML, p. 135, note 1). On peut dire de la méthode de l'équidistance ce que Boggs disait de celle des enveloppes des arcs de cercle: elle est d'un maniement aussi facile que celle du papier de tournesol pour déterminer si une solution est acide ou alcaline (*AJIL*, vol. 45, 1951, p. 248). «Aucune autre méthode de délimitation, a déclaré la Cour elle-même, ne combine au même degré les avantages de la commodité pratique et de la certitude dans l'application.» *Son «emploi, a-t-elle ajouté, est indiqué dans un très grand nombre de* cas» (*C.I.J. Recueil 1969*, p. 23, par. 22-23). Le tribunal franco-britannique a noté que le bien-fondé de cette observation de la Cour

> «est certainement confirmé par la pratique des Etats; celle-ci montre que jusqu'à ce jour un nombre considérable de délimitations de plateaux continentaux ont été effectuées par l'application soit de la méthode de l'équidistance, soit, assez fréquemment, par quelque variante de cette méthode» (sentence arbitrale, par. 85).

La Chambre de la Cour vient également de relever la «simplicité» de cette méthode (*C.I.J. Recueil 1984*, p. 327, par. 195), qui, a-t-elle précisé, a rendu «des services indéniables par son application dans bien des situations concrètes» (p. 297, par. 107). Les explications fournies à la Cour par mon ami Elihu Lauterpacht corroborent pleinement ces vues. Mais alors, Monsieur le Président, je me permets de poser une question: si l'emploi de l'équidistance apparaît si souvent «indiqué» pour le résultat définitif, ne l'est-il *a fortiori* lorsqu'il s'agit seulement de déterminer une ligne de référence appelée à subir l'épreuve du contrôle de l'équité?

Ces deux raisons majeures de prendre l'équidistance comme point de départ, à savoir sa relation avec le binôme côtes/distance et sa simplicité et commodité d'emploi, se prolongent par une troisième considération, mise en lumière par l'arrêt du *Golfe du Maine*. Au sujet de la méthode consistant à diviser par parts égales les zones de convergence et de chevauchement des projections maritimes des deux Etats, l'arrêt sur le *Golfe du Maine* déclare que son «équité est de longue date considérée comme un caractère rejoignant la simplicité» (*C.I.J. Recueil 1984*, p. 327, par. 195); cette méthode, poursuit l'arrêt, met en œuvre un «critère dont le caractère équitable est inhérent à son simple énoncé» (p. 328, par. 197) et peut être tenue pour équitable «de prime abord au moins» (p. 300, par. 115), c'est-à-dire à titre de point de départ.

On comprend, dans ces conditions, que lorsque deux gouvernements cherchent à se délimiter par la voie conventionnelle, ils commencent presque toujours par envisager une ligne d'équidistance, soit pour la retenir définitivement, soit pour l'ajuster ou même l'écarter à la fin du processus. De cette pratique de la négociation, les témoignages les plus autorisés ne manquent pas.

En 1958 déjà, au cours de la Conférence de Genève, le Commander Kennedy avait indiqué que, même s'il existe dans une situation donnée des circonstances spéciales justifiant une ligne autre que l'équidistance, la ligne médiane «constituerait, même alors, le meilleur point de départ pour des négociations» *(would*

still provide the best starting point for negotiations) (*Première conférence des Nations Unies sur le droit de la mer, Documents officiels*, vol. VI, p. 112; trad. angl., p. 93).

Plus significative que cette prise de position intervenue dans le contexte juridique de la règle équidistance-circonstances spéciales de la convention de 1958 est l'analyse faite récemment de la pratique française par M. Guillaume: cette analyse est d'autant plus précieuse que, selon les indications de l'auteur — orfèvre en la matière, s'il en est —, la France cherche à négocier avec ses partenaires, sauf exceptions particulières, des délimitations fondées sur le droit, et non pas seulement sur des raisons d'opportunité, politiques ou autres. Et que nous dit M. Guillaume? Je lis:

> «La méthode de l'équidistance doit toujours constituer un point de départ dans la recherche de l'équité... Elle constitue un excellent point de départ permettant de tracer une première délimitation objective grâce à laquelle les négociations pourront partir d'un élément concret.» (*Op. cit.*, p. 281-282.)

Ce qui n'empêche pas, bien sûr, M. Guillaume de noter que dans certains cas l'équidistance s'avérera inéquitable et qu'il conviendra donc de la corriger ou de l'écarter.

Ce témoignage du directeur des affaires juridiques du ministère français des relations extérieures est d'autant plus intéressant, me semble-t-il, que la France a fait partie à la troisième conférence de ce qu'un membre de la Cour a appelé le «courant de pensée» *(school of thought)* des «principes équitables» par opposition à celui de l'équidistance, et qu'elle a figuré parmi les Etats qui ont proposé au groupe de travail n° 7 le texte dit NG 7/10, auquel la Libye se réfère dans ses écritures (II, CML, p. 111, note 1, et annexe documentaire n° 33) (cf. *C.I.J. Recueil 1982*, opinion dissidente de M. Oda, p. 223-224).

Ce qui est vrai des délimitations conventionnelles l'est tout autant des délimitations par voie judiciaire ou arbitrale.

Dans l'arrêt de 1969, on lit que:

> «la Cour doit rechercher comment une délimitation de plateau continental peut être assurée lorsque le principe de l'équidistance ne donne ... pas une solution équitable» (*C.I.J. Recueil 1969*, p. 50, par. 92).

Comment savoir que l'équidistance «ne donne pas une solution équitable» si on ne commence pas, à tout le moins, par l'essayer? C'est de toute évidence ce que la Cour a fait dans l'affaire du *Plateau continental de la mer du Nord*, et c'est seulement parce que le résultat lui est apparu comme inéquitable, compte tenu de la configuration particulière des côtes en cause, qu'elle s'est mise à la recherche d'une autre solution.

La sentence arbitrale de 1977 évoque de son côté

> «la question de savoir si certaines caractéristiques géographiques ont pour objet de rendre «injustifiée» ou «inéquitable» une délimitation conforme au principe de l'équidistance...» (par. 240).

Et c'est effectivement à partir de la ligne d'équidistance et par rapport à cette ligne qu'ont été appréciés par le tribunal arbitral les effets disproportionnés de la configuration géographique particulière des Sorlingues (par. 243).

Sans doute l'arrêt de 1982 paraît-il écarter l'équidistance «as a first step» (*C.I.J. Recueil 1982*, p. 79, par. 110), mais il ne faut pas oublier que dans cette affaire les deux Parties s'étaient prononcées, l'une et l'autre, contre l'application de cette méthode: «la Cour, est-il dit dans l'arrêt, doit tenir compte de

cette ferme position des Parties» *(C.I.J. Recueil 1982)*. La suite de l'arrêt montre au surplus que, au moins dans le second secteur, la méthode de l'équidistance a été prise en considération par la Cour (*ibid.*, p. 88, par. 126).

Quant à l'arrêt de la Chambre dans l'affaire du *Golfe du Maine*, il déclare certes qu'il n'y a pas de méthode «dont on puisse dire absolument qu'elle doit être prise en considération en priorité» (*C.I.J. Recueil 1984*, p. 315, par. 163). Cela ne l'empêche pas de relever que «dans nombre de cas» on a pris «certaines méthodes» en considération «en priorité par rapport à d'autres» (*ibid.*, par. 162). Cela ne l'empêche surtout pas, au moment où il s'apprête à proposer sa solution au litige, de déclarer que

> «son choix de base ne peut que se porter sur le critère à propos duquel l'équité est de longue date considérée comme un caractère rejoignant la simplicité: à savoir le critère qui consiste à viser en principe — en tenant compte des circonstances spéciales de l'espèce — à une division par parts égales des zones de convergence et de chevauchement des projections marines des côtes des Etats entre lesquels la délimitation est recherchée» (*ibid.*, p. 327, par. 195; dans le même sens, p. 328, par. 197).

C'est effectivement en partant de l'équidistance que la Chambre a procédé à la délimitation dans deux des trois secteurs qu'elle a distingués dans la région à délimiter, quitte à y apporter ensuite les corrections qu'elle a jugées équitables compte tenu des circonstances de l'espèce (*ibid.*, p. 331-332, par. 209-210, et p. 333-337, par. 215-223).

Je voudrais enfin pour terminer faire état du témoignage d'un membre même de la Cour, selon lequel:

> «Il va de soi que, dans toute affaire de délimitation, le juge envisage la ligne d'équidistance, même si aucune des Parties n'en a demandé le tracé.» (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 105, par. 18.)

Monsieur le Président, la situation, on le constate, est des plus claires.

La solution préconisée par Malte commence par prendre en considération, à titre provisoire, la méthode de l'équidistance, qui incorpore les concepts de côtes et de distance dont la combinaison constitue le fondement du titre juridique de l'Etat côtier au plateau continental adjacent à ses côtes.

La solution préconisée par la Libye court-circuite, au contraire, ce double paramètre.

Cela est évident pour la composante spatiale, à laquelle la Libye refuse tout *simplement toute pertinence dans la délimitation.*

Mais c'est vrai également pour la composante côtière, à laquelle la Libye fait certes semblant d'accorder une place de choix, mais qui ne joue aucun rôle effectif dans la délimitation qu'elle préconise: avec des côtes maltaises et des côtes libyennes tout à fait différentes de ce qu'elles sont, la revendication libyenne d'une délimitation le long de la *Rift Zone* et de la zone des escarpements ne bougerait pas d'un pouce.

En prenant, comme elle le fait, le contre-pied de l'équidistance en tant que point de départ de l'opération de délimitation découlant du principe de distance dans sa double composante, la Libye ignore en définitive la règle des 200 milles, elle néglige la conception du plateau continental telle que l'exprime l'article 76, elle ne tient aucun compte de l'apparition du concept de la zone économique exclusive — en un mot elle méconnaît l'environnement juridique du droit de la mer contemporain. La thèse libyenne est une survivance du passé.

Après ces observations sur la prise en considération de l'équidistance comme

point de départ de l'opération de délimitation, je voudrais maintenant me tourner pour finir, avec votre permission, Monsieur le Président, vers l'importante et délicate question des rapports entre l'équidistance et l'équité dans notre affaire.

Equidistance et solution équitable

Non contente d'imputer à Malte la thèse purement imaginaire selon laquelle l'équidistance serait toujours équitable, la Partie adverse en vient à laisser entendre que l'équidistance ne serait jamais équitable. Oh, je sais bien que la Libye n'a pas dit cela *expressis verbis* et qu'elle a même pris soin de noter dans ses écritures que dans certaines circonstances l'équidistance peut se révéler comme une solution équitable! Il est clair pourtant que les critiques que la Libye a faites à l'équidistance ne restent pas sur le terrain des circonstances concrètes de la présente affaire, mais s'adressent *in abstracto* à cette méthode en tant que telle — ce qui, je le note en passant, est assez piquant lorsqu'on songe à l'âpreté avec laquelle la Libye nous a reproché notre prétendue «abstraction».

Ce n'est en effet pas seulement le caractère équitable de la ligne médiane dans le cas concret de notre affaire qui fait l'objet d'une offensive de grande envergure, mais le caractère équitable de toute ligne d'équidistance, autrement dit de la méthode de l'équidistance en soi. Sous la plume de nos adversaires, j'exagère à peine, l'équidistance devient, si j'ose dire, la brebis galeuse du droit de la délimitation du plateau continental, dont toute l'évolution du droit international tend à s'écarter («trend away from equidistance»). Pour un peu le vocable même d'équidistance deviendrait un mot honteux, que l'on n'oserait plus utiliser qu'avec d'infinies précautions de langage.

Si les critiques formulées par la Libye contre la méthode d'équidistance en soi étaient justifiées, l'équidistance ne devrait pour ainsi dire jamais être retenue comme base d'une délimitation de plateau continental. Et pourtant, combien de délimitations conventionnelles ne reposent-elles pas sur l'équidistance, même lorsqu'un petit Etat insulaire fait face à un grand Etat continental? Et comment oublier que la jurisprudence n'a pas seulement eu à cœur de noter je ne sais combien de fois que l'équidistance peut constituer une solution équitable (cf. **II**, CMM, p. 82, par. 174), mais qu'elle a effectivement eu recours à cette méthode, ou à une variante de cette méthode?

Pour comprendre l'attitude de la jurisprudence à l'égard du caractère équitable ou non de la méthode de l'équidistance, il ne faut pas perdre de vue la distinction terminologique et conceptuelle entre les deux variantes de la ligne d'équidistance sur laquelle l'arrêt du *Golfe du Maine* vient d'attirer une fois de plus l'attention: celle entre une ligne d'équidistance latérale entre deux côtes limitrophes et une ligne d'équidistance médiane entre deux côtes se faisant face (*C.I.J. Recueil 1984*, p. 323-324, par. 186-187). Face à une jurisprudence unanime sur ce point, et confirmée par l'arrêt sur le *Golfe du Maine*, l'affirmation libyenne d'une «disparition progressive de toute distinction entre Etats «se faisant face» ou «adjacents» (**II**, CML, p. 112-117, par. 5.34-5.48) prend figure de *wishful thinking*, ainsi que nous l'avons montré dans notre réplique (ci-dessus, RM, p. 63-68, par. 120-129, et p. 91-93, par. 182-189).

Cette distinction avait été déjà posée par la Cour dans son arrêt de 1969 (*C.I.J. Recueil 1969*, p. 17, par. 6, et p. 36, par. 57); la Cour avait montré — j'ai à peine besoin de le rappeler — que les difficultés soulevées par une ligne latérale entre côtes limitrophes ne se retrouvent pas dans le cas d'une ligne médiane entre côtes se faisant face. Le texte des paragraphes 6 et 57 de l'arrêt

de 1969 est si connu que je ne me permettrai pas d'en donner lecture à nouveau *ici*.

La sentence arbitrale franco-britannique de 1977 avait également tenu à souligner la nécessité d'une rigueur terminologique sur ce point (par. 96, note 1), et elle avait qualifié d'«essentielle» la distinction posée par la Cour (par. 86). Selon le tribunal arbitral:

> «pour établir si la méthode de l'équidistance permet d'aboutir à une solution équitable, il faut tenir compte de la différence qui existe entre une limite «latérale» entre Etats «limitrophes» et une ligne «médiane» entre Etats «se faisant face» (par. 97);
>
> «dans le cas d'Etats «se faisant face», une ligne médiane aura pour effet normal une délimitation qui sera dans l'ensemble équitable»,

ce qui n'est pas toujours le cas pour une ligne d'équidistance latérale (par. 95; dans le même sens, par. 235). Comme l'observe M. Bowett, le tribunal arbitral a recouru d'emblée à la ligne médiane dans les régions non controversées de l'arbitrage franco-britannique et, dans les deux régions controversées, il a modifié plutôt que rejeté cette méthode (*op. cit.*, p. 217; *BYBIL, loc. cit.*, p. 14).

L'arrêt *Tunisie/Libye* de 1982 avait lui aussi confirmé que dans le cas de côtes se faisant face «la position d'une ligne d'équidistance pèse plus qu'elle ne ferait normalement dans l'appréciation globale des considérations d'équité» (*C.I.J. Recueil 1982*, p. 88, par. 126).

C'est à cette distinction solidement établie que se réfère avec insistance l'arrêt du *Golfe du Maine*. Même dans le secteur intérieur du golfe, où la situation est pourtant, selon la Chambre, celle d'un rapport d'adjacence latérale (*C.I.J. Recueil 1984*, p. 324-325, par. 188-189), la Chambre a considéré que «l'idée de tracer une ligne d'équidistance latérale» était «parfaitement concevable» (par. 188); et si elle a corrigé en fin de compte cette ligne en raison des circonstances propres à l'espèce, elle l'a fait au profit d'une ligne plus favorable pour le Canada que la ligne d'équidistance que ce dernier revendiquait. Ayant ainsi admis qu'une ligne d'équidistance latérale entre côtes limitrophes à l'intérieur du golfe était à tout le moins concevable, la Chambre allait tout naturellement, à plus forte raison, souligner avec plus de force encore le caractère normalement équitable d'une ligne médiane dans le second secteur, celui où se présentait entre les côtes des Parties un rapport caractérisé d'opposition frontale. Pour l'application du «critère équitable de la division, autant que possible par parts égales, des zones de chevauchement des projections maritimes des deux Etats», a déclaré la Chambre, «on ne saurait ... imaginer de meilleure occasion ... que l'existence de deux côtes opposées pratiquement parallèles, entre lesquelles il s'agit d'établir à mi-chemin une ligne de délimitation médiane» (*C.I.J. Recueil 1984*, p. 334, par. 217). La prise en considération des circonstances pertinentes, et notamment de l'existence d'une frontière terrestre dans un coin particulier du golfe, conduira la Chambre à corriger la ligne médiane plutôt qu'à la rejeter.

On saisit, dans ces conditions, à quel point est excessive et injustifiée la critique, faite par la Libye, à la méthode de l'équidistance en général, selon laquelle cette méthode conduirait à répartir le plateau continental entre les Etats en cause dans la proportion de 1:1 (ci-dessus, RL, p. 80-81, par. 6.14-6.17). Faut-il rappeler, une fois de plus, que dans notre affaire, avec une ligne médiane, la Libye aurait une zone de plateau continental beaucoup plus étendue que Malte (cf. **I**, MM, p. 36, par. 117; **II**, CMM, p. 107, par. 244)? Diviser également les zones de chevauchement des projections maritimes des deux

côtes ne signifie pas diviser également le plateau continental entre les deux pays. Les deux notions sont différentes.

Pas davantage ne saurait-on accorder d'intérêt au témoignage du déclin de l'équidistance en général que la Partie adverse croit trouver dans l'absence de référence à l'équidistance dans le texte définitif de l'article 83 de la convention sur le droit de la mer (**II**, CML, p. 112, par. 5.32-5.33). Cette absence ne revêt nullement la signification de vaste envergure que la Libye voudrait lui attacher. Il ne faut pas oublier que la méthode de l'équidistance est la seule à avoir bénéficié d'une mention expresse dans certains des textes de négociation. Cette mention a certes disparu de la rédaction définitive de l'article 83, mais pour une raison très particulière : c'est, comme je l'ai rappelé précédemment, parce que ce texte de compromis, rédigé en hâte à la fin de la conférence, a éliminé en même temps les deux concepts disputés au cours de la longue lutte qui s'était déroulée au sein de la conférence et du groupe de travail : les « principes équitables » ont disparu dans la tourmente finale en même temps que l'« équidistance », et seule a survécu la mention neutre et, dans une certaine mesure, inoffensive de la finalité d'une « solution équitable ». On ne saurait tirer du silence gardé par l'article 83 au sujet de l'équidistance la conclusion dévastatrice pour cette méthode que la Libye souhaiterait en tirer — pas plus d'ailleurs, je m'empresse de le noter, que l'on ne serait justifié à inférer du silence de l'article 83 sur les « principes équitables » pour soutenir que ces derniers ont disparu du droit de la délimitation du plateau continental.

Par l'excès même de ses critiques la Libye s'est engagée, je le crains, dans ce que j'ai cru pouvoir appeler dans l'affaire du *Golfe du Maine*, où l'une des Parties avait recouru à la même tactique de critique sans mesure de l'équidistance, une croisade contre l'équidistance, présentée comme le mal absolu (*C.I.J. Mémoires*, vol. VII, p. 32).

Monsieur le Président, faut-il répéter que l'équidistance n'a certainement pas valeur universelle; elle n'est certainement pas toujours équitable. Mais de cela on ne saurait déduire que l'équidistance n'a pratiquement pas de valeur, qu'elle n'est presque jamais équitable. En dépit des réserves qu'elle a exprimées à son égard, la Chambre vient de réaffirmer, dans l'affaire du *Golfe du Maine*, que l'équidistance constitue « une méthode pratique utilisable aux fins de la délimitation » (*C.I.J. Recueil 1984*, p. 297, par. 106). Le fait que son emploi ne soit pas juridiquement obligatoire — et nous en convenons, du côté maltais — ne signifie pas, a précisé la Chambre, que son emploi soit juridiquement interdit : « il ne faut pas confondre, déclare la Chambre, l'absence d'une obligation de faire avec une obligation de ne pas faire » (p. 321, par. 180). Ce n'est pas parce que les partisans des « principes équitables » se sont affrontés à ceux de l'« équidistance » au sein de la troisième conférence que l'équidistance devrait être conçue comme l'opposé des « principes équitables », et réciproquement. Equidistance et équité ne sont pas plus antinomiques que synonymes : l'équidistance peut être équitable, elle peut être inéquitable. Evidences d'une totale banalité, penseront sans doute la plupart des membres de la Cour. Certes, et j'aurais hésité à les rappeler devant la Cour si toute l'argumentation de la Libye dans notre affaire ne se déroulait pas sur la toile de fond d'une espèce d'opposition quasi ontologique à l'équidistance.

Les rapports entre l'équidistance et l'équité ont été résumés par la Cour dans une formule d'une puissante simplicité à laquelle il faut toujours revenir et dont je voudrais demander à la Cour la permission de donner une fois encore lecture : « l'équidistance est applicable si elle conduit à une solution équitable; sinon il y a lieu d'avoir recours à d'autres méthodes » (*C.I.J. Recueil 1982*, p. 79, par. 109). Dans cette formule se trouve affirmée l'idée que l'équidistance

constitue la méthode de référence par rapport à laquelle l'équité est appréciée. Dans cette formule se trouve également énoncé, avec le sens de l'équilibre et de la mesure qui fait les grands *dicta* juridiques, qu'équidistance et équité peuvent coïncider sans coïncider nécessairement, peuvent diverger sans diverger nécessairement.

Il apparaît ainsi que l'opposition entre équidistance et équité est un faux problème. Comme l'a dit M. Guillaume, dans la communication déjà mentionnée:

> «*il n'existe pas*, semble-t-il, *un dilemme équidistance/équité*, mais un objectif, la recherche d'une solution équitable, qui doit être atteint en faisant application de la règle juridique selon laquelle l'équidistance doit être corrigée en fonction des circonstances spéciales» (*op. cit.*, p. 280). (Les italiques sont de moi.)

Cette prise en considération des circonstances pertinentes destinées à vérifier l'équité du résultat pose bien entendu le problème de l'identification des circonstances dont il convient de tenir compte, car toutes les circonstances ne sont pas pertinentes *en droit*, et c'est le juge ou l'arbitre qui, dans chaque affaire, déterminera celles des circonstances auxquelles il accordera cette qualité. Après quoi surgira le problème de la mise en balance des différentes circonstances que le juge ou l'arbitre aura retenues comme pertinentes. Problème difficile, car rien n'assure *a priori* que les circonstances retenues comme pertinentes en droit militent toutes dans le même sens. Des choix difficiles peuvent s'avérer nécessaires, et c'est là que s'exerce ce que la sentence franco-britannique a appelé le pouvoir d'«appréciation» du juge (par. 70; cf. arrêt du *Golfe du Maine*, *C.I.J. Recueil 1984*, p. 312, par. 156, et p. 325, par. 191).

Il n'est pas nécessaire que j'examine ici ce double problème de l'identification des circonstances pertinentes et de leur poids respectif. Je noterai seulement que les circonstances de caractère géographique — c'est-à-dire celles qui tiennent à la configuration des côtes, aux relations entre les côtes en présence, d'une part, et entre ces côtes et la zone de plateau continental à délimiter, d'autre part — sont à coup sûr pertinentes et qu'elles occupent au sein des autres circonstances pertinentes une place privilégiée. C'est essentiellement, bien que non exclusivement, par rapport aux données de la géographie que l'équité de la ligne d'équidistance prise comme point de départ va devoir s'apprécier.

Cette primauté accordée aux circonstances pertinentes de caractère géographique pour tester l'équité du résultat remonte à fort loin.

Il y a un demi-siècle déjà, Gidel préconisait, pour délimiter la mer territoriale dans ce qu'il appelait les «détroits peu larges» — nous dirions aujourd'hui: entre côtes se faisant face —, le recours à la méthode de la ligne médiane, sauf convention contraire et à moins que des «conditions physiques exceptionnelles» ne conduisent à recourir à une autre méthode et à adopter «tel tracé à déterminer en tenant compte de la nature des lieux» (G. Gidel, *Le droit international public de la mer*, t. III, Paris, 1934, p. 756-757). On reste admiratif devant l'intuition de Gidel et le modernisme de ses vues.

Plus près de nous, et à propos cette fois du plateau continental lui-même, la Commission du droit international élaborait ce qui allait devenir la règle de l'article 6 de la convention de 1958: ligne médiane «à défaut d'accord, et à moins que des circonstances spéciales ne justifient une autre délimitation»; et la Commission précisait dans son commentaire que par «circonstances spéciales» elle entendait «une configuration exceptionnelle de la côte, ou encore la présence d'îles ou de chenaux navigables» (*Annuaire de la CDI*, 1956, vol. II, p. 300).

Cette primauté des circonstances géographiques, établie par Gidel et la Commission, ne s'est pas démentie depuis lors. Le dispositif de l'arrêt de 1969 place au premier rang des facteurs à prendre en considération « la configuration générale des côtes des Parties et la présence de toute caractéristique spéciale ou inhabituelle » (*C.I.J. Recueil 1969*, p. 54, par. 101 D). La sentence arbitrale de 1977 attire dix fois, vingt fois l'attention sur les « circonstances géographiques », qu'elle cite tantôt seules (par exemple, par. 84-85), tantôt avec d'autres en évoquant les circonstances pertinentes « géographiques et autres » (par exemple, par. 69, 93, 194, 232). Dans l'arrêt *Tunisie/Libye* la géographie côtière a également joué un rôle de premier plan qu'il n'est pas nécessaire de rappeler à la Cour (*C.I.J. Recueil 1982*, p. 86, par. 122, et p. 88-89, par. 128). Plus récemment encore, l'arrêt du *Golfe du Maine* énonce que

> « le caractère équitable ou non du résultat de l'opération de délimitation ... pourrait difficilement être apprécié par rapport à des paramètres autres que ceux, dominants, fournis par la géographie physique et politique des lieux » (*C.I.J. Recueil 1984*, p. 340, par. 231).

La géographie côtière, Monsieur le Président, je le note en passant, constitue ainsi un facteur « dominant » dans les deux phases de l'opération de délimitation : au niveau du point de départ, de la ligne de départ provisoire, c'est elle qui suggère l'emploi de la méthode de l'équidistance et détermine le tracé de la ligne d'équidistance de premier pas; au niveau de la délimitation définitive, c'est encore la géographie côtière qui fournit le paramètre de référence dominant pour l'appréciation du caractère équitable, ou non, de la ligne.

L'idée qui se dégage de l'ensemble de la jurisprudence est que le juge entend avant tout vérifier si un accident géographique mineur de l'une des côtes — une île ou un rocher, un saillant isolé de la côte ou un promontoire exceptionnellement long, par exemple — n'a pas pour effet de provoquer une déviation majeure de la ligne d'équidistance, génératrice d'une amputation ou d'un empiétement disproportionnés par rapport à l'importance de l'accident et, par là même, inéquitable.

C'est parce que la configuration des côtes « peut dans certains cas aboutir à des résultats de prime abord *[on the face of them]* extraordinaires, anormaux ou déraisonnables » que la Cour a considéré, en 1969, qu'il faut parfois écarter l'équidistance (*C.I.J. Recueil 1969*, p. 23, par. 24). La Cour parle dans cet arrêt de la nécessité d'« éliminer l'effet exagéré de déviation » que peuvent engendrer des « îlots, des rochers ou des légers saillants de la côte » (*ibid.*, p. 36, par. 57); et elle relève qu'il convient de « remédier à une particularité non essentielle d'où pourrait résulter une injustifiable différence de traitement » (*ibid.*, p. 50, par. 91).

Quelques années plus tard, cette approche est confirmée par la sentence arbitrale franco-britannique : « Le rôle de l'équité est ... de remédier de façon convenable aux effets inéquitables de déviation d'une caractéristique géographique. » (Par. 251.) Il faut éviter, estime le tribunal arbitral, que des « configurations particulières de la côte », des « caractéristiques particulières », des « particularités non essentielles » (sentence, par. 100, 101, 251) ne créent une « distorsion dans le tracé de la limite » (par. 100). Le tribunal évoque « la question de savoir si certaines caractéristiques géographiques ont pour effet de rendre « injustifiée » ou « inéquitable » une délimitation conforme au principe de l'équidistance » (par. 240).

Dans l'affaire du *Golfe du Maine* la Chambre a souligné, dans le sillage et le droit fil de la jurisprudence antérieure, qu'« il ne faut pas se laisser trop facile-

ment séduire par les apparences de perfection» de la méthode de l'équidistance en raison, notamment, des

> «inconvénients que peut engendrer une méthode consistant précisément à retenir comme points de base, pour le tracé d'une ligne recherchant une division à égalité d'un certain espace, de toutes petites îles, de rochers inhabités, des hauts-fonds, situés parfois à une distance considérable de la terre ferme» (*C.I.J. Recueil 1984*, p. 330-331, par. 201; cf. aussi p. 327-328, par. 196).

C'est cette considération, entre autres, qui a conduit la Chambre à corriger la ligne d'équidistance de départ dans le secteur intérieur du golfe: «c'est exactement [c'est-à-dire la présence de petites îles, de rochers inhabités, de hauts-fonds] le type d'accident géographique mineur, dit la Chambre, dont ... il convient de faire abstraction...» (*ibid.*, p. 332, par. 210).

C'est là que réside l'élément essentiel, bien que non exclusif, de la prise en considération des circonstances pertinentes: s'assurer que la méthode d'équidistance retenue comme première approche ne provoque pas, en raison d'une configuration géographique particulière et exceptionnelle, une déviation disproportionnée, une distortion déraisonnable. Ce n'est pas toute déviation, même minime, qui sera à corriger parce que génératrice d'inéquité, mais seulement celle qui conduit à une «différence injustifiable de traitement» ou à des résultats «de prime abord extraordinaires, anormaux ou déraisonnables». Des distortions insignifiantes n'appellent aucune correction. Comme j'ai cru pouvoir le dire dans un autre contexte, *de minimis non curat delimitator* (*C.I.J. Mémoires, Délimitation de la frontière maritime dans la région du Golfe du Maine*, vol. VII, p. 34).

On en vient ainsi à apprécier à sa juste valeur ce qui a constitué, si je puis dire, la philosophie de la Commission du droit international, il y a près de trente ans: l'équidistance, mais avec la flexibilité et la souplesse nécessaires pour permettre une solution équitable compte tenu des circonstances particulières de l'espèce. Sur le plan de l'opportunité technique, et non pas sur le plan juridique, le Comité d'experts avait suggéré la solution de la ligne médiane ou de l'équidistance, assortie d'une soupape de sûreté (*Annuaire de la CDI*, 1953, vol. II, p. 79), et, dans le sillage de cette suggestion, la Commission s'était prononcée, sur le plan du droit cette fois, en faveur de l'équidistance assortie d'une certaine élasticité:

> «il doit être prévu [a indiqué la Commission dans son rapport de 1956] qu'on peut s'écarter de la règle lorsqu'une configuration exceptionnelle de la côte ou encore la présence d'îles ou de chenaux navigables l'exigent. Ce cas pourra se présenter assez souvent. La règle adoptée est donc dotée par là d'une certaine souplesse.» (*Annuaire de la CDI*, 1956, vol. II, p. 300.)

Trente ans après, on ne peut manquer d'être frappé par la perspicacité de la Commission et par l'actualité de son approche. A cette époque le principe de distance en était encore à ses tout premiers balbutiements, et c'est surtout la commodité pratique de l'équidistance qui inspirait la Commission. Cette commodité n'a pas disparu, et demeure aussi convaincante aujourd'hui qu'hier. Mais une raison juridique s'ajoute à présent à ce motif pratique de prendre l'équidistance pour point de départ: le principe de distance justifie aujourd'hui juridiquement ce qui n'était encore à cette époque qu'une solution de convenance.

Il est certain, Monsieur le Président, comme vient de le rappeler la Chambre dans l'affaire du *Golfe du Maine*, que la règle combinée «équidistance-circons-

tances spéciales», dont s'occupait la Commission, est limitée au droit international particulier de la convention de Genève et ne constitue pas une règle du droit international général et coutumier (par. 122-123). J'en suis parfaitement conscient. Il n'en demeure pas moins que, dans leur substance, la règle conventionnelle de la convention de Genève combinant «équidistance-circonstances spéciales» et la règle de droit coutumier dont la Chambre vient de donner une «reformulation» au paragraphe 112 de son arrêt ne sont pas très éloignées l'une de l'autre; l'un des apports jurisprudentiels majeurs de la sentence franco-britannique a précisément été d'unifier, ou de rapprocher du moins, le contenu du droit conventionnel et du droit coutumier en cette matière, en relevant qu'il n'y a pas de véritable différence de fond ou de résultat entre la règle de l'article 6 et la norme générale du droit coutumier (sentence arbitrale, par. 69-70 et 97). Il est peut-être significatif à cet égard que la Chambre elle-même ait eu recours, pour désigner les données concrètes susceptibles de conduire à une correction de la méthode d'équidistance de départ dans le cadre du droit coutumier, au vocable de «circonstances spéciales de l'espèce» emprunté à la terminologie de la Commission du droit international et de la convention de 1958 (par. 195).

Les observations que je viens de faire conduisent à poser à présent la question décisive sur laquelle j'échèverai cet exposé: existe-t-il, dans le cas présent, des circonstances pertinentes qui feraient apparaître le caractère inéquitable de la ligne d'équidistance de départ et nécessiteraient donc sa correction, voire même son abandon?

La géologie et la géomorphologie sous-marines ne sauraient, nous l'avons montré, avoir de poids dans notre affaire, pour des raisons tant scientifiques que juridiques.

D'autres circonstances présentent davantage d'intérêt: la conduite des Parties, les considérations de sécurité au sens large, et d'autres encore. Mes collègues ont eu — et auront — l'occasion de montrer que, loin d'invalider la ligne d'équidistance, ces circonstances contribuent au contraire à en confirmer l'équité.

Je m'en tiendrai, pour ma part, aux circonstances de caractère géographique, dont le caractère «dominant» est affirmé, comme nous l'avons vu, par une jurisprudence unanime.

L'examen de la géographie côtière conduit à une constatation difficilement contestable: aucune circonstance de caractère géographique ne permet de regarder comme inéquitable la ligne médiane entre les côtes qui se font face de Malte et de la Libye; toutes les circonstances de caractère géographique conduisent au contraire à regarder une telle ligne comme conforme à l'exigence fondamentale d'un résultat équitable.

Pour asseoir cette constatation avec plus de certitude, revenons un instant en arrière, Monsieur le Président, et remontons au début de l'opération de délimitation.

Les côtes de Malte et de la Libye se font face, même si elles ne sont pas rigoureusement parallèles mètre par mètre. Ces côtes — les maltaises aussi bien que les libyennes — engendrent des projections de plateau continental omnidirectionnelles. Sans le vis-à-vis libyen les projections maltaises s'étendraient jusqu'à 200 milles marins au moins des lignes de base de Malte. Sans le vis-à-vis maltais les projections libyennes s'étendraient jusqu'à 200 milles marins au moins des points de base de la Libye. En dépit de leur différence de taille, en dépit du caractère insulaire de l'un et continental de l'autre, les deux Etats seraient alors traités sur un pied d'égalité au regard du droit de la mer et de leur pouvoir générateur de plateau continental. Mais Malte a un vis-à-vis libyen, et la Libye a un vis-à-vis maltais, et chacun des deux pays est situé trop près de son vis-à-vis pour qu'il soit possible de lui conserver la plénitude de ses droits

potentiels de plateau continental. Les projections des deux côtes se rencontrent et se chevauchent, et c'est de l'existence de ce front de chevauchements que naît le problème de délimitation soumis à la Cour.

Pour résoudre ce problème, l'égalité des Etats interdit de privilégier la projection de l'une des Parties au détriment de celle de l'autre. Les deux côtes sont juridiquement d'égale valeur. La projection maltaise n'a pas plus de poids que celle de la Libye, mais pas moins non plus; et la même chose est vraie de la projection libyenne. Chacun des deux Etats a une vocation d'égale valeur au plateau continental s'étendant jusqu'à une distance de 200 milles marins au moins de ses côtes. Chacun des deux doit cependant accepter une amputation. L'équité exige que cette amputation soit équilibrée et raisonnable. Diminuer l'amputation de l'un revient à augmenter l'amputation de l'autre. Aussi est-il nécessaire d'envisager pour commencer une méthode de délimitation qui soit capable de respecter l'égal droit de Malte et de la Libye à une zone de plateau continental s'étendant jusqu'à une même distance de leurs côtes respectives. La méthode susceptible de satisfaire à cette exigence est celle qui arrête la projection de chacune des Parties à un endroit tel que, si on la laissait se poursuivre plus loin, la projection d'égale valeur de l'autre se trouverait compromise. Une telle méthode existe: c'est celle de l'équidistance, représentée ici par une ligne médiane.

Voilà donc ce que Malte propose: commencer par prendre en considération la ligne médiane, qui reflète la configuration côtière et respecte les exigences du principe de distance.

Bien sûr, s'il apparaissait que cette ligne est inéquitable et déraisonnable en raison de l'effet exagéré de déviation provoqué par une caractéristique géographique mineure, il serait nécessaire de la corriger ou même, dans des cas extrêmes, de lui substituer une ligne basée sur une variante de l'équidistance ou une autre méthode.

Mais tel n'est pas le cas — à moins, bien entendu, et peut-être est-ce là tout le problème de considérer l'existence même de l'Etat maltais comme génératrice d'inéquité! Voici deux côtes situées incontestablement dans un rapport d'opposition frontale, dont le caractère de côtes se faisant face n'est pas douteux, et dépourvues de toute trace d'adjacence. Pas de configuration mineure, sur aucune des deux côtes, qui serait susceptible de faire «dévier latéralement la ligne d'équidistance» et d'amputer l'Etat d'en face «de zones situées juste devant sa façade maritime». Pas de saillant, pas de rentrant, pas de convexité, pas de concavité. Du côté maltais comme du côté libyen, des côtes régulières, *d'une totale banalité, et assurément dépourvues de toute «caractéristique spéciale ou inhabituelle»*. Et ce qui est vrai des côtes l'est tout autant de l'espace qui les sépare. Dans cet espace pas la moindre île, pas le moindre rocher, pas le moindre haut-fond, que ce soit devant la côte de Malte ou devant la côte de la Libye, que ce soit du «bon» ou du «mauvais» côté de la ligne médiane. La Libye écrit que: «The question of the distorting effect which small islands may have on an equidistance line has always been a problem» (ci-dessus, RL, p. 80, note 1): l'observation est exacte, mais entre les côtes des deux Etats, pas le moindre îlot de nature à faire problème et à donner quelque piment à une géographie dépourvue d'originalité.

Quelle que soit la manière dont on aborde la situation géographique, elle apparaît banale, dépourvue de toute caractéristique particulière. Aucune déviation ou distorsion de la ligne d'équidistance assez importante «pour justifier une ligne de délimitation autre que la ligne médiane». Pas de résultats qui apparaissent «de prime abord extraordinaires, anormaux ou déraisonnables». Nous sommes presque en présence d'un cas d'école, que l'on aurait simplifié à

l'extrême pour faciliter la démonstration. La situation géographique de notre affaire est plus que simple, elle est simpliste. Non, rien, vraiment rien, dans la géographie côtière ne conduit à jeter le doute sur le caractère raisonnable et équitable de la ligne médiane envisagée comme point de départ et à l'écarter comme ligne de délimitation définitive. Toute autre solution conduirait à refaire la nature et la géographie.

Le caractère raisonnable de la ligne médiane revendiquée par Malte s'éclaire encore davantage si l'on se rappelle que cette ligne, comme je l'ai indiqué hier, est située à peine plus au sud que ne le serait une ligne médiane que l'on tracerait entre la Libye et l'Italie en faisant abstraction de Malte. La prise en considération de Malte ne conduit en définitive pas à une ligne beaucoup plus défavorable pour la Libye que si Malte n'existait pas. Mais cette modeste conséquence de l'existence de Malte paraît, semble-t-il, encore excessive à la Libye...

Reste la longueur des côtes.

Une différence dans la longueur des façades côtières produit par elle-même une délimitation accordant à chaque Etat une superficie différente de plateau continental, mais il est clair que la longueur comparée des côtes ne saurait être considérée comme une circonstance appelant *per se* un ajustement de la ligne d'équidistance de départ. Si, au terme de la prise en considération et de la mise en balance des circonstances pertinentes, la ligne d'équidistance paraît inéquitable, ce sera pour des considérations autres que la différence dans la longueur des façades côtières: un effet de déviation exagéré dû à un accident géographique mineur, par exemple, ou un empiétement disproportionné; ce ne sera pas simplement parce que les côtes en présence n'ont pas la même longueur.

Si l'arrêt du *Golfe du Maine* a corrigé la ligne médiane entre les côtes se faisant face du Massachusetts et de la Nouvelle-Ecosse, dans le second secteur, en fonction de la longueur comparée des façades côtières des deux pays dans le premier secteur (c'est-à-dire à l'intérieur du golfe), c'est en raison d'une considération spécifique à cette affaire, à savoir que le point terminal de la frontière internationale entre le Canada et les Etats-Unis est situé dans le coin nord-est du golfe et non pas au milieu de ce dernier. C'est cette considération particulière, relevant de ce que la Chambre a appelé la «géographie politique» (*C.I.J. Recueil 1984*, p. 273, par. 42, et p. 328, par. 196; cf. p. 327, par. 195, et p. 340, par. 231), qui a conduit la Chambre à faire intervenir *indirectement* la longueur comparée des côtes dans l'appréciation du caractère équitable de la ligne médiane (p. 334-335, par. 217-218). La Chambre a précisé que c'est seulement «dans ces conditions» qu'elle a fait jouer la longueur comparée des côtes comme élément de la vérification de l'équité de la ligne médiane provisoire (p. 334, par. 218; cf. p. 312-313, par. 157). A aucun moment la Chambre n'a, il convient de le noter, comparé la *ratio* des longueurs côtières totales des deux pays dans l'aire de délimitation avec la superficie totale d'espaces maritimes attribués à chacun d'eux. Aucun élément de ce genre n'a été pris en considération dans l'arrêt.

Il ne saurait être question, on le voit, de condamner *ipso facto* et automatiquement comme inéquitable toute ligne médiane dès lors que les longueurs des deux côtes ne sont pas dans un rapport de 1:1. Si on procédait ainsi, cela signifierait que la longueur comparée des côtes deviendrait une circonstance pertinente — la seule circonstance pertinente, sans doute — susceptible d'exercer une sorte de droit de veto, puisque, même dans le cas où toutes les autres circonstances pertinentes établiraient le caractère équitable de la délimitation équidistante de départ, une différence dans les longueurs des côtes suffirait à neutraliser ce résultat et à condamner la ligne d'équidistance ou la ligne médiane. La

proportionnalité des longueurs de côtes deviendrait alors la circonstance pertinente la plus déterminante, celle en tout cas à prendre en considération en tout premier lieu, puisque c'est d'elle que dépendrait le caractère équitable de la ligne; et l'on ne serait pas loin, une fois de plus, de la proportionnalité érigée en source du titre ou en méthode autonome et directe de délimitation. En un mot, Monsieur le Président, l'égalité des longueurs côtières n'est pas une condition juridiquement nécessaire du recours à la ligne médiane.

C'est à mon ami Ian Brownlie que revient la tâche d'examiner les questions de la proportionnalité, de la longueur des côtes et de la magnitude territoriale, que je n'ai fait qu'évoquer en passant.

Pour ma part, Monsieur le Président, je demande respectueusement à la Cour son indulgence pour un exposé que l'importance de la matière et l'enchevêtrement des thèses de nos adversaires a condamné à une longueur que je sais excessive.

L'audience est levée à 13 h 5

FOURTEENTH PUBLIC SITTING (3 XII 84, 10 a.m.)

Present: [See sitting of 26 XI 84.]

ARGUMENT OF PROFESSOR BROWNLIE

COUNSEL FOR THE GOVERNMENT OF MALTA

Professor BROWNLIE: Mr. President, Members of the Court. May it please the Court.

I. INTRODUCTION

It is my task to examine the legal significance of coasts with particular reference to the points at issue in this case. In the course of this examination I shall address the question of proportionality and the Libyan argument that the extent of the land territory behind the coast is relevant to delimitation.

As the Court might reasonably expect, the particular focus of my argument will be the family of Libyan contentions concerning the length of coastlines set forth in the course of the submissions appended to the Libyan Reply.

The relevant submissions are as follows:

> "5. Equitable principles do not require that a State possessing a restricted coastline be treated as if it possessed an extensive coastline.
>
> 6. In the particular geographical situation of this case, the application of equitable principles requires that the delimitation should take account of the significant difference in lengths of the respective coastlines which face the area in which the delimitation is to be effected.
>
> 7. The delimitation in this case should reflect 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 respective States and the lengths of the relevant parts of their coasts, account being taken of any other delimitations between States in the same region." (P. 103, *supra*.)

The last of these submissions clearly reflects the *dispositif* of the Judgment of this Court in the *North Sea Continental Shelf* cases and thus the focus appears to be the familiar subject of proportionality. However, it must be emphasized that the apparently orthodox reliance upon the concept of proportionality in the Libyan argument is but the superstructure of a forensic vehicle based upon a variety of elements. Proportionality represents but the surface and is not the inner structure of the argument which is heterodox and radical to a considerable degree. This state of affairs is revealed by the content and order of the submissions at the end of the Libyan Reply. Three of these, which I have already recited, relate to the length of coastlines, and of these three, it is the third alone which is concerned with the issue of proportionality.

The general structure of the Libyan argument, as revealed at length in the course of the written pleadings, is substantially incompatible with a legally justi-

fiable reliance upon the concept of proportionality and this incompatibility takes the following forms.

First, the concept of proportionality is relied upon as a primary basis of delimitation, that is to say, as an independent source of rights over shelf areas, and such reliance is contrary to legal principle.

Secondly, the form in which the test of proportionality is offered by Libya — which involves the reference to the relevance of length of coasts — is inapposite in the geographical circumstances of the present case.

Thirdly, the Libyan argument relies upon the length of coasts as an independent principle, not necessarily connected with proportionality, and this is evident from the submissions.

Fourthly, the Libyan pleadings relate the concept of coasts to the argument that the size of the landmass behind the coasts provides "a legal justification for a State's entitlement to continental shelf rights over maritime areas before its coast" (**II**, LCM, para. 2.48; para. 4.19).

Thus it follows, Mr. President, that the matters raised by the Libyan pleadings call for a canvass of issues which extend well beyond the question of proportionality as it is normally identified. Indeed, significance of coasts, including the length of coasts, is worthy of consideration as a matter of principle and this irrespective of the particular form of the Libyan argument.

In consequence, in the first part of my presentation I shall address a series of issues which are raised directly by the Libyan thesis that "the application of equitable principles requires that the delimitation should take account of the significant difference in the lengths of the coastlines which face the area in which the delimitation is to be effected" — I refer to the words of the sixth Libyan submission. Those issues are as follows:

First, the general significance of coasts in maritime delimitation treated as a question of principle.

Second, the significance of coastal configurations in relation to continental shelf delimitation.

Third, the identification of the area relevant to the decision of the dispute.

Fourth, the concept of equality and the geographical features which establish the legal framework of the process of delimitation.

The examination of these questions will have two objectives. The first is the refutation of the simplistic Libyan thesis based upon the lengths of coastlines, and the second is to lay the foundations for an enquiry into the function of the concept of proportionality in the present case.

II. The General Significance of Coasts in Maritime Delimitation as a Question of Principle

The first issue I shall address within the scheme I have outlined is the significance of coasts in maritime delimitation seen as a question of general principle.

The Libyan argument requires that delimitation should depend on differences in the length of coasts and, in this way, it approaches the concept of coast in a highly abstract form. Length is presented as important as such, and becomes a quantity divorced from the pertinent geographical relationships overall. Moreover, the significance of the greater length of Libyan coasts is presented in conjunction with the assertion that the extent of the land territory behind the coast of Libya is also relevant.

This thesis of the maritime reflection of territorial magnitude is sometimes presented in terms of proportionality (see **I**, LM, paras. 6.90-6.93; **II**, LCM,

paras. 6.25-6.32 ; and *supra*, LR, paras. 7.01-7.22), sometimes in terms of a theory based on the concept of natural prolongation (see **II**, LCM, paras. 2.48, 4.19-4.24 ; *supra*, LR, para. 5.12) and at yet other times in terms of a general description of the circumstances relevant to the delimitation process (*supra*, LR, paras. 3.01-3.23, 6.22, 8.03, 8.15-8.16).

Within the economy of the Libyan case the argument based upon length of coasts and upon the magnitude of Libyan territory behind the coasts remains always the same argument. Removed from the various categories in which it is presented, the argument comes to this. According to Libya, the application of equitable principles requires that the territorial magnitude of a State be reflected in the delimitation of continental shelf areas within the relevant area, and this territorial magnitude is represented either by the greater length of the Libyan coast compared with that of Malta, or by the greater size of the Libyan landmass, or by these two factors in combination.

This formulation of the basis of the Libyan claim does not appear as such in the Libyan pleadings, but it is a fair statement of the essence of the positive aspect of the Libyan case. The use of the concepts of proportionality and natural prolongation in the Libyan written pleadings involves no more than elements which are intended to supplement and consolidate the principal thesis.

The outcome, Mr. President, is a double paradox. In these proceedings Libya asks for a delimitation which follows the general direction of the so-called Rift (9) Zone, as defined in the Libyan Memorial, and illustrated by Map 17 of that Memorial.

(27) Reference may also be made to the axial ridge line illustrated on Map 10 of the (44) Libyan Reply and which may also be seen on Figure 13 of Malta's dossier. One may also refer to the Libyan proposal of 1973 indicated on Map 9 of the Libyan (5) Memorial and to be found again in Figure 1 of Malta's dossier. In other words, Libya is claiming the lion's share, a virtual monopoly of the continental shelf areas within the relevant area. If Libya were to have its way, Malta would be left with a very small fraction of the shelf areas lying between the two countries.

Yet, and here is the first paradox, this claim is based upon the application of equitable principles. Moreover, there is a second paradox. The Libyan position is not based upon actual coasts, on geography and coastal relationships as such, but upon comparisons of magnitudes of land territory and lengths of coasts.

The goods in which the Libyan argument trades are geopolitical and, correctly understood, the argument involves a claim to distributive justice and to apportionment of the shelf in accordance with criteria of comparative territorial magnitude. In the words of the Libyan Counter-Memorial :

> "Malta's claim that a small island — as Malta is — or even a single basepoint on its coast would, as of right, generate a continental shelf of the same reach and extent as a continental coast of considerable length is neither in harmony with continental shelf doctrine nor supported by the jurisprudence of the Court. The continental shelf concept, though a legal concept and subject to legal interpretation according to its object and purpose, cannot be divorced from its factual basis. It is the landmass behind the coastline which — by its continuation into and under the sea — provides the factual basis and legal justification for a State's entitlement to continental shelf rights over maritime areas before its coast — and not mere distance or proximity from certain basepoints on the coast." (**II**, LCM, para. 4.19.)

The legal framework of the Libyan views as to the significance of coasts will be explored in due course. My present purpose is to approach the Libyan thesis,

that delimitation should reflect territorial magnitude, on its own terms and thus to examine the broad politics and rational basis of maritime delimitation.

Mr. President, the Libyan thesis flies in the face of a long-established tradition in matters of maritime delimitation and jurisdiction. This tradition has always been that the seaward reach of the territorial sea, contiguous zones and fishery conservation zones should always be equal for all coastal States and, in that conception, would not reflect the varying territorial magnitudes of the coastal States. This picture is complicated a little by the fact that at certain periods in history there were regional patterns and so for example at one time it looked as though Mediterranean States generally would adopt a six-mile breadth as the regional rule for the territorial sea. Moreover, the rules governing outer limits tended to allow coastal States to choose varying limits within a certain maximum.

However, the major premise of equality of seaward reach remained untouched by such factors. No State and no publicist ever expressed the notion — until these proceedings — that territorial magnitude should play a role either in attribution or in delimitation of territorial sea and zones of jurisdiction for particular purposes.

The well-known works of Jessup, published in 1927 *(The Law of Territorial Waters and Maritime Jurisdiction)* and Gidel, published in 1934 (Vol. 3 of *Le droit international public de la mer*), make no reference to criteria of territorial magnitude, nor do they suggest that island States should be in any respect disadvantaged.

The tradition of equality of seaward reach of jurisdiction is reflected in Article 12, paragraph 1, of the Geneva Convention on the Territorial Sea and the Contiguous Zone adopted in 1958. In respect of the delimitation of the territorial sea as between two States whose coasts are opposite or adjacent to each other, this provision prescribed a median line. However, the provision did not apply "where it is necessary by reason of historic title or other special circumstances" to delimit the territorial seas of the two States in some other way. An almost identical provision appears in the Convention on the Law of the Sea of 1982 (Art. 15, para. 1).

It is ironical to note, more or less in passing, that, when the régime of delimitation of the territorial sea was liberalized in favour of the coastal State by this Court in the *Anglo-Norwegian Fisheries* case, that liberalization involved no reference to territorial magnitude. Indeed, the part of the Norwegian littoral concerned in the proceedings was very narrow and deeply indented and cut into by fjords. In its consideration of the "geographical realities" of that case the Court did not refer to the modest extent of Norwegian land territory (*I.C.J. Reports 1951*, p. 116 at pp. 127-128), but it is clear at least that Norway was not disadvantaged as a consequence of her cramped geographical position.

It is true, Mr. President, that the tradition of equality of seaward reach was developed in connection with the territorial sea and zones of jurisdiction for special purposes, the so-called contiguous zones. It is equally true that, when it first appeared, the continental shelf developed as an autonomous legal concept. However, there is no reason to believe that the shelf concept involved a radical break with tradition in matters of maritime delimitation.

The terms of the Truman Proclamation, which is generally acknowledged as the precursor of the development of the shelf as a concept of customary international law, indicate the inherent unlikelihood of the development of criteria of the kind now urged upon this Court by my distinguished opponents. With your permission, Mr. President, I shall read the salient parts of the Proclamation issued on 28 September 1945.

First of all the consideranda:

> "Whereas the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and
>
> Whereas its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and
>
> Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and
>
> Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon co-operation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources."

Then the Proclamation itself provides as follows:

> "Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.
>
> In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."

It is immediately apparent that the criteria of attribution are highly practical in character. The emphasis is upon contiguity and the need for co-operation and protection from the shore in respect of the utilization and conservation of the resources of the sea-bed. No one reading the Proclamation could envisage the geopolitical criteria now offered in the Libyan pleadings. The references to contiguity and the element of security or self-protection are reminiscent of the thinking behind the concepts of the territorial sea and contiguous zone. Moreover, the position of the coastal State was strengthened when the State practice relating to shelf claims developed on the basis of the inherent rights of the coastal State, which were not dependent upon express claims or effective occupation.

The jurisprudence on the delimitation of shelf areas lying off opposite or adjacent States does not represent a challenge to the general equality of coastal States in respect of maritime jurisdiction. On the contrary, the decisions involve the working out of the concept of equality in relatively complex geographical circumstances. As I shall demonstrate later on in this presentation, the key decisions

...

on shelf delimitation provide no support whatsoever to the Libyan position on the significance of coasts and lengths of coasts.

Mr. President, any attribution of maritime jurisdiction and any consequent issues of delimitation lead to a consideration of the political implications of coastal geography. In as much as the conduct of the parties and elements of acquiescence are relevant in the particular case, maritime delimitation bears certain similarities to the delimitation of land boundaries. And, of course, in both cases the alignment may be the subject of political agreement. In other respects the delimitation of sea-bed boundaries as between opposite or adjacent States is very closely and in most cases exclusively a question of the political (and therefore legal) implications of coastal geography, and this was recognized by the Judgment of the Chamber in the *Gulf of Maine* case (*I.C.J. Reports 1984*, p. 327, para. 195).

The political implications of coastal geography were perceived very clearly by the Court in the *Anglo-Norwegian Fisheries* case. In the well-known passage in which the Court referred to "the close dependence of the territorial sea upon the land domain", the Court carefully indicated the two different but related consequences of being a coastal State. On the one hand, the coast generates title: and thus the Court observed that "it is the land which confers upon the coastal State a right to the waters off its coasts" (*I.C.J. Reports 1951*, p. 133). On the other hand, "the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast" *(ibid.)*. Thus the land is both a generator of rights and a source of limitation and control over the ambit of those rights: the coast prefigures the delimitation of the rights the existence of which are contingent upon it.

The link between continental shelf and pre-existing concepts of maritime law was clearly recognized by the Court in its Judgment in the *North Sea Continental Shelf* cases. The relevant passage reads as follows:

> "The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea." (*I.C.J. Reports 1969*, p. 51, para. 96.)

It may be remarked that this passage is redolent of continuity of doctrine and a traditional approach to the concept of the continental shelf.

The following passage from the decision of the Anglo-French Court of Arbitration is of interest in the same connection:

> "In international law . . . the concept of the continental shelf is a juridical concept which connotes the natural prolongation under the sea not of a continent or geographical landmass but of the land territory of each State." (Decision of 30 June 1977, para. 191.)

I would like to complete this survey of the relevant judicial pronouncements by a quotation from the Judgment of the Court in the *Tunisia/Libya* case:

> "It should first be recalled that exclusive rights over submarine areas belong to the coastal State. The geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title. As the Court explained in the *North Sea Continental Shelf* cases the continental shelf is a legal concept in which 'the principle is applied that the land dominates the sea' (*I.C.J. Reports 1969*, p. 51, para. 96). In the *Aegean Sea Continental Shelf* case the Court emphasized that
>
> > 'it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.' (*I.C.J. Reports 1978*, p. 36, para. 86.)
>
> As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is a decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for the extension of these areas in the process of the legal evolution of the rules of international law." (*I.C.J. Reports 1982*, p. 61, para. 73.)

Mr. President, there is no hint in these expressions of judicial opinion that the magnitude of the territory lying behind the coasts has any relevance either to entitlement or to delimitation. It is the sovereignty of the coastal State over its land territory which creates entitlement to rights over shelf areas. As in the case of the territorial sea, the sovereignty of the coastal State is the necessary condition for the existence of maritime jurisdiction. And naturally in this connection the sovereignty of a small coastal State counts in exactly the same way as that of a large coastal State.

The political thinking, or assumption, behind continental shelf claims has always regarded the coast, and not the landmass behind, as the relevant land territory. To think in terms of the size of landmass would involve transmuting maritime claims into synthetic territorial claims. The criteria of territorial magnitude and coastal length advanced by Libya in this case are criteria of distribution entirely divorced from the actual relation of submerged areas to the land territory. Such criteria have no relation to the practical criteria of attribution and appurtenance to be found in the text of the Truman Proclamation and in the jurisprudence of the Court. These criteria of attribution are as follows:

(a) the general concept of contiguity and appurtenance;
(b) the principle of security or self-protection;
(c) the principle of non-encroachment; and
(d) the conservation and reservation of the natural resources of the sea-bed in favour of the coastal State: and thus the continental shelf doctrine authorized the coastal State to object to the exploitation of the sea-bed in front of its coasts being undertaken by other States.

Such criteria relate to entitlement rather than to delimitation as such, but they provide the rationale for shelf claims and constitute the logical framework for the process of delimitation. It is immediately apparent that they are criteria con-

noting equality and not distribution according to territorial magnitude. Security, access to and reservation of resources, and non-encroachment are quantities which cannot be said to benefit some coastal States more than others. Whatever the problems of delimitation which call for solution, these can only affect marginal areas and the solution must be one within a broad framework of equality. Apportionment in accordance with external values, such as territorial magnitude, is fundamentally opposed to the traditional assumptions behind maritime delimitation.

These propositions can be tested by a consideration of the maritime frontiers of closed or semi-enclosed seas such as the Black Sea, the Baltic Sea and the North Sea. The situation of those seas is shown in Malta's dossier on Figures 19, 20 and 24 respectively. In all these cases the process of maritime delimitation is either virtually complete or well advanced. The pattern includes the establishment of territorial sea limits and the delimitation of areas of continental shelf. There is no sign in the practice of the States concerned that territorial magnitude is considered relevant to the process of maritime delimitation. Equality is the order of the day, both in respect of territorial sea, and continental shelf areas. After all, the automatic and generally equal effect on entitlement, which all coasts have, has resulted in the prominence of the subject of basepoints and baselines.

Mr. President, I can now present my conclusions as to the significance of coasts in maritime delimitation seen as a matter of general principle. In summary form, those conclusions are as follows:

First, the long-established tradition in matters of maritime jurisdiction and delimitation has been that the seaward reach of the territorial sea, contiguous zones and fishery conservation zones should always be presumed to be generally equal for all coastal States. It follows that the seaward extent of jurisdiction should not reflect the varying territorial magnitudes of the coastal States.

Second, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State; and the judicial sources of this doctrine of coastal State entitlement indicate that in this context the sovereignty of a small coastal State counts in exactly the same way as that of a larger coastal State.

Third, the criteria of attribution recognized in the Truman Proclamation and in the jurisprudence of the Court — and especially the principles of security or self-protection and of non-encroachment — are essentially different from the criteria of distribution relied upon by Libya which are divorced from the actual relation of submerged areas to the land territory.

I have concluded my examination of the Libyan case in relation to the general significance of coasts in the context of maritime jurisdiction. In the course of this I have made reference at appropriate points to the Libyan argument based upon territorial magnitude since that is closely associated with the Libyan position on the significance of coasts.

However, the Libyan argument presents the factor of relative landmass as an independent element, which in effect concerns both entitlement and delimitation, and which has no necessary connection with the issue of proportionality, and thus it is appropriate to examine this element separately and on its own terms.

The terms in which the Libyan argument is expressed do not lack either colour or emphasis. The Counter-Memorial expresses the matter in two distinct passages. In the first passage Libya states that:

> "the extent of the land territory behind the coast must be regarded as linked to the factor of the natural prolongation of the land territory of a State from

> its coast seaward by way of its continental shelf. The land territory behind Libya's extensive coast is immense, whereas both the coast and land territory of Malta are very small. Surely, the intensity of the natural prolongation must be greater — the prolongation, more natural — from the Libyan coast in arriving at a line of delimitation?" (**II**, LCM, para. 2.48.)

And elsewhere in the same pleading it is said:

> "The continental shelf concept, though a legal concept and subject to legal interpretation according to its object and purpose, cannot be divorced from its factual basis. It is the landmass behind the coast which — by its continuation into and under the sea — provides the factual basis and legal justification for a State's entitlement to continental shelf rights over maritime areas before its coast — and not mere distance or proximity from certain basepoints on the coast." (*Ibid.*, para. 4.19.)

These passages — and others which could be cited — indicate that it is the size of Libyan territory and not merely the length of its coastline which is the nub of the argument.

Thus the Libyan Reply contains the assertion:

> "If geography is not to be refashioned . . . the size of Malta and the size of Libya are undeniable facts relevant to the question of delimitation." (*Supra*, LR, para. 5.12.)

Mr. President, there are many reasons for rejecting the landmass factor as irrelevant to continental shelf delimitation.

In the first place, it involves a misunderstanding of the legal character of the concept of natural prolongation as it has evolved since the Judgment in the *North Sea Continental Shelf* cases. Indeed, as Judge Jiménez de Aréchaga noted in his separate opinion in the *Tunisia/Libya* case, the Judgment in the *North Sea Continental Shelf* cases made it clear that

> "'natural prolongation' is a concept divorced from any geomorphological or geological requirement and that it merely expresses the continuation or extension seawards of each State's coastal front" (*I.C.J. Reports 1982*, p. 116, para. 58).

The second reason for rejecting the landmass argument is that the factor of territorial magnitude has no necessary relation to the incidence or lengths of coastlines; and differences between spatial magnitudes could not be used except as an index for a process of spatial distribution of sea-bed areas.

Thirdly, the factor of territorial magnitude is completely alien to the concept of a boundary whether it is maritime or in land territory. In the course of disputes concerning territory and the location of land boundaries many arguments, some legal, some factual and political, may be advanced. As the Court will readily appreciate the relative magnitude of the Parties is a complete novelty in this respect. It is apparent that the factor of territorial magnitude is inimical to the idea of equity and this is no doubt why in historical terms it has not been invoked in relation to territorial disputes. The factor of territorial magnitude is equally unsuited to the resolution of continental shelf disputes and, as the Court recognized in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1978*, pp. 36-37, paras. 86-90), shelf disputes have an essentially territorial character.

The fourth reason for rejection is that there is no judicial authority in support of the factor of relative magnitude. Indeed, the argument is so novel that tribunals have lacked the opportunity to reject it. However, it may be recalled that the United States employed an argument based upon the concept of "dominant inter-

est" in the *Gulf of Maine* case, which has a very slight affinity with the Libyan thesis under examination. And it is to be noted that the Chamber gave no encouragement to the use of such a concept (*I.C.J. Reports 1984*, p. 246, pp. 340-342, paras. 223-237).

Certainly, there is no evidence of reference to territorial magnitude in the State practice concerning shelf delimitation. There is no evidence that States with large hinterlands, such as the USSR, Colombia, Venezuela, Iran, Saudi Arabia, or India, have had the benefit of any concept of territorial magnitude in effecting delimitations with smaller neighbours.

Finally, it should be borne in mind that, if territorial magnitude were to be a relevant factor, the consequences of State succession would be radical. The appearance or absorption of small coastal States would result in a need to reorder maritime delimitations carried out on the basis of the previous relative magnitudes.

Thus, a series of important considerations of principle and good policy strongly militate against any legitimation of the argument based upon territorial magnitude and I have perhaps given it more attention than it really deserves.

I shall now return to the major elements in my presentation, moving from the general significance of coasts in maritime delimitation to a consideration of the precise significance of coastal configurations for the purposes of continental shelf delimitation.

III. The Legal Significance of Coastal Configurations in Relation to Continental Shelf Delimitation

In the *Tunisia/Libya* Judgment the Court underlined the significance of coasts in relation to continental shelf entitlement. In the view of the Court the shelf included any sea-bed area possessing a relationship of adjacency to the coast of the territory of the coastal State, and it was stated that "the geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title" (*I.C.J. Reports 1982*, p. 61, para. 73). The Judgment as a whole places considerable emphasis upon actual coasts both in the context of entitlement and of delimitation (see, in particular, *ibid.*, pp. 88-89, paras. 127-129). Moreover, in the *dispositif* the relevant circumstances to be taken into account included "the general configuration of the coasts of the Parties, and in particular the marked change in direction of the Tunisian coastline between Ras Ajdir and Ras Kaboudia" (*ibid.*, p. 93, para. 133, B (2)). This focus upon coasts and coastal relationships had, after all, been characteristic of the earlier decisions on shelf delimitation, and the Judgment of the Chamber in the *Gulf of Maine* case again emphasizes the close connection between the geography of coasts and the choice of equitable criteria (*I.C.J. Reports 1984*, p. 327, para. 195).

And yet the Libyan argument presents coasts either as an abstraction based upon length or as a novel concept related to the landmass of the territory lying behind the coast. In contrast, Malta uses the term coasts within the framework of legal principle.

In the view of Malta, based upon the jurisprudence of the Court, the significance of coasts is simply an aspect of the political and therefore the legal significance of geographical relationships. In this conception it is location and relationship which are the determining factors, and not length as an abstract quantity.

In principle, the fact that a coast is "long" or "short", or that it is the coast of an island or peninsula, or that it is part of a concave or convex coastline, is

much less significant than the location of the particular coasts in relation to other coasts. In the final analysis it is location which determines the decisive relationships, not length and not insularity. Indeed, the relative significance of length is recognized even in the formula relating to proportionality in the *dispositif* of the Judgment in the *North Sea Continental Shelf* cases. The element of proportionality is there defined by reference to the length of the coast "measured in the general direction of the coastline" (*I.C.J. Reports 1969*, p. 54, para. 101, D (3)), and a similar formulation appears in the *dispositif* of the Judgment in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 93, para. 133, B (5)).

Some examples may be taken from the cases. In the *North Sea Continental Shelf* cases the relevant geographical circumstances were the existence of three coastal States with adjacent continental shelves, of which the middle State, the German Federal Republic, had a markedly concave and recessing coast. As the Court made clear in the Judgment, the fact that the coastlines were comparable in length was only significant given the configuration of the relevant coastlines and their relation to each other (*I.C.J. Reports 1969*, p. 49, para. 91). As the Court pointed out, the facts presented a situation of "equality within the same order" *(ibid.)*.

Further examples are furnished by the Decision of the Anglo-French Court of Arbitration in 1977. In particular, the role of the Channel Islands was determined by their distance from the English mainland, and by their location close to the French coast and practically within the arms of a gulf on the French coast (Decision, paras. 181-190). Again the role of Cornwall and the Scilly Islands, and of Finistère and Ushant, in respect of the Atlantic region in the same case, was determined by the location and alignment of these features in relation to each other and in relation to the continental shelf which extended a great distance into the Atlantic Ocean (Decision, paras. 233, 240-248). Some representation of the lines drawn on that basis may be seen in the Malta dossier (Fig. 25). Thus, in judicial practice features are not classified as "islands" or "long coasts" or "peninsulas" for purposes of delimitation. The focus is broadly upon the overall geographical circumstances of the particular case (Decision of the Anglo-French Court of Arbitration, paras. 94, 239-240). In all these examples the length of particular coasts may be relevant as a part of a pattern of geographical circumstances, but it is the location and relationship of features to one another which are the key elements in the analysis. The length of this or that coastline taken in isolation cannot play a role either in analysis with a view to selecting a method of delimitation or in the process of delimitation as such.

IV. The Identification of the Area "Relevant to the Decision of the Dispute"

The conclusion that it is the overall geographical context which is significant, and not coasts or lengths of coasts as such, leads to a further consideration. In the *Tunisia/Libya* case the Court indicated that the practical aspect of assessing the relationship of the coasts of the Parties involved the identification of the area "relevant to the decision of the dispute". In the words of the Court:

> "As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for

the extension of these areas in the process of the legal evolution of the rules of international law."

And the Court continues:

"74. 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."

The Court continues:

"The only areas which can be relevant for the determination of the claims of Libya and Tunisia to the continental shelf in front of their respective coasts are those which can be considered as lying either off the Tunisian or off the Libyan coast. These areas form together the area which is relevant to the decision of the dispute. The area in dispute, where one claim encroaches on the other, is that part of this whole area which can be considered as lying both off the Libyan coast and off the Tunisian coast." (*I.C.J. Reports 1982*, p. 61, paras. 73-74.)

Mr. President, it is the overall geographical circumstances which must establish the general dimensions of the area relevant for the purposes of delimitation. The *entire* coasts of Malta and Libya *facing one another* must be taken into account in determining the relevant area. In the result the relevant area is bounded by lines joining the terminus of the land frontier with Tunisia and the relevant point on the eastern aspect of Cyrenaica to the respective western and eastern aspects of the island of Malta. The result, embellished by a median line, is the simple trapezium figure employed by Malta in the written proceedings. That trapezium has been indicated on the basemap in front of the Court and may also be seen on Figures 7 and 26 in the Malta dossier. (39)(13)

There is in my submission no case for taking a sector of Libyan coast having an eastern terminus at Ras Zarruq as the basis for the relevant area. The Libyan pleadings have failed to justify this arbitrary compression of the relevant area (**I**, LM, para. 10.09; **II**, LCM, para. 2.44; *supra*, LR, para. 5.14; and para. 6.07).

It is quite simply indefensible to accept the relevance of the Libyan coastline as far west as Ras Ajdir and at the same time to stop eastward at Ras Zarruq, which is much less tangentially opposite Malta than Ras Ajdir. The asimuth from Ras Ajdir to Malta is very much at an angle. The straight line from Ras Zarruq to Malta is much less at an angle. The reasons for which in the Libyan view the area east of the Medina Escarpment should be excluded have no relevance to the coastal relationships at present under examination and they lack relevance in any case.

In this same connection, if the actual coastal relationships are considered as such, it would be odd indeed if the embayment of the Gulf of Sirte, which commences more or less at Ras Zarruq, should have the dramatic consequence that *sea-bed areas which would otherwise clearly satisfy the test of relevance should* cease to be relevant, at least for Malta's part in the delimitation process. In principle, it should be attitude of coasts to each other and not the distance between them which determines what is relevant, that is to say, fit to be divided between the Parties in dispute.

The Libyan approach to the relevant area in its eastern aspect is quite simply free from any tincture of rationality. In the first place, Libya makes a claim which encroaches extensively upon the sea-bed adjacent to Malta's coasts, and at the same time takes a spatially restricted view of relevance in the areas to the east

of Ras Zarruq. Of course, the fact that the Gulf of Sirte is an embayment should not give Libya an advantage in the definition of the relevant area for purposes of delimitation vis-à-vis Malta.

In the second place, the logic of the Libyan argument involves treating the distance between the facing coasts as a factor which is detrimental to Malta in the general context of identifying relevant areas, and yet is not detrimental to Libya in the context of claiming areas very close to the coasts of Malta.

I would respectfully ask the Court to refer to the available pictorial indications of the Libyan claim. The first of these is the Libyan proposal of 1973, which (5) appears in Malta's Illustrations in Figure 1 and which appears originally as Map 9 in the Libyan Memorial.

The line indicated in red very close to Malta on that map conspicuously assumes that there are relevant areas to the east of the hypothetical azimuth drawn between Ras Zarruq and the eastern aspect of Malta's coast facing Libya. You have the red line of 1973 going round and up in an angular way and then we have the azimuth, a straight line on the map from Malta to Ras Zarruq. The disposition of the 1973 line quite clearly assumes there is territory, so to speak, to be divided to the east of a line between Malta and Ras Zarruq.

The other pictorial indications of the Libyan claim involve the so-called Rift (9) Zone as defined in the Libyan Memorial and illustrated by Map 17 of that (29) Memorial. The Rift Zone appears again on Map 12 of the Libyan Reply and (30) again on Map 13 of the Libyan Reply, in this case with the addition of the so-called "axial ridge line". The Rift Zone and the axial ridge line are depicted on (44) Figure 13 of Malta's dossier. A study of these maps shows that without any doubt a line which would follow the general direction of the Rift Zone, as requested in the submissions, necessarily involves the delimitation of shelf areas lying far to the east of the Malta to Ras Zarruq hypothetical azimuth.

The Libyan position of the extent of the relevant area in this case lacks foundation and is incompatible with the views Libya has held at various times on the extent of its claim as against Malta and, in particular, the east-west ambit of the different versions of the Libyan claim.

The view which Malta holds on the question of the relevant area is based upon the essentially simple coastal relationships between the two Parties. The areas included within the trapezium satisfy the test propounded by the Court in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 61, para. 74) and consequently can be considered as lying both off the coasts of Libya and off the coasts of Malta.

The embayment to the east of Ras Zarruq cannot be said to affect the essence of the coastal relationship. It is true that large areas of shelf are included, but that fact is in no way inimical to the view taken by Malta. It is the attitude of the coasts the one to the other which is paramount.

V. The Concept of Equality and the Geographical Features Which Establish the Legal Framework

The identification of the area relevant to the decision of the dispute is a facet of the more general process which involves an analysis of the overall geographical circumstances with a view to establishing a geographical and legal framework for the delimitation. The geography of coasts produces the setting in which the criteria of equity must be applied and a primary criterion is that of equality. Thus in the *Gulf of Maine* case the Judgment stated:

> "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).

The Chamber gave great emphasis to this principle of equal division, and remarked that it was "a criterion which need only be stated to be seen as intrinsically equitable" (*ibid.*, para. 197).

The problem no doubt is to apply the concept of equality to the geography of the particular case, and the coastal geography of the *Gulf of Maine* case cannot be said to be comparable to that of the present case. Of the preceding jurisprudence, the Decision of 1977 in the Anglo-French arbitration may be singled out as containing elements, both geographical and legal, which may be of some relevance in approaching the problem of delimitation in the present case.

The Decision in the Anglo-French case formulated and applied two concepts, which formed the foundation of the reasoning of the Court of Arbitration, and which are in many ways instructive and suggestive.

The first of these concepts is that of a relationship of approximate equality within the geographical and legal framework presented by the facts (see the Decision, para. 181).

The second of these concepts is that of "the balance of geographical circumstances" between the parties in the particular region. In the Anglo-French Continental Shelf arbitration this concept was employed prominently as a tool of analysis and as an important part of the process of delimitation.

In the case of the region of the English Channel the balance of geographical circumstances resulted from the relationship of opposite coasts (Decision, paras. 181-182), the unity and continuity of the region (*ibid.*, para. 181), and the broad equality of the coastlines in relation to the continental shelf (*ibid.*, paras. 182-183, 196, 199, 201).

In the case of the Atlantic region the Court sought the geographical features which would establish the legal framework for its decision (*ibid.*, paras. 232 *et seq.*). The conclusion reached was that in the Atlantic region "the situation geographically is one of two laterally related coasts, abutting on the same continental shelf which extends from them a great distance seawards into the Atlantic Ocean" (*ibid.*, para. 241; and see also para. 242).

There can be no doubt that the determination of the key geographical features, on the basis of the "actual geographical conditions of the particular area of continental shelf to be delimited" (*ibid.*, para. 240), is in practice a more significant analytical tool for the Court than generalizations about lengths of coasts, or about islands, or about the distinction between "opposite" or "adjacent" States.

The concept of a "balance of geographical circumstances" is at the same time both simple and complex. The concept is not based on the idea of symmetry, nor on the equality of the actual mass of geographical features, and still less on the idea that coastal frontages should be of equal length.

Thus in the Anglo-French case there is no indication that the Court of Arbitration regarded the equality of lengths of coastlines as a necessary condition in all cases for the determination of a balance of geographical circumstances. The position and attitude of geographical features are regarded as more significant than length of coasts as such. Thus in the Anglo-French case the legal framework for delimitation in the Atlantic region consisted of relatively short segments of coast abutting on the shelf areas to be delimited (*ibid.*, paras. 233-235; Malta Illustrations, Fig. 25). Both maritime frontiers were based upon attentuated features, and so much so that the French Republic had contended that the United Kingdom had no maritime frontage facing the region.

In the Anglo-French case a particularly striking feature is the readiness of the Court not only to attach the same significance to the Cornish peninsula as it did to the coast of Finistère but also to regard the Scilly Isles lying some 21 miles beyond the Cornish peninsula as a part of the coastline of the United Kingdom (Decision, paras. 235, 248-249). It is true that the further projection westward of the Scilly Isles was regarded as a cause of distortion justifying a modification of the equidistance method which was otherwise applicable in the circumstances of the Atlantic region. But the important point is the significance for delimitation of every very attenuated feature provided they bear the necessary relation to the shelf areas to be delimited.

In certain geographical circumstances short sectors of abutting coast will play a major role in delimitation providing their location is critical. In the case of the region of the English Channel the two long opposite coasts having a broad equality in relation to the continental shelf provided the balance of geographical circumstances and therefore the legal framework. In the case of the Atlantic region the key features were constituted by two peninsulas and both Ushant and the Scilly Isles were treated as mainland for certain purposes. Indeed Ushant was given full effect in respect of a delimitation affecting shelf areas reaching far out to the 1,000-metre isobath. Point M of the line established by the Court of Arbitration involves giving full effect to Ushant and this point plays a major role in the determination of the final sector of the delimitation from Point M to Point N, a line approximately 170 nautical miles in length (Decision, para. 254; Malta Illustrations, Fig. 25).

In the present case, it is fair to say, the geographical framework is a hybrid of the two situations presented in the Anglo-French case. The small island group of Malta and its dependencies face the long Libyan coast. Thus the relationship of the principal coasts is partly that of the Atlantic region, where short sectors of abutting coast were given a significant role in the delimitation, and partly that of the long opposite coasts of the English Channel. The coasts of Malta and Libya are not laterally related, like those of the Atlantic region, and of course there is no equality of length of coast.

In the geographical circumstances of the present case what is the balance of geographical circumstances? In one sense there is no balance, since the two principal features, the island State of Malta and the long coast of Libya, do not share a common identity. There are no parallel circumstances of the kind which permitted the Court in the *North Sea Continental Shelf* cases to regard the three States concerned as being in "a geographical situation of quasi-equality" (*I.C.J. Reports 1969*, pp. 49-50, para. 91). There is thus no possibility of equality being "reckoned within the same plane" in the words of the Judgment in the *North Sea Continental Shelf* cases *(ibid.)*.

How then is a balance of geographical circumstances, an approximate equality, to be found as between Malta and Libya? Mr. President, the beginning of the answer is to be found in the Judgment in the *North Sea Continental Shelf* cases, where the Court outlined the *modus operandi* of delimitation in the following way:

> "Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. But in the

present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result." (*I.C.J. Reports 1969*, pp. 49-50, para. 91.)

The task as always is to make legal sense of the actual geography and to avoid imposing a solution which involves, so to speak, going behind the real geographical and political circumstances. In the present case, the fact that there is no natural quasi-equality as between the Parties has the simple consequence that the island State of Malta and the long-coast State of Libya constitute, so to speak, neutral quantities in their relationship. The group of islands forming the Republic of Malta cannot be treated as an incidental special feature falling within a geographical and legal framework established by other primary elements in the situation. The facts of this case are entirely unlike those concerning the Channel Islands region in the Anglo-French case. There the key elements were the fact that the Channel Islands region formed part of the English Channel, the Parties facing each other as opposite States having almost equal coastlines, and were "wholly detached geographically from the United Kingdom" (Decision of 30 June 1977, para. 199).

In the present case the Maltese group is a primary element in the geographical and legal framework, and thus plays a major role in that framework.

The Court adjourned from 11.20 to 11.35 a.m.

Mr. President, before the break I was considering, and I was near the end of my consideration, the concept of equality and the geographical features which establish the legal framework of any delimitation of continental shelf areas, and I had completed that part of my exposition by saying that in the present case the Maltese group is a primary element in the geographical and legal framework and plays a major role in that framework.

The geographical difference between Malta and Libya can have no automatic effect either of a beneficial or detrimental nature so far as Malta is concerned. Geography cannot be refashioned and there is no basis for the modification of the normal delimitation to avoid the distortion caused by any incidental special features.

In the present case there are no special features. Only the relationship of Maltese and Libyan coasts. The situation is neither legally nor geographically eccentric.

In the absence of a situation of geographical quasi-equality of the type visible in the *North Sea Continental Shelf* cases, the correct approach must surely be to

ascribe equal legal significance to the coasts of the Parties for purposes of shelf delimitation. To do so is not to impose an equality which is not there originally. Indeed, equality is only in issue in the sense that it is necessary to avoid inequality of attribution. The law requires that the major geographical elements be given full faith and credit in the process of delimitation and this means giving equal significance to the coasts of the two States divided by the same continental shelf.

In legal terms Malta is a major element in the geographical and legal framework and the Maltese group produces the same seaward reach of sovereign rights over adjacent shelf areas as other coastal States. The island of Malta is a mainland and its coasts actually abut upon the shelf areas dividing the Parties. The southerly aspects of the coasts of Malta have an equality of seaward reach with the coasts of Libya.

The shape and location of the Malta group, and not the relative length of coastlines, are the determinants of the appropriate solution, and this can only be the application of the equidistance method.

The soundness of this approach is confirmed by the fact that even if Malta had a longer coast, this would have little or no effect on the generation of shelf rights (16) vis-à-vis Libya. I respectfully draw the attention of the Court to Diagram A of the Libyan Counter-Memorial, which is reproduced in the Malta dossier at (16) Figure 27. This diagram shows how the geography should work unless it is to be in legal terms "refashioned".

As Malta has pointed out in the Reply, practical experience of boundary-making in the Persian or Arabian Gulf, for example, supports the view that the normal legal reflection of real coasts takes the form of the equality of seaward extension of jurisdiction. The delimitations involving the island State of Bahrain are of particular interest and in the delimitations of Bahrain with both Iran and Saudi Arabia there is an equality of seaward reach; I refer the Court to the Malta dossier, Figure 22.

In the geographical circumstances of the present case only a delimitation based upon equidistance is appropriate. Such a solution involves no more than a recognition of the geographical and therefore the political realities. There are no incidental special features which call for modification of equidistance.

In the seaward relationship of Malta and Libya the equidistance method would reflect and not ignore the geographical circumstances and would not be inequitable in result. The use of equidistance in present circumstances simply cannot involve the sources of inequity detected by the Court in the very different circumstances prevailing in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 49, para. 89).

By way of concluding this section of my argument, Mr. President, I can summarize the position by saying that in the circumstances of this case, the only appropriate balance of geographical circumstances involves the preservation of the status quo. The principle of equality of seaward extension achieves this aim whilst the Libyan claim does not.

It is not merely the fact that Libya is contending for a virtual monopoly of the continental shelf dividing the Parties. The most striking feature of the Libyan argument is that it calls for an apportionment *de novo* of the sea-bed areas on the basis of an abstract formula based upon the discrepancy in the lengths of the coasts of the Parties. Such an approach essentially destroys the role of real coasts and actual geographical relationships. The introduction of the thesis that territorial magnitude is also relevant to delimitation gives further emphasis to the intention to divorce the process of delimitation from the realities of coastal geography and coastal relationships. In the result Libya does not so much seek to refashion

geography but rather to set it aside altogether in favour of a scheme of distributive justice based upon an index of territorial magnitude.

VI. The Role of Proportionality

1. Introduction

The object of my argument until now has been the significance of lengths of coasts aside from questions classified as issues of proportionality. This treatment has been justified in part by the character of the Libyan arguments and by the order of Libya's submissions, and in part by the need to examine certain fundamental questions which lie behind the legal principles concerning delimitation of the shelf and maritime jurisdiction in general.

I must now address the group of related issues commonly categorized as the "question of proportionality", which is variously described as a "criterion", a "factor", a "principle", an "element" and a "test".

I would preface my remarks on this protean topic by emphasizing what may seem rather obvious after a perusal of the pleadings in this case; namely, that the term proportionality may stand for a variety of concepts and it may be used as a familiar and apparently orthodox label to give legitimacy to arguments which are entirely incompatible with legal principle and sound policy in matters of delimitation.

2. The Libyan View of Proportionality

The Libyan view of proportionality in this case is really nothing more than a self-serving version of distributive justice which in essence involves apportionment *de novo* and not delimitation in accordance with legal principle. However, the essence of the Libyan position is to some extent obscured by the appearance, in the Libyan Memorial especially, of acknowledgments of matters of principle which are entirely orthodox. Thus the Libyan Memorial (I, LM, para. 6.90) quotes from the Decision in the Anglo-French arbitration to the effect that:

> "Proportionality . . . is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf." (Decision, para. 101.)

Moreover, the precise version of the test which Libya relies upon is that of "proportionality in the light of the ratios between the lengths of the coasts of the Parties" (**I**, LM, para. 10.18) and this reflects passages of the Judgment and *dispositif* in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 52, para. 98; p. 54, para. 101, D (3)).

These elements of apparent orthodoxy are in fact merely the trappings of respectability, and are the mere appearance of legal principle. The essence of the Libyan argument is very different.

Mr. President, the substance of the Libyan argument in this case may be summarized as follows:

First, there is an attack on the equidistance method of delimitation both in general and in the context of this case.

Second, there is considerable reliance upon the concept of natural prolongation both in relation to the basis of title and in relation to delimitation.

Third, it is asserted — without reference to proportionality — that delimitation should take account of the difference in the lengths of the coasts of the Parties.

Fourth, the test of proportionality is invoked in the form based upon the ratio of the lengths of the coasts of the Parties.

Fifth, the "proportionality" argument is said to produce a result which coincides with and thus confirms the result based upon the concept of natural prolongation.

As I hope to demonstrate, the actual role of the Libyan proportionality argument and its relation to the other elements in the Libyan case is such that the argument is not in fact based upon proportionality in the legal sense at all. The use of the ratio of the lengths of coasts can only count as a proportionality argument if that test is justifiable on the basis of the geographical circumstances which constitute the legal framework of the particular case. In the absence of such justification, the Libyan reference to the lengths of coasts, like the reference to territorial magnitude in general, represents nothing more than a concept of distributive justice and the apportionment *de novo* of as yet unattributed areas of sea-bed.

3. Malta's View of Proportionality in Outline

In contrast to the extravagant use to which Libya seeks to put the concept of proportionality, Malta has sought to place proportionality effectively within the broad context of the law concerning continental shelf delimitation. In accordance with this *modus operandi* Malta's position concerning proportionality can be stated in the following propositions:

First, the role of proportionality must depend upon the general legal framework.

Second, proportionality is a criterion for evaluating the equities of the given geographical situation but is not in itself an independent determinant of what is equitable within that geographical framework.

Third, the particular version of the criterion used by Libya — the reference to the ratio of the lengths of the respective coasts — is not of general application and cannot apply in the geographical circumstances of the present case.

Fourth, the role of proportionality as it is evidenced by the relevant jurisprudence is to maintain the equality of the seaward reach of mainland coasts.

Fifth and last, in the geographical circumstances of the present case it is the equidistance method which satisfies the criteria of equitable delimitation and which therefore *ipso facto* satisfies the criterion of proportionality as it should apply as between the opposite coasts of Malta and Libya.

4. The Importance to the Delimitation Process of the General Legal Framework

Having summarized Malta's position with respect to proportionality, it is now necessary to probe more deeply into the variety of issues which shelter under that apparently simple category.

The adjective "proportionate" is somewhat question-begging. A dictionary definition of the adjective tends to be circular and thus the term is defined as meaning "that is in proportion, or in due proportion". Proportionality, the noun, is defined simply as "the quality, character, or fact, of being proportionate".

In the face of these unhelpful definitions it must follow that the standard of proportionality can only be given substance within a general framework such as that of the delimitation process. The element of proportionality is a part of the *team* of equitable principles; it is necessarily a congener of equitable principles

and cannot be seen in the role of an intruder employing values which are at variance with the main body of equitable concepts and techniques.

The general legal framework is set by the actual geographical circumstances of the particular case regarded as a whole and in their main elements.

In the Anglo-French Continental Shelf case the Court pointed out that the concept of proportionality was "clearly inherent in the notion of a delimitation in accordance with equitable principles" (Decision, para. 98), and thus the role of proportionality may be relatively broad, and "not linked to any specific geographical feature" (*ibid.*, para. 99). And the same Court of Arbitration emphasized that "proportionality is not in itself a source of title to the continental shelf, but is rather a criterion for evaluating the equities of certain geographical situations" (*ibid.*, para. 246).

In this conception, proportionality is regarded simply as a part of the matrix of equitable principles and factors, which in turn are employed to determine the balance of geographical circumstances as the basis for the task of delimitation. In this mode, if the difference in the length of the respective coasts is irrelevant to the balance of geographical circumstances, that issue cannot be reintroduced in the form of an abstract proportionality test based on the ratio of the lengths of the coasts, which formula is supposed to be predominant in the matter of seeking an equitable solution, almost as if it were a species of *jus cogens*. However, there is a different and much narrower conception of proportionality to be seen in the jurisprudence. Proportionality may be employed as the justification for modifications in the primary delimitation which in general represents "the balance of geographical circumstances" and an "approximate equality" between the Parties. In this context the purpose is to abate disproportionate effects resulting from "the presence of islets, rocks and minor coastal projections" (*North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 36, para. 57), or from "individual geographical features" (Anglo-French case, Decision, para. 100), or from the presence of islands "wholly detached" from the mainland and thus anomalous in relation to the "primary" equitable boundary (Anglo-French case, Decision, paras. 199, 201, 202).

In the circumstances of the present case, Mr. President, the delimitation can only reflect the configurations of the coasts of the Parties and only the equidistance method of delimitation can provide the necessary equitable reflection of the actual geography. No individual geographical features present causes of distortion, and there is no justification for modification of the primary delimitation based upon equidistance.

In the *métier* of thinking about proportionality the particular version based upon the ratio of coastal lengths represents a relatively exceptional mode, the application of which will not fail to produce markedly inequitable results if the legal and geographical context be inappropriate.

5. The Ratio of Coastal Lengths Produces a Crude Apportionment in This Case

And in the present case the context is wholly unsuited to the application of the test based upon the ratio of the respective lengths of coasts. This formula, applied in a geographical situation where there is no equality within the same plane, but simply the geographical data represented by the coasts of the Parties, would not maintain approximate equality between the Parties. The actual geography represents neither an inequality nor an equality, but simply the real geography of the Central Mediterranean. The legal value of equality is represented by the equal seaward reach of equally significant opposite coasts of the States concerned. The

ratio of lengths of coasts is a formula which is an abstraction and would in the circumstances of this case introduce a legal inequality of major proportions.

To give more or less exclusive weight to this criterion of coastal length would involve a process not of delimitation but of simple apportionment. Such an apportionment of the area in issue would be in conflict with the basic notion that continental shelf rights appertain to the coastal State *ipso facto* and *ab initio*. As this Court said in the *North Sea Continental Shelf* cases:

> "More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, — namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the sea-bed and exploiting its natural resources. In short, there is here an inherent right." (*I.C.J. Reports 1969*, p. 22, para. 19.)

The risk of misapplying the criterion of proportionality was spelled out by the Court of Arbitration in the Anglo-French case in the following passage:

> "In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. The equitable delimitation of the continental shelf is not, as this Court has already emphasized in paragraph 78, a question of apportioning — sharing out — the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines; for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares. Furthermore, the fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory places definite limits on recourse to the factor of proportionality. As was emphasized in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, para. 91), there can never be a question of completely refashioning nature, such as by rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline; it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts. Proportionality, therefore, is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf." (Decision, para. 101.)

Mr. President, it may be helpful to the Court if I offer some elucidation of the intellectual problem which lies at the heart of the issue of proportionality and which is a potential cause of confusion.

On the one hand in the jurisprudence — the *North Sea Continental Shelf* cases, the Anglo-French case (Decision, para. 101), and the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 60, para. 71) — it is emphasized that there can be no refashioning of geography and no consequent distributive apportionment of shares. On the other hand, the primary equitable delimitation may be subject to abatement or modification in order to avoid "distortion" or "disproportionate effects" caused by "individual geographical features". There is thus a certain contradiction, since

the process of modification involves a certain refashioning of geography, albeit on a modest scale.

How can this apparent contradiction be resolved? The answer lies within the formula used by the Court of Arbibration in the Anglo-French case: the task of the Court is to seek an "approximate equality" as between the Parties. This "approximate equality" is based upon, and is not at odds with, the major geographical features abutting upon the shelf areas to be divided. It is a legal conception of equality. The process of modification of the primary delimitation which itself represents the principle of equality involves a further refinement of the principle of equality within the overall geographical framework. The concept of equal division of the area of convergence played an essentially similar role in the Judgment of the Chamber in the *Gulf of Maine* case, and was similarly subject to a certain degree of refinement (*I.C.J. Reports 1984*, p. 334, paras. 217, 218).

In short, the process of modification — if it is justified at all — is part of the overall judicial task of making legal sense of the geography. The judicial task is to impose a legal order within the geographical framework and not to provide a legal substitute for the principal geographical data in the particular case.

In the case of opposite States in the situation of Malta and Libya, where there are no displaced islands or other geographical complications, there is quite simply no room for modification of the primary delimitation which respects the equality of significance, in terms of seaward reach of jurisdiction, of the coasts of the two Parties. In this context a median line involves an *ex hypothesi* compatibility with the test of proportionality, since there are no sources of distortion and both coasts are given equal value. The fact that in the case of the opposite coasts geography prescribes a median line was recognized in the Judgment of the Chamber in the *Gulf of Maine* case (*I.C.J. Reports 1984*, p. 331, para. 206; pp. 333-334, paras. 216-218).

Another way of expressing the matter would be to say that the version of proportionality based upon the ratio of the difference of coastal lengths has no application in the case of opposite States. This point has been made before, and it is a pleasure to be able to quote from my learned friend, Professor Bowett. In his work on *The Legal Régime of Islands in International Law* (Dobbs Ferry, New York, 1979, p. 164), in the context of a discussion of the Judgment in the *North Sea Continental Shelf* cases, he makes the following observations:

> "The relevance of the proportionality factor is more difficult to assess. Clearly, it is entirely subservient to the primary criterion of 'natural prolongation', so there can be no justification for ignoring the geological evidence and simply dividing the shelf according to coastal ratios. Nor, indeed, are such ratios to be calculated on actual coastal length, for the Court envisaged a 'coastal front', a line of general direction to the coast rather than a line following its sinuosities (so that islands may count for this purpose, as part of such a 'front'). Indeed, it would seem that the proportionality factor might only be applied, or be meaningful, in the case of adjacent States (not 'opposite') where the existence of a markedly concave or convex coastline will produce a cut-off effect if the equidistance principle is applied: that is to say, will allocate to one State shelf areas which in fact lie in front of, and are a prolongation of, the land territory of another."

6. *The Special Function of the Test Based upon the Ratio of Coastal Lengths*

The Libyan pleadings have in effect equated the criterion of proportionality with the test based upon the ratio of the lengths of the coastlines or, at least, of

the relevant part of the coastlines as this is understood by Libya. The section in the Memorial of Libya (I) which deals with "the role of proportionality" (paras. 6.90-6.93) states the test in terms of the ratio of coastal lengths and relies upon the Judgment in the *North Sea Continental Shelf* cases (para. 6.90, citing *I.C.J. Reports 1969*, p. 52, para. 98). The treatment in the Libyan Reply, *supra* (Chap. 7) is more nuanced but nevertheless relies exclusively upon the ratio of lengths (paras. 7.12, 7.20) apart, that is, from the size of the land territory (paras. 7.10, 7.16). Moreover, the Submissions appended to the Libyan Reply explicity refer to:

> "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 respective States and the lengths of the relevant parts of their coasts, account being taken of any other delimitations between States in the same region" (*supra*, LR, p. 102, para. 7).

This is proportionality as invoked in the Libyan pleadings. Aside from various other objections of principle to the form in which the proportionality argument is invoked, it is invoked in an exceptional form — the ratio of coastal lengths — which is only appropriate if certain conditions are fulfilled.

The role of proportionality is determined by the overall legal and geographical framework, and therefore the first condition must be that the reference to the lengths of the respective coasts is justifiable in terms of that framework. As the Court of Arbitration expressed the point in the Anglo-French case:

> "particular configurations of the coast or individual geographical features may, under certain conditions, distort the course of the boundary, and thus affect the attribution of continental shelf to each State, which would otherwise be indicated by the general configuration of their coasts. The concept of 'proportionality' merely expresses the criterion or factor by which it may be determined whether such a distortion results in an inequitable delimitation of the continental shelf as between the coastal States concerned. The factor of proportionality may appear in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines, as in the *North Sea Continental Shelf* cases. But it may also appear, and more usually does, as a factor for determining the reasonable or unreasonable — the equitable or inequitable — effects of particular geographical features or configurations upon the course of an equidistance-line boundary." (Decision, para. 100.)

The second condition of application, closely related to the first, is that equity must be reckoned within the same plane, and the requirement of equity is that one should compare like with like (*North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, pp. 49-50, para. 91; Anglo-French case, Decision, para. 101; *Tunisia/Libya* case, *I.C.J. Reports 1982*, p. 76, paras. 104, 130).

In the *North Sea Continental Shelf* cases the Judgment of the Court (pp. 49-50, para. 91) stresses the existence of an equality within the same plane as between the three coastlines there in question. If I may quote that Judgment once again:

> "In the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coast-

lines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two." (*I.C.J. Reports 1969*, pp. 49-50, para. 91.)

It is to be noted that it is the comparability in length of the coastlines and the "broadly equal treatment by nature" which impressed the Court. It was a matter of abatement within "a geographical situation of quasi-equality" *(ibid.)*. The case was thus completely different from the present.

The more or less exceptional character of the ratio of coastal lengths as a proportionality test was given recognition by the Court in the Anglo-French case. In the words of the Court:

> "In particular, this Court does not consider that the adoption in the *North Sea Continental Shelf* cases of the criterion of a reasonable degree of proportionality between the areas of continental shelf and the lengths of the coastlines means that this criterion is one for application in all cases. On the contrary, it was the particular geographical situation of three adjoining States situated on a concave coast which gave relevance to that criterion in those cases. In the present case, the role of proportionality in the delimitation of the continental shelf is, in the view of this Court, a broader one, not linked to any specific geographical feature. It is rather a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation, and in particular of a delimitation by application of the equidistance method." (Decision, para. 99.)

The view of the Court in the Anglo-French case was well applied in practice. The French Government had invoked the argument based upon the ratio of coastal lengths both with reference to the Channel Islands region and in respect of the Atlantic region. In both respects the Court of Arbitration specifically rejected this form of the French argument. (Decision, paras. 98-101, 166, 195 *et seq.*, 246.)

The decision of this Court in the *Tunisia/Libya* case falls within the pattern set by the previous decisions. The Judgment applied the test of proportionality by reference to the lengths of the coastlines within the relevant area and this application was on the basis that the two coasts, and also the pertinent coastal fronts, were in fact comparable (*I.C.J. Reports 1982*, p. 91, paras. 130-131). As the Court made clear in its Judgment, "the only absolute requirement of equity is that one should compare like with like" (*ibid.*, p. 76, para. 104) and again "the essential aspect of the criterion of proportionality is simply that one must compare like with like" (*ibid.*, p. 91, para. 130).

What is lacking in the present case is precisely a comparability of the relevant coasts in legal terms. The principal geographical features, the coasts of Malta and the coasts of Libya, constitute the essential elements of the legal framework, standing opposite each other and abutting upon the areas of continental shelf dividing them.

7. The Scale of Equitable Adjustment

The general intellectual framework of the Libyan pleadings involves a dramatic choice between two contrasting methodologies. The choice appears to be between a solution based upon the method of equidistance and a solution deriving from criteria of distributive justice based upon coastal extent and the size of State territory. In the Libyan conception, small States litigate a great risk, since the

stakes are high and delimitation is related to novel principles of legal radicalism. Mr. President, it is difficult to believe that the law of continental shelf delimitation is as radical, as revisionist, and as unstable as one is led to believe by the Libyan argument.

Even the departures from equidistance sanctioned by the Court in the *North Sea Continental Shelf* cases and the other decisions were designed precisely to maintain a policy of approximate equality in giving legal credit to the actual geography of the Parties. The policy of the law is conservative and it is based on recognition of the security and political interest of coastal States in respect of their adjacent submarine areas.

It must follow that the scale of equitable adjustment must be limited, since the presumption must be the equality of the relationship of coastal States. In legal terms the political and security aspects of coasts and the appurtenant submarine areas are not of variable significance and are no more susceptible to apportionment than shelf areas as such, with the natural resources they contain.

It is clear that the approach to delimitation revealed in the judgments of international tribunals is based upon the assumption that delimitation is a relatively marginal operation affecting a status quo based upon the inherent rights of the coastal State.

Thus in its Judgment in the *North Sea Continental Shelf* cases the Court explained the principle thus:

> "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 disproportionally 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.)

The legal philosophy of the continental shelf, as expounded judicially, contains strong indications that delimitation is always a limited and conservative procedure rather than an extensive and radical procedure.

In the *North Sea Continental Shelf* cases the Court explained that:

> "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the sea-bed and exploiting its natural resources" (*ibid.*, p. 22, para. 19).

The Court used that statement as the premise for an important conclusion and I quote again from the *North Sea Continental Shelf* cases:

> "It follows that even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all, — for the fundamental concept involved does not admit of there being anything undivided to share

out. Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made. But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole." (*I.C.J. Reports 1969*, pp. 22-23, para. 20.)

This view was endorsed by the Court of Arbitration in the Anglo-French case (Decision, paras. 78 and 245).

Mr. President, the idea that the process of delimitation involves an operation which is limited in scale is reinforced by the principle of non-encroachment, which is really an outwork of the concept of a legal or effective equality which reflects the geographical facts. No delimitation can be equitable if it results in a cut-off effect. It follows that the criterion of proportionality, like the method of equidistance, is controlled by the concept of effective equality and this was pointed out by the Court of Arbitration in the Anglo-French case (Decision, para. 101).

The presumption that the process of delimitation is limited in scope is also strengthened by the fact that "the geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title", as this Court stated in its Judgment in the *Tunisia/Libya* case. The Court there continued:

> "As the Court explained in the *North Sea Continental Shelf* cases the continental shelf is a legal concept in which 'the principle is applied that the land dominates the sea' (*I.C.J. Reports 1969*, p. 51, para. 96)". (*I.C.J. Reports 1982*, p. 61, para. 73.)

It follows from these premises that the boundary which accords with equitable principles and legal policy always aims, however approximately, at an equal attribution of shelf areas to coastal States. None of the key statements of principle are qualified by reference to territorial magnitude or the length of coasts. The procedure of delimitation is conditioned by the basically equal relationship of all coastal States. The scale of modification of the primary delimitation, as determined by the major geographical features when such modification is necessary, is always within a limited compass.

In the present case the Libyan claim involves a massive encroachment upon shelf areas legally appurtenant to the coasts of Malta. The Libyan claim, as formulated in the submissions appended to the Libyan Reply, involves a radical inequality as between the Parties and calls for a delimitation procedure substantially outside the controlling conditions set by the legal principles governing the attribution and delimitation of areas of continental shelf.

8. Proportionality Is Not a General Principle Providing an Independent Source of Rights

In the Anglo-French case the Court of Arbitration emphasized that proportionality was not to be used "as a general principle providing an independent source of rights to areas of continental shelf" (Decision, para. 101, and see also para. 246). The reason for this was given by the Court:

> "there can never be a question of completely refashioning nature, such as by rending the situation of a State with an extensive coastline similar to that of

> a State with a restricted coastline; it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts" (Decision, para. 101).

The Libyan claim to a very high proportion of the Pelagian Block, to a virtual monopoly of the submarine areas dividing the Parties, must involve reliance upon proportionality as an independent source of rights.

The claim is formulated alongside, but also independently of, the argument based upon natural prolongation. The proportionality argument is autonomous and forms an important aspect of the Libyan submissions.

The fact that the argument is used in isolation from the actual geography must make it suspect at the outset. The formula based on lengths of coasts completely ignores the geographical framework and the requirement of comparability. The entire purpose of the Libyan argument is to give Libyan coasts more legal significance in terms of attribution than those of Malta.

If the graphic representations of the Libyan claim are examined (LM, Maps 9 and 17; LR, Maps 10, 11, 12 and 13) and I refer the Court respectfully once more to Malta's Illustrations: Figure 1, which shows the 1973 Libyan proposal and Figure 13, which shows the so-called Rift Zone and the axial ridge line as identified by Libya — if one looks at those graphic representations of the Libyan claim, it is immediately apparent that proportionality is being used as a major source of attribution, since the scale of the move away from the normal equality of seaward reach of jurisdiction is redolent of a major principle of attribution rather than an ancillary principle of equitable adjustment which is not an independent source of rights. The fact is that Libya seeks to use proportionality not as an instrument of equity and approximate equality but as a primary source of claim.

The Libyan claim not only fails to observe the principle that adjustment can only take place within a framework of geographical comparability — that one should compare like with like — but it would succeed in rendering the unlike even more so, since the consequences of the difference in size between the Parties would be greatly exaggerated, and this without any justification.

The practical and political consequences of the Libyan arguments in this case, were they to succeed, would be very unfortunate. It goes without saying that disputes concerning maritime delimitation are normally settled by negotiations. Article 83 of the Law of the Sea Convention expressly provides (in its first paragraph) that

> "the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution".

If the principle of territorial magnitude and ratio of coastal lengths as a major source of rights were to be given currency, the settlement of disputes by negotiation would become much more difficult. The Libyan approach would substitute a geopolitical system of attribution for the existing procedure based upon the equality of the significance of coastal States in matters of attribution and delimitation.

9. The Inappropriateness of the Libyan Version of Proportionality as an Instrument of Equity: the Jurisprudence

Mr. President, there is another perspective in which the Libyan version of proportionality may be examined. The general tendency of the Libyan case is to dis-

credit the method of equidistance *tout court*. The impression which is received from the Libyan pleadings is that not only equidistance, but also the very concept of approximate equality in matters of delimitation must be discarded. In place of approximate equality, and the principle of not refashioning geography, the Libyan side would put the concept of natural prolongation (in its own interpretation) and the concept of territorial magnitude and the ratio of lengths of coasts.

The Libyan argument thus constitutes a frontal assault not only on the method of equidistance but also on the idea of approximate equality based upon the actual geographical circumstances of the particular case. I have sought to show the various ways in which the Libyan thesis based upon the ratio of the lengths of coasts runs counter to legal principle and sound policy.

The eccentricity of this thesis may now be seen by reference to the leading cases on continental shelf delimitation, which confirm the general equality of the seaward extension of the sovereign rights of coastal States in respect of both submarine areas appertaining to adjacent coasts and submarine areas off opposite coasts.

The cases involve important examples of adjacent or partly adjacent coasts and it is a striking fact that, even in situations of adjacency, the test of proportionality is not applicable in the mode on which the Libyan argument relies. The fact is that the cases are not inimical to the concept of equality of coasts and the reservations which the jurisprudence contains concerning the equidistance method are precisely motivated by the need to maintain an approximate equality in the process of delimiting shelf areas.

I turn first to the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 3). The facts of this case, the Court will be aware, involved three adjacent States in a situation in which, but for the concavity of the German coast, the three States had been given more or less equal treatment by nature. As the Court expressed the matter:

> "What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length." (*Ibid.*, p. 50, para. 91.)

The entire object of the Court as explained very clearly in the Judgment was to maintain equality when there was in geographical terms a "situation of equality within the same order" *(ibid.)*. The Court set aside the equidistance method precisely because in the circumstances the result would deny to one of the three States concerned "treatment equal or comparable to that given the other two" *(ibid.)*.

The *North Sea Continental Shelf* cases are of particular relevance, of course, since the Court there invoked proportionality in a form similar to the version invoked by Libya in the present case. And yet, Mr. President, the reasons which moved the Court to criticize the equidistance method in the *North Sea Continental Shelf* cases are fundamentally opposed both to the substance and to the philosophy of the arguments advanced by Libya in the present case.

In the *North Sea Continental Shelf* cases the Court was using the medium of natural prolongation, and the principle that the land dominates the sea and generates entitlement to shelf rights *ipso facto* and *ab initio*, to express a practical view on delimitation which took the form of the principle of non-encroachment.

The principle of non-encroachment involved recognition of the equality of the seaward reach of coastal States and was based upon the legal concept of natural prolongation as the basis of title to adjacent shelf areas. It may be noted that in

the *dispositif* in the *North Sea Continental Shelf* cases proportionality had a low normative status as a "factor to be taken into account", whereas the principle of non-encroachment features as the first in the recital of "principles and rules applicable to the delimitation".

The Judgment in the *North Sea Continental Shelf* cases was much concerned with the problem of cut-off — that is, of encroachment laterally on the coastal front of another State — which in certain situations is exacerbated by the method of equidistance (*I.C.J. Reports 1969*, p. 31, paras. 43-44; pp. 34-37, paras. 51-59; pp. 46-47, para. 85; p. 49, para. 89). It was this problem which caused the Court to formulate the principle of non-encroachment (*ibid.*, pp. 46-47, para. 85), and to criticize the role of equidistance in certain situations.

However, the Court expressly acknowledged that in the case of opposite States the problem of encroachment does not arise from the use of the method of equidistance, and in that case delimitation can only be by means of a median line which "must effect an equal division of the particular area involved" (*ibid.*, p. 36, para. 57; and see also para. 58). The Libyan argument in the present case, and the type of alignment it involves, is completely incompatible with the reasoning of the Court in the *North Sea Continental Shelf* cases. Libya is seeking to legitimate encroachment on a very substantial scale and the Court can verify
(5) that assertion by looking at Figure 1 and the 1973 proposal. The claim reaching to within 15 miles of Malta involves cut-off of a high order, even although the relationship is one of opposite rather than adjacent coasts.

So much for the *North Sea Continental Shelf* cases, and I can now move on to the Decision of the Court of Arbitration in the Anglo-French case. Once again, the reasoning contradicts the argument which Libya offers. The approach of the Court of Arbitration, with particular reference to the Atlantic region, was based on a concept of proportionality — and its close relative "distortion" — and the objective was to maintain an equality of seaward reach of the mainlands of the two States as they abutted upon the submarine areas of the region.

It is of interest to recall that the Court regarded the coastal relationship of the United Kingdom and France as "one analogous to that of adjacent States" beyond the point where the coasts were geographically opposite one another (Decision, para. 242; and see also paras. 233, 241).

The Court applied the equidistance method on the basis that it produced a solution appropriate to the balance of geographical circumstances of the Atlantic region. The issue of the effect to be given to Ushant and the Scilly Isles was seen exclusively in terms of the modification, not the abolition, of the equidistance method. The Court expressly stated that but for the distorting effect of the Scilly Isles, "the line equidistant from the coasts of the two States would otherwise constitute the appropriate boundary" (Decision, paras. 248, 249). To the Court the equidistant line between the mainlands of the United Kingdom and France represented equity, subject to the technique — on a modest scale — of abating inequities caused by particular geographical features (Decision, paras. 249-251).

The issue of proportionality was seen by the Court of Arbitration exclusively in terms of the small-scale modification of the equidistance line in order to abate the inequitable effects of "the distorting geographical feature", that is to say, the Scilly Isles. The purpose of the exercise was to maintain a legal equality between the mainlands of the United Kingdom and France. No reference was made to the lengths of coasts except by way of a rejection of a French argument based upon the lengths of coasts within the Channel (Decision, para. 246).

Next I shall turn to the decision of the Court in the *Tunisia/Libya* case. Here again no support can be found for the type of proportionality argument deployed by Libya in the present proceedings. The primary objectives of the Court in the

Tunisia/Libya case were to avoid any undue encroachment upon the shelf areas adjacent to the Libyan coast as a result of changes in the configuration in the Tunisian coast (*I.C.J. Reports 1982*, pp. 86-89, paras. 122-129), and, in addition, to give appropriate weight to the conduct of the Parties and to the *de facto* maritime limit. The Court did not use the equidistance method and of course neither Party had pleaded equidistance. However, the procedure of delimitation had the clear purpose of maintaining equality as between the Parties in somewhat complicated geographical circumstances.

The Court applied "the test of proportionality as an aspect of equity" (*ibid.*, p. 91, paras. 130-131) in relation to a delimitation which the Court had already established on the basis of the various other relevant circumstances. There is no evidence in the Judgment that proportionality played a dominant role in the delimitation process. Whilst it is true that the element of proportionality appears in the *dispositif* as a "relevant circumstance" (*ibid.*, p. 93), it is fifth and last in the order of the relevant circumstances listed, and apart from a brief reference in the discussion of Tunisian baselines (*ibid.*, p. 76, para. 104) the subject of proportionality is only taken up at the very end of the Judgment (*ibid.*, p. 91, paras. 130-131). The Court there refers to proportionality explicitly as a test and "as an aspect of equity", that is to say, as a means of evaluating the attribution of shelf areas "following the method indicated by the Court" (*ibid.*, para. 131). Moreover, the test of proportionality was applied, it is to be presumed, on the basis that the two coasts in the second sector of the delimitation were in principle comparable. As in the case of the Atlantic region in the context of the Anglo-French case, the procedure was then to find ways of abating the eccentricities of coastal configuration. This was in effect the procedure adopted, *mutatis mutandis*, in the Judgment of the Court in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, pp. 82, 85-89, paras. 114-115, 121-129; *dispositif*, pp. 93-94, para. 133, C (3)). Moreover, in respect of the second sector the Court stated that:

> "The major change in direction undergone by the coast of Tunisia seems to the Court to go some way, though not the whole way, towards transforming the relationship of Libya and Tunisia from that of adjacent States to that of opposite States, and thus to produce a situation in which the position of an equidistance line becomes a factor to be given more weight in the balancing of equitable considerations than would otherwise be the case." (*Ibid.*, p. 88, para. 126.)

And finally, I come to the decision of a Chamber of this Court in the *Gulf of Maine* case. In that case the first segment of the delimitation involves a coastal relationship of lateral adjacency. However, away from the international boundary terminus and approaching the outer opening of the Gulf, the geographical relationship becomes one of frontal opposition with a marked quasi-parallelism (*I.C.J. Reports 1984*, p. 325, paras. 188-189). In respect of the second segment of the delimitation, the Chamber stated that geography prescribed "that the delimitation line should rather be a median line (whether strict or corrected remains to be determined) for delimitation as between opposite coasts . . ." (*ibid.*, p. 331, para. 206).

The reasoning of the Chamber is insistent that in the case of opposite coasts a median line reflects the geographical facts and also gives effect to "the equitable criterion, so abundantly endorsed by the Chamber, of the equal division — so far as feasible — of areas where the maritime projections of the coasts of the two States overlap" (*ibid.*, p. 334, paras. 216-217).

However, the Chamber found it necessary to apply to the median line as initially drawn what it called a correction which "though limited" would take

account of the fact that "the back of the Gulf is entirely occupied by the continuous coast of Maine, i.e., a component state of the United States" (*I.C.J. Reports 1984*, p. 334, para. 218). The difference in length between the respective coastlines of the two Parties in the delimitation area was regarded by the Chamber "a special circumstance of some weight" (*ibid.*, p. 322, para. 184) and the ratio between the coastal fronts was applied as an *ad hoc* method of effecting the appropriate correction to the median line (*ibid.*, p. 336, para. 222).

The Chamber was careful to explain its *modus operandi* and it is abundantly clear that it has little in common with the *modus operandi* contended for by Libya in the present case. The reference to the difference in coastal lengths did not constitute a basis for the settling of a delimitation but was a ground for the correction of a delimitation established initially on the basis of other criteria (*ibid.*, p. 323, para. 185).

The Chamber emphasized in two separate passages — paragraphs 185 and 218 — of the Judgment that the extent of the respective coasts of the Parties did not constitute a criterion or method of delimitation. Moreover, in the same two passages the Chamber stated that it had no intention of making "an autonomous criterion or method of delimitation out of proportionality" — I refer to paragraph 218 and this refers back to paragraph 185 of the Judgment of the Chamber.

The thinking of the Chamber is expressed with particular clarity in the following passage:

> "The Chamber's views on this subject may be summed up by observing that a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction." (*Ibid.*, p. 323, para. 185.)

What took place was thus an adjustment of a median line which was itself the result of the equitable criterion selected by the Chamber, that is to say, the principle of equal division of the area of overlapping of the maritime projections of the coasts of the two States. As a matter of a formulation of principle, the approach of the Chamber is entirely unlike the dogmatic reliance upon the ratio of coastal lengths to be found in the Libyan arguments in the present case.

And yet apart from the question of the *modus operandi* and the criteria applicable, it may be noted that the occasion for the correction of the median line in the main segment of the delimitation was an unusual conjunction of politics and geography, involving a rectangular stretch of water with a land boundary terminus at the corner of this rectangle.

The Chamber was seeking to apply the concept of equality *mutatis mutandis* to the particular geographical and political circumstances, and in the result all the geographical features were in principle given full effect, including even the Cape Cod peninsula. Even Seal Island, a very minor feature, was given half effect. The median line was adopted, as the basis of the delimitation between opposite coasts, subject only to an element of correction.

The decision in the *Gulf of Maine* case thus stands in the line of jurisprudence which has worked out the concept of approximate equality in relation to different conjunctions of geography and politics. The centre of the reasoning of the Chamber is occupied by the concept of equality, and thus the philosophy of the decision, like its predecessors, is inimical to the approach of Libya in this case.

Mr. President, the four decisions I have reviewed provide a *modus operandi*

for the construction in varied circumstances of a régime of legal equality between coastal States abutting upon the same continental shelf. The equitable principles and factors presented by the jurisprudence constitute a code for the maintenance of an approximate equality of coastal States. The *modus operandi* offered by the Libyan side in this case finds no place in that code.

Having surveyed the jurisprudence, I shall now turn to an examination of the pertinent State practice.

10. The Concept of Proportionality: the Evidence of State Practice

By way of preface, it may be observed that the Libyan view of proportionality in this case is strongly contradicted by the general practice of States in continental shelf delimitation and it is not at all surprising that the Libyan pleadings exhibit a fear of State practice. Indeed, the Libyan pleadings contain what are virtually blanket denials of the relevance of State practice, as, for example, in the Counter-Memorial (**II**, LCM, para. 5.96), where it is stated that "if State practice demonstrates anything therefore, it is that each case has its own unique setting and its own peculiar facts".

In the *Tunisia/Libya* case the Court remarked that: "the concept of natural prolongation . . . was and remains a concept to be examined within the context of customary law and State practice" (*I.C.J. Reports 1982*, p. 46, para. 43), and in the same connection the Court referred to "the actual practice of States which is expressive, or creative, of customary rules". It is obvious that any concept of the law of the sea may be examined "within the context of customary law". Not surprisingly Governments and their legal advisers take great trouble to monitor State practice on maritime delimitation and it is unusual for pleadings to ignore such material. The course of lectures given at the Hague Academy in 1981 by Dr. Jagota, the Legal Adviser to the Ministry of External Affairs of India, on the subject of maritime boundaries, makes very substantial use of State practice (*Recueil des cours*, Vol. 171 (1981-II), p. 83), and this is surely to be expected.

But, of course, whilst the general relevance of State practice may be undoubted, the individual items of State practice must be carefully evaluated. It is not normal for agreements relating to continental shelf delimitation to make express reference to the precise legal and political elements which lie behind the alignment established, but it is not uncommon for the preamble of such agreements to refer to the fact that the delimitation has been established "in accordance with international law". Not atypical in this respect are the agreements creating continental shelf boundaries between Iran, a long-coast State with an extensive land territory, and short-coast States opposite Iran (Malta Illustrations, Fig. 22).

The relevant agreements in chronological order were as follows:

First, between Iran and Saudi Arabia, signed in 1968 (ratified on 29 January 1969; **II**, LCM, Annex of Delimitation Agreements, No. 17).

Second: between Iran and Qatar, signed in 1969 (ratified on 10 May 1970; MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 21).

Third: between Iran and Bahrain, signed in 1971 (ratified on 14 May 1972; **I**, MM, Annexes, p. 66; **II**, LCM, Annex of Delimitation Agreements, No. 25).

Fourth: between Iran and Oman, signed in 1974 (ratified on 28 May 1975; MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 40).

Fifth: between Iran and the United Arab Emirates signed in 1974 (not yet ratified; **II**, LCM, Annex of Delimitation Agreements, No. 42).

Each of these agreements is furnished with a preamble, containing a recital which makes explicit reference to the application of international law.

The agreement between Iran and Saudi Arabia contains the following recitals:

> "Desirous further of determining in a just and accurate manner the boundary line separating the respective submarine areas over which each party is entitled by international law to exercise sovereign rights,
>
> Now therefore and with due respect to the principles of law and particular circumstances, . . ."

The other four agreements include preambles with an identical considerandum as follows:

> "Desirous of establishing in a just, equitable and precise manner the boundary line between the respective areas of the continental shelf over which the Parties have sovereign rights in accordance with international law."

Even in cases in which no express reference is made to international law there is a presumption that such delimitation agreements are based upon legal principles.

It goes without saying that the various agreements make no particular reference to the factor of proportionality, and it is obvious that the precise course of the alignment in each case will be affected by the geographical circumstances of that case and certain elements of political compromise.

None the less the general pattern of agreements relating to comparable geographical circumstances surely constitutes reliable evidence of the practice of States in the actual application of the matrix of equitable principles, relevant circumstances and factors, in the process of delimitation.

The practice need not be seen as evidence of a particular rule of customary law, but it must provide significant and reliable evidence of normal standards of equity. The practice constitutes an international and objective standard of equity and of what is generally accepted as "approximate equality" in matters of shelf delimitation. Such a standard is also *ex hypothesi* relevant to the concept of proportionality.

The Court rose at 12.55 p.m.

FIFTEENTH PUBLIC SITTING (3 XII 84, 3 p.m.)

Present: [See sitting of 26 XI 84.]

Professor BROWNLIE: Mr. President, before the recess for lunch I had moved on to the relevance of State practice as providing evidence of the international objective standard of equity in matters of shelf delimitation, and in that way being also a standard as to what is accepted by States generally as an approximate equality in matters of shelf delimitation.

Malta has set out the relevant State practice in her written pleadings (**I**, MM, paras. 184-195; **II**, MCM, paras. 252-256), and it is of course not necessary to rehearse the material in full. We have also analysed the Libyan treatment of State practice in our Reply (*supra*, MR, paras. 234-270; and Annex 4).

However, with your permission, I would like to point up certain aspects of the State practice. By way of preface I would respectfully remind the Court of the point of reference. The point of reference would seem to be a situation in which a long-coast State claims a high proportion of the submarine areas dividing it from an opposite short-coast State, whether that short-coast State is an island or not. In the Libyan Memorial it is stated "that a boundary within the Rift Zone would leave to each of the Parties areas of shelf within the relevant area that bear a ratio to each other of between 1:8 and about 1:12" (**I**, LM, para. 10.18).

No support can possibly be found in the practice of States for such a dramatically unequal partition of shelf areas, either of shelf areas dividing opposite States or shelf areas dividing States with other types of coastal relationship.

Four types of evidence may be pointed out. In the first place, the existing patterns of delimitation in semi-enclosed seas provide substantial contradiction of the Libyan view of proportionality in the present case. I would respectfully refer the Court to certain figures in Malta's dossier: Figures 19, 21, 22 and 24. Figure 19 illustrates the existing shelf delimitations in the Baltic Sea; Figure 21 the existing delimitations in the Mediterranean; Figure 22 the delimitations of shelf areas in the Gulf; and Figure 24 the existing continental shelf delimitation between the Soviet Union and Turkey in the Black Sea.

Secondly, there is the practice involving long-coast States and island States in an opposite relationship, and such practice is clearly based upon a principle of equality and the method of equidistance.

The relevant delimitations of this class include the following:

Bahrain and Iran (**I**, MM, Annexes, p. 66; **II**, LCM, Annex of Delimitation Agreements, No. 25) (Malta Illustrations, Fig. 22);

Cuba and Mexico — Mexico is the long-coast State (**I**, MM, Annexes, p. 68; **II**, LCM, Annex of Delimitation Agreements, No. 47) (Malta Illustrations, Fig. 23);

India and the Maldives (**I**, MM, Annexes, p. 70; **II**, LCM, Annex of Delimitation Agreements, No. 49) (Malta Illustrations, Fig. 28);

Cuba and the United States (as the long-coast State) (**I**, MM, Annexes, p. 72; **II**, LCM, Annex of Delimitation Agreements, No. 53) (Malta Illustrations, Fig. 23);

Colombia, the long-coast State, and the Dominican Republic (**I**, MM., Annexes, p. 74; **II**, LCM, Annex of Delimitation Agreements, No. 54) (Malta Illustrations, Fig. 23);

Colombia, the long-coast State, and Haiti (**I**, MM, Annexes, p. 77; **II**, LCM, Annex of Delimitation Agreements, No. 55) (Malta Illustrations, Fig. 23);

Again Bahrain and Saudi Arabia (**I**, MM, Annexes, p. 85; **II**, LCM, Annex of Delimitation Agreements, No. 5) (Malta Illustrations, Fig. 22).

Then I come to the third class of practice, that is agreements effecting delimitations between long-coast States and short-coast peninsular States opposite the long-coast States. Such delimitations are on the basis of the method of equidistance and the relevant delimitations are as follows:

The delimitation between Denmark and Norway, Denmark as the peninsular State opposite Norway (MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 12) (Malta Illustrations, Fig. 20);

Iran, the long-coast State, and Qatar as the short-coast peninsular opposite (MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 21) (Malta Illustrations, Fig. 22);

And then again Iran and Oman as the peninsular State opposite Iran (MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 40) (Malta Illustrations, Fig. 22);

Australia (in respect of the Yorke Peninsula and so in that respect Australia is the peninsular short-coast State) opposite Papua New Guinea (which in that situation is the long-coast State) (MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 60) (Malta Illustrations, Fig. 31).

Fourthly, there are those delimitations between groups of islands, which groups are in some cases more or less autonomous, and the mainlands of opposite-related long-coast States. The relevant cases, I submit, have a strong similarity of geographical circumstance to the relation of Malta and Libya, and the delimitations all reflect the concept of equality.

The delimitations concerned are those between:

Denmark (in respect of the Faroes group) and Norway as the long-coast State (**I**, MM, Annexes, p. 51; **II**, LCM, Annex of Delimitation Agreements, No. 62) (Malta Illustrations, Fig. 29);

Finland (in respect of the Åland Islands which belong to Finland) and Sweden as the long-coast State (*Limits in the Seas*, US Dept. of State, No. 71; **II**, LCM, Annex of Delimitation Agreements, No. 31) (Malta Illustrations, Fig. 32);

France (in respect of New Caledonia) and Australia as the long-coast State opposite (**I**, MM, Annexes, p. 203; **II**, LCM, Annex of Delimitation Agreements, No. 71) (Malta Illustrations, Fig. 33);

Norway as the long-coast State and the United Kingdom (in respect of the Shetland Islands) (**I**, MM, Annexes, p. 195; **II**, LCM, Annex of Delimitation Agreements, No. 8) (Malta Illustrations, Fig. 34);

Then two delimitations involving India:

India (in respect of the Nicobar Islands) and Indonesia (Agreements of 1974 and 1977) (**II**, LCM, Annex of Delimitation Agreements, No. 41) (Malta Illustrations, Fig. 35);

India (again also in respect of the Nicobar Islands) and Thailand as the long-coast State (**I**, MM, Annexes, p. 201; **II**, LCM, Annex of Delimitation Agreements, No. 59) (Malta Illustrations, Fig. 36).

In this particular connection, of island groups opposite long coasts, it is useful to recall that the United Kingdom and France have agreed that, in principle, the maritime boundary between the Channel Islands and the neighbouring coasts of

the French mainland should be the median line (see the Anglo-French Arbitration, Decision of 30 June 1977, para. 22).

Mr. President, I submit that the only possible conclusion is that the State practice effectively demonstrates that a delimitation in accordance with the Libyan thesis on proportionality would be wholly incompatible with the international standard as to what is equitable and what accords with the legal concept of approximate equality.

The Libyan pleadings do not seek to make out a positive argument based upon State practice to support the Libyan view on proportionality. The tactics of our distinguished opponents are founded upon two simple and essentially negative elements: first, the general denial of the relevance of State practice; and, second, an assault on the State practice invoked by Malta in the written pleadings.

Of course, given the dogmatic Libyan view that State practice is irrelevant *tout court*, such an assertion should preclude resort to State practice by the other side. And in general the Libyan pleadings have eschewed practice. Thus, for example, the section of the Libyan Reply entitled "Proportionality in Practice" (*supra*, LR, pp. 90-93) is not concerned with State practice at all.

However, with a certain inconsistency, the Libyan Counter-Memorial (II, LCM, para. 6.15) makes a passing reference to the Franco-Spanish Agreement of 1974 (II, LCM, Annex of Delimitation Agreements, No. 34), one of the few pieces of State practice to fall under the notice of that written pleading. The Libyan pleading there states that:

> "Even with an equitable or 'adjusted' equidistance line, between adjacent States, the differences in coastal length may cause a diversion in the line (as with the Franco-Spanish Agreement of 1974)."

Moreover, in the Annex of Delimitation Agreements forming part of the Libyan Counter-Memorial, the commentary upon the Franco-Spanish Agreement relies upon the analysis of the Geographer of the Department of State (*Limits in the Seas*, No. 83, p. 13). The analysis states that:

> "the second segment of the Franco-Spanish continental shelf boundary was negotiated according to equitable principles relating to the ratio of the artificial coastlines of the two States".

This statement is not given a source in the text of the *Limits in the Seas* item. However, the source would appear to be an article by Professor José Luis de Azcárraga (*Revista española de derecho internacional*, Vol. 28, pp. 131-138), which is reproduced and translated in the United States Counter-Memorial in the *Gulf of Maine* case (Vol. IV, Ann. 10, App. A[1]). This article is a personal assessment of the negotiations of the continental shelf agreement relating to the Bay of Biscay and it makes clear that a number of factors other than the lengths of coasts influenced the delimitation. In particular, the article points to the special circumstances arising from the topography of the sea-bed and the fact that France's more extensive continental shelf "dominated the negotiations" (*Revista española de derecho internacional*, p. 133; translation[1]).

In any case the coastal relationships in the Bay of Biscay are unlike those of Malta and Libya and seaward *beyond the Point R* of the Franco-Spanish delimitation the shelf is divided into two distinct areas. As Professor José Luis de

[1] Not reproduced. For reference see *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. IV, p. 458. *[Note by the Registry.]*

Azcárraga expresses the matter: "the line joining Points R and T . . . is virtually the median line equidistant between the isobath curves at equal depths" (*Revista española de derecho internacional*, p. 132; United States Counter-Memorial, Vol. IV, Ann. 10, App. A). In the segment landward of Point R, that is to say, the sector reaching from the territorial sea to the foot of the continental slope, the Parties adopted the equidistance method in its normal form.

In the result the delimitation in the Franco-Spanish Agreement has little or no relevance for present purposes and the Libyan pleadings have signally failed to produce any State practice which provides support for the application of the test of proportionality, in the form of the ratio of coastal lengths, to geographical circumstances comparable with those of the present case.

11. Coastal Relationships in Semi-Enclosed Seas

The evidence of State practice leads naturally to a consideration of the general significance of the Libyan thesis in the context of semi-enclosed seas.

The existing practice in the Baltic and the Gulf provides no support whatsoever to the Libyan position in the present case. The patterns of delimitation in both the Baltic and the Gulf flatly contradict the thesis that the length of coasts or overall territorial magnitude generate special advantages when it comes to delimitation of the continental shelf.

Moreover, the system implied in the Libyan argument is contradicted by logic and ordinary political sense.

(31) If the simple model presented in Figure A (Malta Illustrations, Fig. 27A) is examined, the strange consequences of the Libyan thesis immediately appear. According to the Libyan argument the advantages of length of coast and territorial magnitude are absolute and are not relative to the actual number of opposite coastal States. Moreover, general reference to the rights of third States does not (31) resolve the difficulty which is revealed by Figure A, since the question remains, always, what are the rights of the States on the opposite coast?

The Libyan contention is that a large landmass behind the coasts produces a natural prolongation of greater intensity. As it is expressed in the Libyan Counter-Memorial (II, LCM, para. 2.48): "The land territory behind Libya's extensive coast is immense, whereas both the coast and land territory of Malta are very small." And the conclusion then follows: "Surely, the intensity of the natural prolongation must be greater — the prolongation, more natural — from the Libyan coast in arriving at a line of delimitation?" *(Ibid.)*

The logic of the Libyan argument is such that it applies to all the short-coast States jointly as much as it applies to a single short-coast State opposite to the (31) long-coast State 1 in Figure A. The Libyan argument for special advantage is not conditioned by the existence of a single short-coast State opposite and the Libyan position thus stands quite simply for the dominance of the shelf areas of a semi-enclosed sea or gulf by a long-coast State. This result which is visible on (31) Figure A provides further evidence of the divorce between equitable principles and the doctrine now proposed by Libya as a version of proportionality.

Mr. President, the logic of the Libyan reasoning based upon the ratio of length of coasts and territorial magnitude must be applicable equally to the case of one short-coast State and to the case of several short-coast States in an opposite relationship to State 1 on that figure. When there is only one short-coast State opposite, naturally the consequences will vary but the nature of the variation does not (31) fundamentally affect the issue as presented graphically on Figure A.

12. The Coincident Results of Proportionality and the Principle of Natural Prolongation in the Libyan Argument

I come now to the last of the bountiful crop of logical difficulties presented by the Libyan argument based upon proportionality.

(9) *Both in the submissions and generally in the written pleadings* (I, LM, para. 6.90; Map 17 (following p. 160); *supra*, LR, paras. 7.15-7.17), the Libyan argument involves an assertion that the principle of natural prolongation and the concept of proportionality produce a coincident result, namely a line somewhere within the so-called Rift Zone.

Even if, which Malta would deny, natural prolongation in the Libyan version were relevant to the delimitation in the present case, the coincidence can have no legal significance. There can be no logical connection between the ratio of the lengths of coastlines and the incidence of geological and geomorphological features in and under the sea-bed. This is not to say that such coincidence automatically disqualifies the two factors which produce the coincident result: but unless there is some legally significant connection between the two factors the coincidence as such cannot increase the independent legal weight, whatever that might be, of the two factors taken singly.

The situation involves the use by Libya of a particular version of proportionality which makes reference to the lengths of the respective coasts or at least of selected coasts. This criterion of proportionality operates on its own plane and clearly has no logical and therefore no legal or equitable relation to the geology of the sea-bed areas dividing the Parties or to the legal question of natural prolongation. Still less does it have any connection with the extent of the Libyan landmass, which is also related to the principle of natural prolongation in the Libyan pleadings (**II**, LCM, para. 2.48).

It must follow that the coincidence of result between the proportionality criterion as proposed by Libya and the principle of natural prolongation is entirely artificial and cannot involve any mutual confirmation. The matter can be expressed even more simply: the physiography of the sea-bed has no logical connection either with the lengths of the coasts of the two Parties or with the ratio of the difference of those lengths. For that matter, the physiography of the sea-bed in the Rift Zone has no connection with any linear value such as the latitudinal reach of Libya or the length of the coast from the Tunisian frontier to Ras Zarruq.

13. Conclusion on Proportionality

Mr. President, Members of the Court, I can now present a summary of conclusions on the issues relating to proportionality.

1. The first conclusion is the most important. The equitable solution must be found within the actual geographical framework and within this framework is to be found the "balance of geographical circumstances". This balance is not related to proportionality as an independent factor but reflects the geographical circumstances overall and is translated in legal terms as a concept of approximate or legal equality.

2. The purpose of the law concerning shelf delimitation is to maintain an equality of seaward reach of jurisdiction and to avoid a delimitation which causes encroachment upon the continental shelf areas adjacent to the coastal front of another State.

3. It follows that proportionality cannot be invoked in order to justify a delimitation or a method of delimitation which involves a monopoly or preponderance of jurisdictional reach to the advantage of one State as against another State abutting upon the same areas of shelf.

4. The test of proportionality cannot have any radical effects upon the delimitation since the judicially evolved approach to delimitation rests upon the assumption that delimitation is an operation of limited scale. In other words, it is a relatively limited or marginal operation affecting a status quo based upon the inherent rights of the coastal State as generated by its sovereignty over land territory.

5. The ratio of coastal lengths as a test of proportionality is inappropriate to the geographical framework of the present case and appears consequently as an argument to support a manifestly inequitable solution, since there is no equality within the same plane.

6. The length of coasts and the ratio of the different lengths represent an abstraction which is not based upon the actual geography and coastal relationships of the Parties: such criteria cannot reflect the geographical framework and would necessarily involve a radical apportionment of the submarine areas dividing the Parties. The result of resort to the Libyan criteria would be to provide a substitute for the geographical data in this case.

7. The State practice relating to comparable situations clearly demonstrates the international standard in the practice of continental shelf delimitation, that is to say, the objective standard of what is equitable and the State practice is clearly incompatible with the view of proportionality advanced by Libya in these proceedings.

8. The Libyan position, based as it is upon the criteria of coastal length and territorial magnitude, produces a result which would be wholly inequitable, not only in the present case but generally in the situation of long-coast States coexisting with short-coast States in semi-enclosed seas. The Libyan argument for special advantage is after all not conditioned to apply only in the case of a single short-coast State opposite and the factor of territorial magnitude is, in Libya's thinking, equally significant for each kilometre of Libya's coast, irrespective of the number of short-coast States affected.

9. The coincidence of result between the proportionality criterion, as applied by Libya, and the principle of natural prolongation, is wholly artificial and would be so even if the so-called Rift Zone had the significance contended for by Libya in the context of its argument based upon natural prolongation.

The final conclusion may now be formulated. The premise to that conclusion must be the geographical framework and the relevant area. The trapezium figure, which appears on Figures 7 and 26 in the Malta dossier illustrates, I submit, the correct position and does so in the simplest possible terms. In Figure 7, the trapezium shows the relevant area in relation to the position as between the actual geography of Malta and Libya; in Figure 26 the trapezium is presented simply as an analytical concept. The relevant area, as shown on Figure 7, consists of the submarine areas lying between the coasts of the Parties. The attribution of an equal seaward extension of jurisdiction from the relevant coasts is represented by a median line.

The trapezium figure is based on the actual geographical relationships. It shows that the median line between Malta and Libya leaves Libya with a proportion in the ratio of five to one of the submarine areas dividing the Parties — that is Malta's proportion, that is what remains to Libya. And this proportion is, in fact, admitted in the Libyan pleadings. It is a proportion based on two factors, the first is the equality of seaward reach — and this gives *equal legal weight* to the coasts of both Parties, in so far as they are opposite each other.

The second factor consists of the longitudinal reach of the coasts of Libya. That is inevitably and directly reflected in the extent of the southern segment of the trapezium.

In this way the median line reflects the coastal configurations. The north-south, or facing, or opposite relation is treated on an equal basis, since to do otherwise is to create an inequity. The longitudinal aspect of the attribution is also determined neutrally, and therefore on a basis of equality, since it is the attitude of the coasts of the Parties and their relation to each other which produce the lateral limits of the areas delimited by the median line. By the attitude, we mean the areas which are facing either the coasts of Malta or the coasts of Libya and the concept of facing and the concept of attitude is reflected in the sides of the trapezium; and then we have the coasts of Malta and the coasts of Libya, opposite each other. Thus are the legally equal entitlements based upon geographical data which are different from each other, but are to be treated equally within the legal order. A long-coast State thus generates a larger area of shelf than a short-coast State without this involving any inequality in the opposite or seaward extensions of jurisdiction.

Mr. President, the 1973 proposal of Libya, which was based exclusively upon (5) the proportionality argument, and appears on Figure 1 of the dossier, would produce a situation in which Malta would be virtually deprived of all adjacent submarine areas outside her territorial sea. This outcome can be compared with the (39)(13) result achieved in the trapezium figure (Figs. 7 and 26), which shows a delimitation which produces no encroachment on shelf areas which are more adjacent to Libya than to Malta. Indeed, the counterpart to the Libyan claim would be a line along perhaps the Tripolitanian Furrow, and it was just such a line which was ruled out by the Court in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 64, para. 80). The existing experience of delimitation in semi-enclosed seas and gulfs — and it is substantial — provides no support for the Libyan view on these matters.

Neither in principle nor in practice is there any justification for a weighting in favour of long-coast States which would destroy the legal equality of coastal States. Such a weighting would be *ex hypothesi* disproportionate, unreasonable and inequitable. Malta is relying upon the concept of legal equality in the matter of shelf delimitation and this involves the reflection in equitable terms of the relevant geography and geographical relationships. The median line represents the equitable result in this case, precisely because that line gives legal expression to the equality of seaward reach of the coasts abutting upon the relevant area. Malta's position does not involve a claim to a spatial half-share of the relevant area. As the Agent for Malta has already indicated in his exposé of the issues, the calculations of the Libyan Counter-Memorial — at **II**, page 43, footnote No. 4 — produce a result according to which, within the area covered by the trapezium, Libya would receive approximately five times as much as the area in issue as Malta. Malta's stance is based firmly upon a concept of equality within the pertinent legal order; and the trapezium illustrates that conception. Malta's conception of proportionality as a test of the equity of the result is compatible with the geographical and legal framework of the case. In contrast, the Libyan reference to the ratio of coastal lengths, like the reference to an index of territorial magnitude, is inappropriate both in terms of general legal principle and in terms of the geographical circumstances. Any doctrine which is allowed to subvert the fundamental legal equality of coastal States would produce radical and disruptive effects in the process of delimitation, whether this is to take the form of negotiation or the activity of international tribunals.

Mr. President, I have concluded my presentation, I would like to thank the Court for its customary courteous attention, and I ask you if you would recognize the Agent of Malta.

STATEMENT BY MR. MIZZI

AGENT OF THE GOVERNMENT OF MALTA

Mr. MIZZI: Mr. President, Members of the Court. It had been our intention that my learned friend Mr. Lauterpacht would sum up the case for Malta and that I should conclude this round of the oral proceedings with a few words.

However, the statements by counsel have run a little longer than expected and, in order not to abuse the courtesy of the Court, we have agreed that I should instead conclude Malta's submissions at this stage of the oral proceedings by recalling, very concisely, the hard core of the arguments developed by my learned friends and colleagues during the previous sessions.

We believe that Libya's case rests fundamentally on two main propositions.

The first is that Malta's natural prolongation terminates at the so-called Rift Zone on the south, and at the Escarpments-Fault Zone on the east. Consequently, the delimitation of the shelf areas of Malta and Libya ought to be effected by means of a line which follows the general direction of the said Rift Zone and which is contained within it.

The second proposition is that such a line is also the line which is indicated by the requirements of equity which, in Libya's view, is synonymous with a division of shelf areas in direct proportion to the lengths of the respective coastlines and bearing also some relation to the difference in the size of the respective land-masses.

In answer to these arguments, counsel for Malta have shown, and I believe conclusively, that the Rift Zone does not produce a fundamental discontinuity in the natural prolongation of the Parties' territories, much less does it terminate Malta's continental shelf. Moreover, whatever its true physical nature may be, the Rift Zone is legally irrelevant since the continental shelf of Malta would extend, in law, up to the very shores of Libya were it not for the legal entitlement of Libya to the same shelf. There is, therefore, no valid reason why the delimitation should be effected by a line within the Rift Zone. The same applies, with perhaps greater force, to the Escarpments-Fault Zone.

As to the second Libyan proposition, counsel for Malta have shown that proportionality in the form of a ratio between the size of landmasses is not even recognized in international law, whether by the jurisprudence, State practice or doctrine. They have further shown that in cases of delimitation, proportionality is merely a criterion for assessing the equitable or inequitable effects, of a particular geographical feature or configuration upon a delimitation which would otherwise be indicated by the general configuration of the coastlines of the Parties. It is not an independent source of rights and only infrequently does it appear in the form of the ratio between areas of shelf and lengths of coastlines.

Proportionality therefore has no role to play where the geographical circumstances are normal and the delimitation indicated by those circumstances is consequently also equitable. Such are the circumstances of two opposite States, at some distance one from the other, without any feature or other circumstances which could disturb the regularity of the geographical setting, and these are precisely the circumstances of the present case.

Thus, in Malta's submission, both arguments which are fundamental to Libya's case have been shown to be unable to withstand a close scrutiny of their validity. Indeed, the manner in which Libya invokes natural prolongation and

proportionality as a justification for constructing the boundary so close to Malta and so distant from its own shores not only lacks legal validity but is also an invitation to disproportionality.

On the other hand, Malta's case rests, it is firmly believed, on very solid factual and legal grounds.

It rests on equity as reflected in the uncontested principle governing all State relations in the contemporary international law; namely, the equality of States. That principle applies to both entitlement and delimitation. It entitles all States, large or small, continental or insular, to an equal standing both with respect to entitlement of continental shelf rights and to their delimitation when the rights of one State and those of a neighbouring State meet and overlap. Less effect has at times been given to island dependencies. But island States are States with equal rights to those of continental States and have invariably been treated as such.

In all such cases the equality of States demands that delimitation, which is the consequent and inevitable constraint on a State's rights, should be effected on an equal basis. Any discrimination on the grounds of size or insularity, or similar grounds, would violate the principle of equality as well as the principle of equity. In fact, neither of those principles could justify a rule which would give to a large State more than is justified by its coastal geography by taking away from a smaller State what properly belongs to it by reason of the seaward reach of its coasts.

In the case of opposite States, and Malta and Libya stand in that position, the shelf rights generated by their respective coastlines extend seawards one towards the other until those rights meet and overlap. That overlap has to be divided and the division can only be effected on the basis of equality and equitably by means of a line which leaves to both of them a relatively equal share of the areas of overlap. This result is obtained only by an equidistant or median line. This conclusion has been recognized by the jurisprudence and finds ample confirmation in State practice.

In special circumstances where such a line proves to be inequitable — such as where an otherwise equitable line is unduly distorted by some geographical feature — that line would have to be adjusted or modified and, in extreme cases, it may even have to give way to some other method or combination of methods. And even in such cases, the modification or adjustment is a modest one. But where this is not the case the equidistance line is the equitable and consequently the definitive line.

It is Malta's submission that this is precisely the situation in the present case. In the geographical setting of the case before the Court only a median line could allow Malta and Libya to retain an appropriate extent of the areas of shelf generated by the seaward reach of their respective coasts, and which ensures to both the least possible amputation of their respective entitlements. This does not mean that such a delimitation would result in an equal division of shelf areas in spatial terms. Those areas will be unequal in size, indeed, as has been shown, substantially unequal. But that is the natural and legally acceptable result of the different configuration of the coastlines of the two States including the difference in the length of those coastlines.

These differences, Malta respectfully submits, are adequately reflected in the result obtained from an equidistant or median line and such a line must therefore be also equitable. This is therefore the result — the equitable solution — which is the purpose and object of the whole case before the Court.

Mr. President, I have concluded. It remains only for me to explain that since there will be a second round of oral arguments which is due to start, as the Court has indicated to the Parties, towards the end of January or the beginning of

February, I shall not formulate the final submissions of Malta required by paragraph 2 of Article 60 of the Rules of Court at this stage. I shall do this at the conclusion of the last statement made by Malta during a further stage of the oral proceedings.

Mr. President, Members of the Court, with your permission I again thank the Court as well as our friendly and learned opponents for the courtesy and patience shown to us, and I extend to you, Mr. President, to the Members of the Court, to the Agent of Libya and to all counsel and other advisors on both sides, my Government's and my own good wishes for the coming festivities and the New Year to which we look forward with keen interest and anticipation.

The Court rose at 3.55 p.m.

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