SEPARATE OPINION OF VICE-PRESIDENT SETTE-CAMARA

While voting in favour of the Judgment, I feel that there are some points of the reasoning with which I do not entirely agree. That is why I find myself bound to append this separate opinion to the Judgment.

In order to arrive at the proper delimitation of the relevant area we should start from the definition of the relevant coasts. And in the present case this is particularly important because we are faced with a case of States with opposite coastlines and coastlines with an unprecedented disproportion in lengths. It is of paramount importance that the coasts of each Party which are relevant to the case be defined in an unambiguous way. And that of course would be a part of the process for establishing the relevant area. The definition of the relevant coastlines is moreover of extreme importance because the Judgment has considered the disproportion in the comparable lengths of coasts as a very important special circumstance, indeed a determinant for the correction of the equidistance line which constituted the first step in the process of delimitation. But it is beyond doubt that the segments of coastlines between Delimara Point and Ras il-Wardija on the Maltese side, and between Ras Ajdir, on the boundary between Libya and Tunisia, and Ras Zarruq on the Libyan side emerge as the relevant coasts.

Again, I fully agree with the Judgment in rejecting the geomorphological argument advanced by Libya. To the reasoning of the Judgment on this point I would add the following : the Court has been very careful in the recognition of natural boundaries of continental shelf areas constituted by natural features. The treatment of the Norwegian Trough by the United Kingdom and Norway in the Agreement of 10 March 1965 completely disregarded it in spite of its marked characteristics ; the findings of the Court of Arbitration in the Anglo-French Arbitration of 1977, when referring to the Hurd Deep – another marked feature –, stated that the location of features of this kind is a matter of chance – "a fact of nature" –, "and there is no intrinsic reason why a boundary along that axis should be the boundary . . ." (Decision of 30 June 1977, para. 108). And again the Court's 1982 Judgment in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case rejects the Tunisian attempt at presenting the Zira and Zuwarah Ridges as a potential boundary line. The Court found :

> "As for the features relied on by Tunisia, the Court, while not accepting that the relative size and importance of these features can be reduced to such insubstantial proportions as counsel for Libya sug-

gest, is unable to find that any of them involve such a marked disruption or discontinuance of the sea-bed as to constitute an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations." (*I.C.J. Reports 1982,* p. 57, para. 66.)

In the present case both Parties have resorted to the practice of States to support their arguments. Libya produced a two-volume Annex to its Counter-Memorial, reproducing Delimitation Agreements, mainly based on the United States Department of State's *Limits in the Seas.* Malta submitted, as Annex 4 to the Maltese Reply, a learned expert opinion on State practice by Dr. J. R. V. Prescott. The main controversy between the Parties centred on the use of the equidistance method in maritime boundary agreements.

I believe that it is otiose to embark on such a controversy. Since 1969 it has been well established that equidistance is one method among others, and that there is no question of attributing to it a primacy or the character of a primary test. But, on the other hand, it would be futile to try to prove that it has been progressively discarded by the practice of States. As recently as the *Tunisia/Libya* case in 1982, the Court invoked equidistance to justify the veering of the delimitation line at the point of change of direction of the Tunisian coastline. The Court found (Judgment, para. 126) :

> "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." (*I.C.J. Reports 1982,* p. 88.)

A simple perusal of the series *Limits in the Seas* will show beyond any doubt that equidistance has always been, and continues to be, found a useful technical method for delimitation, even though the work of the Third United Nations Conference on the Law of the Sea has led to the suppression of any mention of it in Article 83 of the 1982 Convention on the Law of the Sea. One should note that, in spite of this fact, equidistance has not been altogether expelled from that Convention. According to its Article 4 thereof equidistance is still the official criterion for establishing the outer limit of the territorial sea.

Regarding natural boundaries, the Timor Trough seems to be the only indisputable example of a geomorphological phenomenon governing a line of delimitation. The Timor Trough is described by The Geographer, Bureau of Intelligence and Research of the Department of State of the United States in *Limits in the Seas,* No. 87, page 3, as follows :

> "Two major submarine morphologic provinces may be distin-

guished : the Timor trough in the northwest and the Sahul shelf in the southeast. The Timor trough is an elongated basin oriented approximately northeast-southwest ; the maximum depth is approximately 3,200 meters."

In the other cases mentioned by Libya, namely the 5 February 1974 Agreement between Japan and Korea, and the 29 January 1974 Agreement between France and Spain, the existence of marked morphological features led to the establishment of joint development zone limits, and did not really determine the course of the boundary.

But it is important to observe that it is one thing for any State to be free to conclude with another State a delimitation agreement that would take into account geomorphological features of whatever dimension ; for a tribunal to feel obliged to decide on the basis of any accidental feature of the sea-bed is quite another.

When we resort to maps, we should not merely search for natural boundaries in the dark blue depths of depressions and troughs or in the pale shallownesses of ridges and plateaus.

Beyond all this we have to resort to law and it is law that will have the final word.

* * *

The Judgment has correctly recognized that in the present case the Court cannot rely on any provision of treaty-law as a source of the law to be applied. Libya, unlike Malta, is not a party to the 1958 Geneva Convention on the Law of the Sea. There is no previous agreement on delimitation of maritime boundaries in force between the Parties. On the other hand, the 1982 Montego Bay Convention on the Law of the Sea is not yet in force, and will not be for a considerable time, if the present pace of ratifications is maintained. Therefore provisions of treaty-law, particularly those of the two above-mentioned Conventions, may be invoked only in so far as they constitute the expression of customary international law.

The Judgment did not find it necessary to evoke the history of the evolution of the concept of continental shelf. The Court itself has done so extensively in the *North Sea Continental Shelf* cases (see *I.C.J. Reports 1969,* p. 32, para. 42) and in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case (see *I.C.J. Reports 1982,* p. 43, para. 47). And in both these Judgments it was emphasized that even today some of the main elements of the doctrine of the continental shelf can be traced back to Proclamation 2667 made by the President of the United States on 28 September 1945.

The 1969 Judgment of the Court certainly continues to be a milestone in the evolution of the concept of the continental shelf. In the Judgment of 12 October 1984 given by the Chamber of the Court in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area,* between Canada and the United States, the importance of the 1969 Judgment was emphasized in strong terms :

> "That Judgment, while well known to have 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, is nonetheless the judicial decision which has made the greatest contribution to the formation of customary law in this field. From this point of view, its achievements remain unchallenged." (*I.C.J. Reports 1984,* p. 293, para. 91.)

A few of the 1969 *dicta* constitute basic formulations of the principles and rules governing the whole of the field of the law of the continental shelf, that must be kept in mind whenever we deal with this problem. The overriding *dictum* is contained in operative paragraph 101 (C) (1) of the Judgment which reads :

> "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" (*I.C.J. Reports 1969,* p. 53).

The Judgment contains a recognition moreover that such a natural prolongation is a fact of nature, so that geography cannot be ignored when trying to identify the continental shelf of a given country. Indeed it says in paragraph 95 :

> "The institution of the continental shelf has arisen out of the recognition of a physical fact ; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime." (*Ibid.,* p. 51.)

And more : "The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact . . ." *(Ibid.)*

The source of the concept of the continental shelf as the natural prolongation of the landmass arises from the basic principle that the land dominates the sea. The Court put it in the following terms :

> "What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, – in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea." (*Ibid.,* p. 31, para. 43.)

The Judgment also considered it

> "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 . . . 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 seabed and exploiting its natural resources" (*I.C.J. Reports 1969,* p. 22, para. 19).

Another important point of the 1969 Judgment is that there is no rule of international law imposing the equidistance method as obligatory, failing the agreement of the Parties (see *ibid.,* p. 41, para. 69).

The Anglo-French Arbitration of 1977 coincides on most points with the 1969 Judgment on the establishment of the principles and rules governing the question of delimitation of the continental shelf. The importance of the relationship between the physical fact of natural prolongation and the legal concept of continental shelf, the nature of the rights of the coastal State over the shelf, and the relevance of the configuration of the coasts to the identification of the natural prolongation, are likewise emphasized in the arbitral decision.

The 1982 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case confirmed the basic findings of the *North Sea Continental Shelf* cases and added some important *dicta* on relevant aspects of continental shelf delimitation.

For instance, the importance of the configuration of the coasts is emphasized in paragraph 74 of the 1982 Judgment.

The 1982 Judgment is especially meaningful for the present case because of the controversy between the Parties relating to Libya's fidelity to the basic principle of natural prolongation and Malta's reliance on the "distance principle" as it appears in Article 76 of the 1982 Convention on the Law of the Sea. On this point the Court said :

> "According to the first part of paragraph 1 the natural prolongation of the land territory is the main criterion. In the second part of the paragraph, the distance of 200 nautical miles is in certain circumstances the basis of the title of a coastal State." (*I.C.J. Reports 1982,* p. 48, para. 47.)

And

> "In so far however as the paragraph provides that in certain circumstances the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State, it departs from the principle that natural prolongation is the sole basis of the title." (*Ibid.,* para. 48.)

But the same paragraph 48 concluded that the distance principle is a mere "trend". It reads :

> "Both Parties rely on the principle of natural prolongation : they

have not advanced any argument based on the 'trend' towards the distance principle. The definition in Article 76, paragraph 1, therefore affords no criterion for delimitation in the present case." (*I.C.J. Reports 1982,* pp. 48-49.)

So, in the present case, the argument of Malta, according to the jurisprudence of the Court, is based on a "trend" that cannot yet be considered as a rule of customary international law.

Consistently with the 1969 Judgment, the 1982 Judgment discards equidistance as a mandatory rule :

"While ... there is no mandatory rule of customary international law requiring delimitation to be on an equidistance basis, it should be recognized that it is the virtue – though it may also be the weakness – of the equidistance method to take full account of almost all variations in the relevant coastlines." (*Ibid.,* p. 88, para. 126.)

But one of the highlights of the 1982 Judgment deals with the specificity of each case of dispute over continental shelf delimitation, where it states :

"Clearly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances ; therefore, no attempt should be made here to overconceptualize the application of the principles and rules relating to the continental shelf." (*Ibid.,* p. 92, para. 132.)

And the Judgment proclaims :

"the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances" (*ibid.,* para. 133 A. (1)).

The Judgment accepted the reality of the "widening of the concept [of continental shelf] for legal purposes" :

"at a very early stage in the development of the continental shelf as a concept of law, it acquired a more extensive connotation, so as eventually to embrace any sea-bed area possessing a particular relationship with the coastline of a neighbouring State, whether or not such area presented the specific characteristics which a geographer would recognize as those of what he would classify as 'continental shelf' " (*ibid.* p. 45, para. 41).

The Judgment dated 12 October 1984 of the Chamber of the Court, constituted by the Order of 20 January 1982 in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, contributes substantially to consolidating the basic findings of the jurisprudence of the Court on the question of delimitation of continental shelf, and to clarifying additional points.

Regarding the problem of natural submarine frontiers the Chamber

concurred with the previous Judgments in giving them a limited weight. Indeed, in paragraph 46 we read :

> "Even the most accentuated of these features, namely the North-east Channel, does not have the characteristics of a real trough marking the dividing-line between two geomorphologically distinct units. It is quite simply a natural feature of the area. It might also be recalled that the presence of much more conspicuous accidents, such as the Hurd deep and Hurd Deep Fault Zone in the continental shelf which was the subject of the Anglo-French arbitration, did not prevent the Court of Arbitration from concluding that those faults did not interrupt the geological continuity of that shelf and did not constitute factors to be used to determine the method of delimitation." (*I.C.J. Reports 1984,* p. 274, para. 46.)

And more in paragraph 56 :

> "It must, however, be emphasized 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." (*Ibid.,* p. 277.)

The Chamber did not fail to emphasize the limited reach of customary international law in the actual process of delimitation. In paragraph 81 of the Judgment it found :

> "In a matter of this kind, international law – and in this respect the Chamber has logically to refer primarily to customary international law – can of its nature only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective." (*Ibid.,* p. 290.)

And it concluded in paragraph 82 :

> "The same may not, however, be true of international treaty law. There is, for instance, nothing to prevent the parties to a convention – whether bilateral or multilateral – from extending the rules contained in that convention to aspects which it is less likely that customary international law might govern." *(Ibid.)*

On the role and nature of the equidistance principle the Chamber followed in the footsteps of the 1969 and 1982 Judgments. In paragraph 107 the Chamber stated clearly :

> "It will not be disputed that this method has rendered undeniable service in many concrete situations, and is a practical method whose use under certain conditions should be contemplated and made mandatory by a convention like that of 1958. Nevertheless this concept, as manifested in decided cases, has not thereby become a rule of general international law, a norm logically flowing from a legally binding

principle of customary international law, neither has it been adopted into customary law simply as a method to be given priority or preference." (*I.C.J. Reports 1984,* p. 297.)

One of the most important passages of the Judgment of the Chamber is the one where, drawing upon the Judgment in the *North Sea Continental Shelf* cases, the Chamber enunciated what could be considered the "basic norm", which is contained in paragraph 112 and reads :

"(1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

(2) In either case, 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." (*Ibid.,* pp. 299-300.)

I have tried to draw up a *marginalia* of the important findings of the Court in its three relevant Judgments, as well as the 1977 Decision of the Anglo-French Court of Arbitration, as an important background for consideration of the more recent achievements in the field of treaty-law through the almost ten years of labour of the Third United Nations Conference on the Law of the Sea, of which the 1982 Montego Bay Convention is the result.

* * *

The two Parties in the present case have diverged in their pursuit of the basic legal support for their claims. Libya attached itself to the principle of natural prolongation, attributing special importance to the physical aspects of natural prolongation, to develop its claim of the existence of two natural frontiers in the area, namely the "Rift Zone" in the northwest and the line of Escarpments (Sicily-Malta Escarpment and Medina Escarpment, separated by the Heron Valley) in the east. The "Rift Zone", extending from the Egadi Valley to the Heron Valley, over more than 300 nautical miles, is a fundamental discontinuity according to Libya and constitutes a natural frontier.

Malta denies any importance to the same morphological features, affirming the continuity, "simplicity" and "normality" of the area to be

delimited. Moreover, Malta alleges the progressive erosion, in the course of the work of the Third United Nations Conference on the Law of the Sea, of the hitherto undisputed principle of natural prolongation, and has maintained that the fundamental principle of the law of the continental shelf is, since the 1982 Convention, the "principle of distance" as envisaged in paragraph 1 of Article 76 of the Convention.

In view of the argument of Malta the Court was bound to examine the "new trends" of international law in the law of the sea, as reflected in the Montego Bay Convention, although the Special Agreement between Libya and Malta does not contain any specific proviso attributing to the Court such a task, as was the case with the Tunisia/Libya Special Agreement.

At the outset one should enquire what is the present status of the 1982 Convention on the Law of the Sea. Of course it is a Convention signed by a large number of States, ratified by a few, and not yet in force. The required number of ratifications for its coming into force (60 ratifications) is far from being attained : at present only 14 States have ratified it. Therefore the Convention can be taken into consideration only in so far as it contains principles of customary international law. Apart from that the Convention is irrelevant to this case.

But since the Judgment, particularly in paragraphs 39, 42 and 43, has attributed to the so-called "distance principle" the status of a rule of customary international law in the form it takes in Article 76, paragraph 1, of the Convention, I feel it would be appropriate to analyse its meaning and importance.

My first observation is that Article 76 relates to the definition of the continental shelf and of its outward limits, and not to delimitation, which is dealt with in Article 83. Paragraph 10 of Article 76 contains an express proviso according to which :

> "The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."

In fact, paragraph 1 of Article 76 by no means discards the principle of natural prolongation as a corollary of the rule that the land dominates the sea. Indeed Article 76, paragraph 1, reads :

> "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 . . .*" (Emphasis added.)

The principle of natural prolongation therefore has not been abandoned ; it is supplemented by the second part of the paragraph which took care of the situation of States possessing a continental margin with an outer edge not extending to the distance of 200 nautical miles.

The history of this provision is well known and does not require to be

recapitulated. Throughout the greater part of the Third United Nations Conference on the Law of the Sea two important disputes took place : the equidistance versus equitable principles controversy, and – most important – the struggle against the growing tendency of many countries towards the establishment of 200 miles as the breadth of the territorial sea. The fears of a number of countries, rightly concerned about the threat to the preservation of the sacrosanct principle of the freedom of the high seas constituted by any generalization of the trend towards the 200-mile territorial sea, led to a painstaking and intricate exercise of diplomacy, from which emerged a consensus on the recognition of the 200 miles exclusive economic zone and the 200 miles proviso of Article 76, paragraph 1. The dispute between the "territorialists" and the "patrimonialists" is probably at the root of the magic number of 200 miles. It was negotiated to counter the 200 miles territorial sea, renunciation of which by the interested countries will follow from the signing of the Convention and by the forthcoming ratification of its provisions.

Now, the problem before us is : does the distance criterion of Article 76, paragraph 1, of the 1982 Convention on the Law of the Sea constitute customary international law, in the sense that 200 nautical miles from the baselines, from which the breadth of the territorial sea is measured, will be the minimum breadth of the continental shelf, while the maximum breadth of the same continental shelf shall not exceed 350 nautical miles, according to paragraph 5 of the same Article ?

In spite of all the speculations backing the theory of instantaneous formation of customary international law by the procedure of consensus, I find it difficult to accept at this time the distance provisions of Article 76, paragraphs 1 and 5, as rules of customary international law. The only rule of customary international law retained by this Article is, I submit, still the old rule of natural prolongation. Anything further lacks evidence of *opinio juris sive necessitatis* and of *usus*. To the best of my knowledge, there is not one single convention between States – aside the Montego Bay Convention – embodying the rule of minimum 200 miles and maximum 350 miles. Neither is there any decision of an international tribunal subscribing to these distance criteria. In support of the distance principle political and diplomatic convenience can be invoked – but this is hardly *opinio juris sive necessitatis*.

* * *

On the other hand, it has been suggested that the magic criterion of 200 miles tends to lead to a merger of the two concepts – continental shelf and exclusive economic zone. I have my doubts on this point. There are substantial differences in the jurisdiction of the coastal State in the two cases. Part V of the 1982 Convention, which deals with the exclusive economic zone, does not contain one word that would give the rights of the

coastal State an *ab initio* and *ipso facto* character, as is clearly established in paragraph 3 of Article 77 concerning the continental shelf. It is true that the Convention does not require an express claim or proclamation of the coastal State to establish the existence of the exclusive economic zone. But so far the practice of States has been that an express claim is necessary for the existence of the exclusive economic zone. Moreover, according to Article 57 of the Convention, the breadth of the exclusive economic zone shall not extend beyond 200 nautical miles. In the case of the exclusive economic zone 200 nautical miles is the maximum breadth and in the case of the continental shelf it is the minimum breadth. The maximum breadth of the latter, according to paragraph 5 of Article 76, will be 350 miles or 100 miles from the 2,500-metre isobath. So the two boundaries of maritime spaces, although possibly coinciding, delimit different things.

What does not seem clear to me is what the distance principle of Article 76 has to do with the present delimitation. The Maltese group of islands lies about 180 nautical miles off the coast of Libya ; so, unless one accepts the argument of Libya of the fundamental discontinuity and natural boundaries, what exists between the two coasts is one single continental shelf of less than 200 nautical miles to be divided by agreement between the Parties, according to principles and rules to be established by the Court in its Judgment.

As to the exclusive economic zone, neither Party has so far made any official claim. Malta has unilaterally established a 25-mile fishing zone to protect its traditional fisheries, especially the *kannizzati,* the latter being the source of 40 per cent of the Maltese catch. Although the *kannizzati* – made of bundles of palm leaves under which certain species gather in search of shade and are then caught – are very similar to the Tunisian historic fisheries, which involved a substantial part of the argument of the Parties in 1982, in the present case nobody has questioned the right of Malta to establish its 25-mile fishery zone. Since, furthermore, it is located to the north of what the Judgment treats as the maximum northward adjustment of the median line (para. 72), I think we should not lose any time in discussing it.

To sum up, Article 76 of the Convention retained natural prolongation as a source of entitlement and as a rule of customary international law. The so-called "distance principle" could hardly be considered a rule of customary international law at the present time.

Moreover, the concept of continental shelf, since its inception in the Truman Proclamation, has related to a submarine area – the natural prolongation of the territory of a State into and under the sea. There is nothing in the Montego Bay Convention that can be said to change this fact. It is true that the physical fact of the geological "species of platform" has been progressively replaced by the juridical concept of the continental shelf. I admit that in the light of the 1982 Convention the distance of 200 miles may be measured on the surface of the waters. But I doubt

whether the "new trends" have in any way changed the nature of the continental shelf as a submarine area.

We have before us a case of delimitation of continental shelf with States having opposite coasts lying less than 200 miles apart. The natural prolongations of the coasts meet and overlap. The Court resorts to equidistance because equidistance is a method – among others – which recommends itself in cases like this – not on account of the so-called "distance principle". In a second stage the Court corrects the equidistance line to take account of special circumstances and to achieve an equitable result. That is a normal procedure according to customary international law. I do not see any need to resort to paragraph 1 of Article 76 *in fine* of the Montego Bay Convention, and to introduce into the Judgment an unwarranted and premature discussion on the nature of its new approach to the definition of the continental shelf.

As regards the exclusive economic zone, I do not see why the Judgment devotes a considerable part of the reasoning to it (paras. 31-34).

The exclusive economic zone is a creation of the Third United Nations Conference on the Law of the Sea and of the Montego Bay Convention. Some believe that within the economy of the Convention the concepts of continental shelf and exclusive economic zone tend to merge and become the same thing. I disagree with that view. In fact the rights and jurisdiction of the States over the continental shelf and the exclusive economic zone overlap to a considerable degree ; but they differ in many ways. For instance, Article 56 of the Convention deals with the "duties" of the coastal State in relation to the exclusive economic zone and there is no similar proviso regarding the continental shelf. Another striking difference in the two régimes is the one concerning Article 82 of the Convention, under which the coastal State exploring non-living resources of the continental shelf beyond 200 miles shall make payments and contributions to the Authority, which shall distribute them "on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them". Nothing of that kind exists concerning the exclusive economic zone.

Now, I repeat, in the present case, neither Party has claimed an exclusive economic zone, and an offer of Libya to negotiate the limits of the latter together with those of the continental shelf was rejected by Malta, and therefore nothing of the kind was included in the Special Agreement. So, I submit that the *excursus* of the Judgment on the exclusive economic zone was unnecessary and does not contribute to the clarity of the reasoning.

* * *

Already in the *North Sea Continental Shelf* cases the Court dealt with the

problem of proportionality in two different contexts : according to paragraph 101 (C), which deals with the principles and rules of international law applicable to delimitation proper, resort to the concept of proportionality is ancillary and relates only to marginal "areas that overlap", which are to be divided between the Parties 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". But the *dispositif* deals with proportionality in another context, namely that of subparagraph (D), which enumerates the factors to be taken into account in the course of the negotiations of the Parties, and lists under (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 and prospective, of any other continental shelf delimitations between adjacent States in the same region" (*I.C.J. Reports 1969,* p. 54).

The Court, though rejecting the concept of proportionality raised by the Federal Republic of Germany as corresponding to "a just and equitable share" of the continental shelf, could not discard it, and that is why it emerges in the *dispositif* as a criterion for the division of the areas which overlap, and as a "factor" to be taken into consideration by the Parties in the "course of negotiations". One should observe the difference : in the former context there is no definition of proportionality between the areas to be divided, so much so that paragraph 101 (C) (2) stipulates that failing agreement between the Parties the areas should be *equally* divided. Conversely the wording of paragraph 101 (D) (3) spells out the meaning of proportionality, that is to say, a balance between the extent of the continental shelf areas and the length of coast, measured in the general direction of the coastline. But again, I repeat, in this case proportionality was resorted to as "a factor to be taken into account" by the Parties "in the course of negotiations". And this, with the goal referred to in paragraph 92 of the 1969 Judgment, namely that delimitation be carried out in such a way as to be recognized as equitable.

The 1977 Decision in the Anglo-French Arbitration contests the general application of the criterion of a reasonable degree of proportionality, as put forward by the 1969 Judgment. In paragraph 99 it implies that the criterion was intended to be applied in the specific situation of three adjoining States situated on a concave coast and nothing else. And in paragraph 101 the Court of Arbitration stated :

> "In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor . . . 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."

The Court of Abitration shunned the idea of embarking on "nice calculations" between the extent of the coasts of the State and the area of continental shelf appertaining to it. Proportionality is, on the contrary, recognized as a criterion for remedying distortions due to particular geographical features. Proportionality is an instrument for correcting disproportionality.

Paragraph 98 of the 1969 Judgment (*I.C.J. Reports 1969,* p. 52) seems to understand the element of proportionality in a much broader sense than the one suggested by Libya in 1982. Indeed it stresses the need to measure the coastlines

> "according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions".

In favour of its own position Libya quoted in 1982 the following passage of the Decision in the Anglo-French Arbitration :

> "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. Futhermore, 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." (Para. 101.)

But the fact is that in the present case the flagrant disproportion in the lengths of coasts is such that the correction of any line according to a reasonable ratio is indispensable for achieving an equitable result.

The argument of Libya repeatedly makes reference to consideration of proportionality in relation to the landmass of the territory of each of the Parties. I think the Judgment is right in recognizing that these territorial dimensions are not to be taken into consideration ; it is the coastal length that matters.

In the Arbitral Award of 14 February 1985, the Arbitration Tribunal for Delimitation of Maritime Boundaries between Guinea and Guinea-Bissau found in paragraph 119 :

> "As to proportionality in relation to the landmass of each State, the Tribunal considers that this is not a relevant circumstance in the present case. The rights over the sea to which a State may lay claim are related, not to the extent of its territory behind its coasts, but with

those coasts, and the way in which they bound that territory. A State of limited area may claim much more extensive marine territories than a State of large area : everything depends on their respective coastal fronts, and on their presentation." *[Translation.]*

The striking difference in the lengths of the relevant coasts, without precedent in the practice of States – at least in the degree present here –, could not be ignored by the Court. But the Judgment, following in the steps of the Anglo-French Court of Arbitration, took into account disproportionality rather than proportionality ; and this flagrant disproportionality was recognized as an important special circumstance for the correction of the equidistance line. The principle of proportionality itself was retained only for its normal *a posteriori* use to test the equity of the final result.

* * *

I cannot subscribe to the way in which the northern extreme parameter, for the establishment of the corrected equidistance line, is arrived at. The consideration of the general geographical context proposed by paragraph 69, so as to come to the conclusion that although the delimitation relates only to the continental shelf appertaining to two States it is at the same time a delimitation between a portion of the southern littoral and a portion of the northern littoral of the Central Mediterranean, seems to me a far-fetched exercise. We are dealing with the delimitation of continental shelf between two States, and under the terms of the Special Agreement we have no jurisdiction to deal with delimitation of "portions" of littorals of continents. Moreover, parts of the coast of Sicily relevant for this exercise have already been used in the "provisional" median line in the channel between Malta and Sicily. Of course all this is only the first step towards establishing the extreme limit northwards of the shifting of the equidistance line, which is dealt with in paragraph 72 of the Judgment. There, resorting to a hypothetical situation tantamount to ignoring the existence of Malta, the Court established a notional median line between Libya and Sicily. That line is to provide the maximum northwards adjustment of the Libya-Malta median line, estimated by the Judgment to be 24′ of latitude. Between the two lines the Court has reached the solution of the line of 34° 30′ N, resulting from a correction of 18′ which it considers equitable.

Though accepting the decision of the Court I have doubts concerning the intricate method of reasoning. Malta exists and is before us as a Party in the case. It cannot be ignored even *ex hypothesi.* For so far as its coasts extend, they interrupt any possible relationship between the coasts of Libya and Italy. In opposite States it is the confrontation of coasts that plays the paramount role in the delimitation process, and there is no such confrontation between Libya and Sicily as long as the Maltese coasts are inter-

posed between them. I have reservations in relation to the imaginary refashioning of geography implied by paragraph 72 of the Judgment. It would be much simpler to attribute partial effect to the coasts of Malta, to be balanced up with similar partial effect to be given to the disproportionality in the lengths of the relevant coasts, so as to reach an equitable result.

However, my reservations relate only to some aspects of the reasoning. I am convinced that the equitable solution, which is the final goal of the delimitation procedure according to Article 83 of the Montego Bay Convention, is fully achieved by the present Judgment.

(Signed) José SETTE-CAMARA.