COUNTER-MEMORIAL OF MALTA

CONTRE-MÉMOIRE DE MALTE

VOLUME I

INTRODUCTION

1. This Counter-Memorial is filed pursuant to the Order made by the President of the Court on 26 April 1983 fixing 26 October 1983 as the time limit for the filing of the counter-memorials in accordance with Article II of the Special Agreement between Malta and Libya.

2. This Counter-Memorial is divided into the following Parts:

Part I	The Fundamental Ideas Underlying the Libyan Case
Part II	The Task of the Court
Part III	Critique of Libya's Substantive Case
Part IV	Restatement of Malta's Case in the light of the Libyan Memorial

PART I

THE FUNDAMENTAL IDEAS UNDERLYING THE LIBYAN CASE

CHAPTER I

THE SUBSTANCE OF THE LIBYAN CASE: MALTA DISREGARDED

3. Reduced to its essentials, the argument developed in the Libyan Counter-Memorial may be summarized as follows: there is a fundamental discontinuity between the continental shelf of Malta and the continental shelf of Libya arising out of the presence of a zone which Libya calls the "Rift Zone". This discontinuity enables one to identify two distinct natural prolongations. The result, so Libya argues, is that the delimitation must be carried out on the basis of this discontinuity.

4. A glance at the map immediately enables one to identify one of the most remarkable elements in this claim: it takes no account of the existence of Malta. Since Malta is presented as being situated on the natural prolongation of Sicily, and the "Rift Zone" is presented as a natural frontier which imposes itself as the appropriate line of delimitation, the "Rift Zone" separates the natural prolongation of Libya not only from that of Malta but at the same time from that of Italy. The northern boundary of the Libyan continental shelf as conceived by Libya in relation to Malta is thus, in the logic of the Libyan argument, exactly the same as the one which Libya would claim vis-à-vis Italy if Malta did not exist.

5. Malta will demonstrate in the course of this Counter-Memorial that in fact the so-called "Rift Zone" does not show the characteristics of a radical physical separation between the natural prolongations of the two countries and that in international law this question has in any event no relevance to the delimitation of the continental shelf. It is important however to identify at the outset what one might call the philosophy of the Libyan case, for many aspects of the Libyan Memorial are more readily understood in the light of such an identification.

6. It is in relation to this philosophy, for example, that the contention so strongly advanced in the Libyan Memorial of "an indefinite extension of the Libyan claim seawards"[1] assumes a special importance. A reading of the Libyan Memorial conveys the impression that for Libya it is less a matter of delimiting the continental shelf of the neighbouring states of Malta and Libya, than it is one of establishing how far towards the north Libya's continental shelf rights extend. Libya would really like to see its rights stretch as far as the limit of Italian rights without being in any way affected by the existence of Malta's

[1] Libyan Memorial p. 52 para. 4.21; cf. pp. 49–53 paras. 4.12–4.23.

rights. It is in the same perspective that one may see the Libyan observation that the Court should not delimit the continental shelves of Malta and Libya beyond the Sicily–Malta Escarpment, i.e. beyond the meridian of Ras Zarrouq, at about 15° 30′ E, "where this physical boundary roughly ends".[1] Libya's continental shelf rights evidently continue, so the Libyan Memorial says on a number of occasions,[2] further to the east. This contention, one may observe in passing, is somewhat surprising; why should the descent into the depths of the Ionian sea limit the rights of Malta towards the east but not constitute any obstacle to the extension of the rights of Libya towards the north? However, it is necessary, so Libya considers, that a delimitation vis-à-vis Malta should in no way trespass on some future delimitation vis-à-vis Italy. Moreover, the Libyan Memorial adds:

> "... a little island group ... would erase the obvious relationship that exists across this Sea between the coasts of mainland Italy and of Libya".[3]

At least one may say Libya is not concealing its cards. For it, the true confrontation in this part of the Mediterranean is between Libya and "mainland" Italy, and it is only in relation to Italy that Libya is prepared to limit its indefinite claim northwards–a new kind of "manifest destiny". By contrast, Libya never appears to acknowledge the existence of a face-to-face relationship with Malta.

7. To give some semblance of justification to this attempt to transform the delimitation between Malta and Libya into the establishment of a northern boundary of continental shelf rights between Libya and Italy, as if Malta did not exist, the Libyan Memorial does not hesitate to embark upon the most surprising descriptions. The purpose is obvious: if Malta could be regarded as a negligible quantity – as seems to be the thrust of Libya's Memorial – there might after all be nothing juridically scandalous if Malta were disregarded.

8. First of all, says the Libyan Memorial, Malta is not really an island opening on to the ocean. The population of the two islands of the Maltese archipelago, so Libya describes it, has always been essentially agricultural, and the capital cities of the two islands "were in the centre of each island". Better still:

> "The inland location of almost all towns and villages is a striking characteristic of Malta even today. In short, Malta is at present, as it has been in the past, an *'inland' community*.[4] Malta is in effect *land-centered*[4] and not, as might have been expected, a nursery of sailors and fishermen dependent on the sea, comparable to Greece or parts of Spain and Italy"[5]

In the same vein the suggestion is made that Maltese "fishing activity is

[1] *Ibid.* p. 34, para. 3.24.
[2] *Ibid.* p. 34, para. 3.24; p. 133 para. 8.16; p. 149 para. 9.49.
[3] Libyan Memorial, p. 149, para. 9.49.
[4] Emphasis supplied.
[5] *Ibid.* pp. 20–21, para. 2.40.

on a small scale".[1] Then the Libyan Memorial adds that, even if Malta were an island possessing coasts opening onto the sea, these face not the south but only the north:

> "... on the Islands of Gozo and Malta the longest stretches of coast or coastal front face north or, more often, north-east ... Very little of the Maltese coast actually faces due south ..."[2]

Moreover, the southern coast, to the extent that it exists, has no economic interest:

> "... the major economic coastal activity is restricted largely to the northeast and east coasts"[3],

and the "inland community" which constitutes Malta has

> "... just one large window to the sea – a window facing northward. Especially notable is the complete absence of any permanent settlement along the whole of the south and west-facing coastline of the Island of Malta".[4]

In a word, Malta is not really an island; or, if it is, it has one side only. It is an island with a northern facing facade, without a back – a kind of unilateral island.

9. For those who know the close links between Malta and the sea and the significant rôle which Malta has played as an island situated at the cross-roads of the north-south and east-west passages of the Mediterranean, such descriptions hardly merit refutation. However, out of respect for the Court, Malta has set out in an Annex[5] a number of historic and economic facts and other material which may assist the Court in assessing at their true value the Libyan allegations which have as their manifest purpose the creation of the impression that Malta is "inland and land-centered" rather than being a true island.

10. To the extent that Malta possesses coasts, Libya continues, these coasts are in any case insignificant – so insignificant that "they are practically impossible to gauge" on a map of the scale of Map 1 of the (1) Libyan Memorial. "From Map 1", it is asked, "in what direction could the coasts of Malta be said to face?".[6] The Libyan Memorial never wearies of insisting upon the short length of the Maltese coasts and of comparing them with the great length of the Libyan coasts. From this difference the Memorial draws legal conclusions which the present Counter-Memorial will examine presently. For the moment it is sufficient simply to counter the impression which the Libyan Memorial attempts to create, viz. that the coasts of Malta are so ridiculously short, compared with those of Libya, that they are not even worth taking into

[1] *Ibid.* p. 14, para. 2.15.
[2] *Ibid.* p. 20, para. 2.37.
[3] *Ibid.* p. 20, para. 2.39.
[4] *Ibid.* p. 21, para. 2.49.
[5] Annex 1.
[6] *Ibid.* p. 17, para. 2.27.

consideration. To reinforce this impression, the Libyan Memorial does not limit itself to comparing the shortness of the Maltese coast with the lengths of the Libyan coast. It also brings into play the comparison of the small insular territorial area of Malta with the enormous continental mass of Libya. This idea crops up as a theme throughout the Libyan Memorial:

> "... in contrast to Malta, small islands with very limited coastlines however measured, Libya is a very large continental State with an extensive coastline"[1];
>
> "... in the circumstances of the very small island group of Malta and the large continental State of Libya with its extended coastline ..."[2];
>
> "... the long extended coast of a continental landmass opposite small islands"[3];
>
> "... the obvious point that Malta and Libya are, in terms of size, just not comparable"[4];

11. Malta, Libya says, is an island "small indeed" even in the Mediterranean.[5] Its dimensions "are not on the same scale as those of other States that abut the Central Mediterranean",[6] and even less are they on the same scale as the "continental landmass" of Libya. This for the Libyan Government is one of the most important elements in the situation:

> "... it is apparent that the most significant relevant circumstance of a geographic character is the difference between the size of Libya and the fact that *Malta* ... is a *small group of small islands while Libya is a vast continental State*".[7]

12. It is evident that the respective sizes of the two States interested in a delimitation does not have the slightest legal relevance; the only thing which matters is the coasts, as will be seen later, but not the *hinterland* which lies behind them. There is no support either in State practice or in arbitral or judicial decisions for the suggestion that a State with a large area has greater maritime rights than a State with a small one or that a continental State has more rights than an insular one.

13. The Libyan Memorial appears to have overlooked entirely the fact that Malta is not only a *State* but also a *coastal* State. The Libyan Memorial also forgets that, by virtue of the principle of the sovereign equality of States, Malta has the same rights as all coastal States to the

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[1] *Ibid.* p. 22, para. 2.46.
[2] *Ibid.* p. 53, para. 4.24.
[3] *Ibid.* p. 135, para. 9.03.
[4] *Ibid.* p. 142, para. 9.21.
[5] *Ibid.* p. 141, para. 9.20.
[6] *Ibid.* p. 148, para. 9.45.
[7] *Ibid.* p. 137, para. 9.11: Emphasis supplied.

enjoyment of maritime jurisdiction. This almost complete disregard of the coastal State quality of Malta has, as will be seen, led Libya to misunderstand both the fundamental principle of the sovereign equality of States and the no less fundamental principle of the right of every coastal State to the possession of maritime jurisdiction as acknowledged by international law.

14. The Libyan Memorial does not hesitate to push this concept of the inequality of States to the extreme. The Mediterranean Sea, so Libya explains, is small and the areas of continental shelf available for division are relatively limited. Small States and, even more so, small islands must understand that they cannot have claims comparable with those of large States. The extraordinary language of the Libyan Memorial warrants quotation:

> "The Mediterranean Sea is bordered by many continental States and dotted with many islands. When the claimant is a very small island, it must be fully prepared to consider the rights and claims of its much larger neighbours";[1]
>
> "... a small group of islands such as Malta must ..... according to equitable principles, necessarily expect a relatively small area of continental shelf".[2]

In these surprising passages one finds simultaneously expressed both the idea of unequal maritime rights for States of unequal size and the idea of the inequality of continental and insular States.

15. Reference has already been made to the suggestion in the Libyan Memorial that the only relevant coastline, if any, of Malta is the one which faces north. This is only one aspect of the systematic attempt in the Libyan Memorial to persuade the Court that Malta possesses no significant coasts oriented towards the south, capable of generating areas of maritime jurisdiction between its coasts and those of Libya. The Libyan Memorial makes a great effort not only to distort the coasts of Malta towards the north but also to attach Malta entirely to the north, that is to say, to Sicily and to deny to it any maritime "window" towards the south. These efforts take a number of diverse and unexpected forms:

> — Originally, so Libya says, Malta and Sicily were but one: "there seems little doubt that the Maltese islands were connected by land to Sicily during prehistoric times",[3] "with Malta emerging less than 10 million years ago";[4]
>
> — Emphasis is based upon "the close geological ties between Malta and Sicily";[5]
>
> — The Memorial further notes "Malta's relative proximity to

[1] *Ibid.* p. 155, para. 10.05.
[2] *Ibid.* p. 136, para. 9.07.
[3] *Ibid.* p. 39, para. 3.38.
[4] *Ibid.* p. 40, para. 3.32.
[5] *Ibid.* p. 41, para. 3.45.

Sicily",[1] and the parallel character of the direction of their coasts;[2] — More significantly, the Libyan Memorial stresses, on several occasions, "Malta's close physical connection with it (Sicily)",[3] "the present-day morphological link between Malta and Sicily"[4] and that Malta "physically projects" from Sicily;[5]

— This attachment is demonstrated by the fact, stated repeatedly, that Malta is situated on the Malta–Ragusa Plateau, which is itself an extension of Sicily: the Maltese Islands "are situated on the geomorphological extension of the Sicilian landmass";[6] it is on the "submarine extension of the Island of Sicily ... the Ragusa–Malta Plateau, that the Maltese Islands are situated";[7] they are "poised ... on the southwest edge of the Ragusa–Malta Plateau";[8] "it is on the southwestern edge of the Ragusa–Malta Plateau that the Maltese Islands are perched".[9]

— Finally even toponymy has itself been adjusted in such a way as better to suggest this fundamental unity between Malta, the Ragusa–Malta Plateau and Sicily.[10] Thus what the maps and
(11) specialists (including the IBCM, so much appreciated by Libya) normally call the "Malta Plateau" is referred to in the Libyan Memorial as the "Ragusa–Malta Plateau" because, as it frankly admits, this term is more descriptive of the geomorphological link between Malta and the Ragusa area in Sicily".[11] Sometimes the word "Malta" is itself "forgotten" and mention is simply made of the "Ragusa Platform".[12] In a comparable manner, what the Parties in the *Tunisia-Libya* case generally called the "Malta–Misratah Escarpment" or "Ionian Flexure",[13] is described in the Libyan Memorial – at any rate as regards its northern part – as the "Sicily–Malta Escarpment".[14] The Libyan approach is eventually summarized in one phrase:

"... Malta in so many ways is linked to the North".[15]

What all this means is clear: Malta has no basis for a legal claim to any maritime space upon which she turns her back.

16. To this insignificant island, facing only north, lacking any "window" towards the south and inhabited by an "inland" and "land-

[1] *Ibid.* p. 23, para. 2.50.
[2] *Ibid.* p. 20, para. 2.37 and p. 41 para. 3.43.
[3] *Ibid.* p. 14, para. 2.17.
[4] *Ibid.* p. 40, para. 3.41.
[5] *Ibid.* p. 42, para. 3.48.
[6] *Ibid.* p. 14, para. 2.14.
[7] *Ibid.* p. 28, para. 3.08; of p. 29, para. 3.11.
[8] *Ibid.* p. 42, para. 3.48.
[9] *Ibid.* p. 16, para. 2.22; of p. 128, para. 8.05.
[10] *Ibid.* of p. 42, para. 3.48.
[11] *Ibid.* p. 28, Note 1.
[12] *Ibid.* p. 40, para. 3.41.
[13] See *I.C.J. Reports*, 1982, p. 41, para. 32, and p. 57 para. 65.
[14] Libyan Memorial, p. 33, para. 3.21 and p. 41, para. 3.46.
[15] *Ibid.* p. 136, para. 9.10.

centered" community, the Libyan Memorial opposes a "continental landmass" of considerable size, traditionally oriented towards the sea and facing north:

> "The coastal areas of Libya have been not only where most of its population has settled but also the centre of major currents of east/west trade from ancient times ... Not surprisingly, in light of this *traditional orientation toward the sea*,[1] the fishing industry of Libya has been and continues to be locally important ....[2] Libyan *contact with the sea*[1] along this lengthy coastline was an essential formative influence ..."[3]
>
> "The people of what now forms the territory of Libya have *traditionally looked seaward across*[1] the Mediterranean Sea ..."[4]

17. One cannot avoid being struck in this respect by the insistence with which the Libyan Memorial urges that at no time, nor in any manner, has Libya limited its northwards-probing maritime ambitions: the earlier legislation mentioned in this connection has, so Libya contends, remained in force after Libya became independent in 1951 and has since then been continued by the policy followed by Libya in connection with the development of hydrocarbons. As has already been noted, the Libyan Memorial does not hesitate to speak of "... the indefinite extent of the Libyan claim seawards ..."[5]

18. Insisting on the geomorphological and geological attachment of Malta to Sicily, on Malta's "recent" appearance, on the smallness of its size and coastal length, and on the trifling extent of its maritime activities, the Libyan Memorial strives to characterise Malta as a "minor" by virtue of its age, size and development and to accord it no more than a junior role and position. To make matters worse, Libya also endeavours to deny Malta not only its physical and cultural independence, but also its position as a State. By these multiple and sometimes contradictory touches the Libyan Memorial seeks to paint a picture conveying the general impression of a confrontation between, on the one hand, an insignificant *inland island* which turns its back on the area to be delimited and, on the other hand, a coastal State of substantial size, traditionally oriented towards the north and whose "claim seawards" is rightly of "indefinite extent".[6]

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[1] Emphasis supplied.

[2] The words "locally important" are a clear indication of a fishing activity of limited dimension. Elsewhere the Libyan Memorial speaks of the interest of the Libyan population "in fishing", and specifies "especially sponge fishing, in the waters to the north without any particular regard for limits such as those of the territorial sea" (Libyan Memorial p. 49 para. 4.12). These limited Libyan fisheries may be contrasted with the importance of the Maltese fisheries in the area subject to delimitation, as is shown by the Maltese Memorial (pp. 18–19, paras. 44–46).

[3] *Libyan Memorial*, p. 23, para. 2.48.

[4] *Ibid.* p. 49, para. 4.12.

[5] *Ibid.* p. 52, para. 4.21.

[6] With a view to denying maritime rights to Malta, the Libyan Memorial claims both that Malta is only an island and that it has no southern coasts. These two claims hardly appear to be compatible.

19. In these circumstances, it is not surprising that the Libyan argument leads in substance to nothing other than a request to the Court – in the name of equity – to accord Libya the bulk of the continental shelf between itself and Malta and to accord Malta no more than a relatively insignificant area. Nearly everything to Libya, practically nothing to Malta: this is the essence of the Libyan claim.

20. Such a claim is clearly contrary to well established principles of international law relating to the delimitation of the continental shelf:

— It disregards the facts which constitute the geographical context of the delimitation. As an island, Malta has coasts on all sides, including the south, and Malta has always lived – and continues to live – in close relationship with the sea.

— It disregards the basic juridical principle that:

> "... the coast of the territory of the State is a decisive factor for title to submarine areas adjacent to it".[1]

For this purpose one cannot speak of "good" and "bad" coasts: there are only coasts, from which it is necessary to start, here as elsewhere, and the southern coasts of Malta are no less relevant than its northern coasts for the purpose of generating maritime rights.

— It also disregards the principle of the equality of States and takes no account of the fact (to which this Memorial will return in due course) that it is precisely with a view to assuring equality between all coastal States that continental shelf rights have been recognized by international law for every coastal State up to a distance of at least 200 nautical miles from its coasts, whatever may be the configuration of the sea-bed.

21. One of the aspects of the Libyan Memorial most open to criticism from a legal point of view lies in the fact that, by placing the boundary between the continental shelves of Malta and Libya only a few miles from the coasts of Malta, it cuts Malta off from its proper maritime extension, encroaches on Malta's inherent right to explore for and exploit the resources of the sea-bed in front of its coasts and infringes Malta's security interests. One may recall in this connection what Libya herself asserted in the *Tunisia–Libya* case:

> "The rationale for the prohibition against encroachment is self-evident. It lies in the fact that coastal States will not tolerate a sea-bed area immediately in front of their coasts being used by a foreign power. Considerations of security and of practicality, in the sense of the need to have direct and easy liaison between the onshore and offshore activities which are essential to sea-bed exploration and exploitation, make it imperative that a State should have jurisdiction over activities directly in front of its coast. It was for this very reason that, at Geneva in 1958, the proposal by

[1] *Tunisia–Libya Continental Shelf* Case, *I.C.J. Reports 1982*, p. 61, para. 73.

> the Federal Republic of Germany to promote 'le laissez-faire' beyond the limits of the territorial sea was totally unacceptable to the Conference. And it was for this same reason that the coastal State's rights were regarded as attaching to the State *ipso facto* and *ab initio*, and not made dependent upon physical occupation or even proclamation".[1]

Similarly Judge Jiménez de Aréchaga said the following in his Separate Opinion:

> "The reason which explains the wide and immediate acceptance of the doctrine was not so much the possibility it offered of exploiting the natural resources of the shelf, but rather the fact that it authorized every coastal State to object to the exploitation of the sea-bed and subsoil in front of its coasts being undertaken by another State. At that time, only a handful of industrialized States possessed the technology required for such exploitation. Yet, all coastal States accepted the doctrine without hesitation mainly because of its negative consequences, namely, that it prevented a rush and grab for sea-bed resources being undertaken by a few States on the basis of the Grotian dogma of "freedom of the seas". It is for this reason that the 1958 Convention does not subordinate the acquisition *ab initio* of sovereign rights to actual exploitation or occupation, or even to a proclamation of these rights".[2]

Evidently the basic reason why Judge Jiménez de Aréchaga rejected an equidistance line in the *Tunisia–Libya* case was because "this line would impinge on the basic principle of non-encroachment, producing a cutting-off effect by pulling the line too close to Tripoli ...".[3]

22. The Libyan Memorial states:

> "The Mediterranean Sea is hardly the place for disproportionate claims".[4]

Malta subscribes fully to this assertion. Of the two claims – that of Malta to an equidistance line and that of Libya which extends the Libyan continental shelf to the very "windows" of Malta – which is the "disproportionate claim"? Malta does not feel that its claim may be so described.

23. In limiting Malta's continental shelf rights to a minuscule fringe to the south, and denying to Malta any extension towards the east beyond the Sicily–Malta Escarpment,[5] Libya's claim in practice leads to placing Malta in an enclave in the middle of the Mediterranean.

[1] Libya's Reply, p. 59, para. 130.
[2] *I.C.J. Reports* 1982, pp. 118–9, para. 70.
[3] *Ibid.* pp. 132, para. 104.
[4] Libyan Memorial, p. 136, para. 9.07.
[5] It should be noted that the rights of Italy vis-a-vis Greece, far from having been limited to this Escarpment by the 1977 Agreement, have been acknowledged as extending to the middle of the Ionian Sea (see Map on page 100 of Malta's Memorial and Map 15 of the Libyan Memorial).

Such a solution is quite without precedent, in relation to Island States. In arguing for a delimitation which approximates to an enclave solution, the Libyan Memorial once again disregards the principle of the equality of States.

24. To sum up: the Libyan case consists fundamentally in minimizing, virtually to the point of denial, the maritime rights of Malta as a coastal State. Geomorphologically and geologically Malta is deemed to be no more than an appendix of Sicily. Malta is exclusively oriented towards the north. The life and activity of its people are said to have nothing to do with the sea. Malta has no maritime window towards the south. Malta is so small that, compared with the immense continental mass of Libya, it may effectively be disregarded. Malta is a kind of spoilsport to which it would be unreasonable to attach any importance. The only important delimitation in this area is one between Libya and Italy, which would disregard Malta. That, in substance is the underlying theme of the Libyan case.

25. To all this Malta replies with a very simple contention, which paraphrases the formula appearing in paragraph 183 of the award in the *Anglo-French Continental Shelf Arbitration:* "Malta, however, does exist".

CHAPTER II

THE LEGAL BASIS OF THE LIBYAN CASE: NATURAL PROLONGATION

26. As the Libyan Memorial recalls, the claim formulated by Libya in 1973 rests in law on the proportionality of the length of the respective coastlines of the parties:

> "This draft agreement ... proposed a delimitation taking account of the difference in length of the Libyan and Maltese coasts".[1]

> "The distance between the two coastlines (Malta and Libya) was divided in the same proportion as the two shorelines bore to each other".[2]

On this juridical basis, Libya claimed a specific boundary which is (5) reproduced in Map 9 of the Libyan Memorial.[3]

27. In its Memorial submitted in the present case Libya has changed its claim in two respects.

28. First, Libya no longer claims any precise boundary and is content to contemplate, as a sequel to the judgement of the Court, an "*agreement on a delimitation within, and following, the general direction of the Rift Zone as defined in this Memorial*".[4] The Libyan claim is tainted by a double uncertainty. First, in limiting itself to claiming a boundary "within the Rift Zone", without further particulars,[5] Libya is referring to a zone more than 100 kilometres at its widest points, comprising a series of features lacking any single axis and within which it is possible to draw an infinite number of lines. The second uncertainty is that neither of the extremities, western nor eastern, of this so-called Rift Zone is clearly defined in geographical terms (as will more fully be developed in the next Chapter). In effect in failing to formulate any precise claim Libya refuses to acknowledge the proper scope of the Court's function.

29. The second change in the Libyan claim relates to its legal basis. No longer is proportionality invoked as the direct and principal justification for the Libyan position. Instead, reliance is placed upon natural prolongation. Malta's rights, so the Libyan Memorial argues, terminates, on the southern side, in the "Rift Zone", which marks the end of Malta's natural prolongation and its separation from the natural

[1] Libyan Memorial, p. 57, para. 4.33.
[2] *Ibid.* p. 58, para. 4.35.
[3] *Ibid.* p. 58.
[4] *Ibid.* p. 164, No. 9.
[5] *Ibid.* p. 126, para. 7.15; p. 133, para. 8.18; p. 149, para. 9.43; p. 159, para. 10.18.

prolongation of Libya; while, to the east, Malta's limits stretch only to the Escarpments–Fault Zone, and more particularly to the Sicily–Malta Escarpment, which is said to represent the end of the natural prolongation of Malta in this direction. Thus, it is natural prolongation "in its traditional character as a physical concept"[1] – that is to say, as determined scientifically – which forms the legal basis for Libya's case.

30. Malta will demonstrate in the next Chapter the ambiguities and the uncertainties of the so-called "Rift Zone" theory which is so essential an element in the Libyan claim that it is developed throughout the Memorial and appears in the final Submissions which conclude that text.[2] Malta will also identify Libya's mistakes in relation to the Escarpment–Fault Zone. In Malta's submission, the scientific aspects of the Libyan contention have no legal significance since the concept of natural prolongation in the purely physical sense is irrelevant to the international law of continental shelf boundary delimitation. In international law there is no such thing as a natural submarine boundary. This is why the purely factual scientific aspect of the Libyan case will be only briefly touched upon in the present Part. On the other hand, the legal aspect of the natural prolongation argument will be the subject of detailed consideration in Part III, Chapters I and II.

31. Without at this stage considering in detail the Libyan argument relating to natural prolongation, it is necessary to note straight away that the argument as presented now differs considerably from the argument as developed by Libya in the *Tunisia–Libya* case. True, Libya presents, in this case as in the previous one, a theory essentially constructed around the concept of natural prolongation in its physical sense, that is to say, as defined by natural science. However, apart from this point of similarity the present Libyan argument is in no way the same as was presented in the previous case. Indeed, in certain respects the two arguments are diametrically opposed.

32. In the *Tunisia–Libya* case, Libya accorded an essential role to what the Court has called "geology in its historical aspect" which describes "the evolution in the long-distant past",[3] and, more particularly, to the theory of plate tectonics. Libya, could then hardly find sufficiently strong language to criticize the importance which Tunisia attached to marine topography, and more particularly to geomorphology and bathymetry, as well as to the examination of present geological conditions. The judgment in the *Tunisia–Libya* case contains a summary of the arguments advanced by the two Parties in this connection at pp. 54–56, paras. 62–64.[4]

33. In the present case, on the contrary, this combination of the

[1] *Ibid.* p. 92, para. 6.28.

[2] *Ibid.* pp. 163–164.

[3] *I.C.J. Reports* 1982, p. 53, para. 60 and p. 54, para. 61.

[4] By way of example of the position then taken by Libya reference may be made to two passages in the Libyan Counter-Memorial: "... the bathymetry is of minimal relevance. As a fundamental geological concept, the superficial or topographical characteristics of the shelf – of which bathymetry is the most obvious – are not true indicators of prolongation"

(Footnote is continued overleaf).

geomorphological and geological elements is raised to the first rank.[1] In this combination geomorphology plays the essential part while geology, of which the task is to shed light on geomorphology is carefully limited – the point is repeatedly made – to "present day" conditions.[2] Libya is even careful to specify that "in this Memorial there is very little further discussion of plate tectonics as such".[3] To the same end, the Libyan Memorial states that the so-called Rift Zone is "the result of recent and current rifting activity"; this "Rift Zone" is young geologically and continues to stretch and shear the crust of the earth and deform the subsoil and sea-bed";[4] it is "still active".[5]

34. In short, while still resting its case on scientific grounds, Libya appears no longer to have confidence in the same scientific considerations as it had in the earlier proceedings.

35. Another difference relates to the territorial entity by reference to which, according to Libya, one must define the natural prolongation. In the *Tunisia/Libya* case, Libya referred to "the continental landmass" and to the "African landmass", essentially from the geological point of view. But this time, taking account of the Court's decision, Libya refers, very correctly, to "land territory", as understood in its political sense.[6] Occasionally, however, "land territory" becomes "landmass", but this is only for the purpose of referring to the size of the State rather than its geology. It is in this sense that the Memorial says:

> "... the size of the landmass should have some correlation with the extent and 'integrity' of its natural prolongation into and under the sea"[7]

This proposition will be discussed presently.

(p. 146, para. 344); — "bathymetry is not a factor of any importance in determining the extent of the Parties' natural prolongation" (p. 165, para. 413). See also p. 140, para. 137, and p. 163, para. 408. Compare the statements made by Sir Francis Vallat, Professor Bowett and Mr. Highet during the oral proceedings (*I.C.J. Pleadings*, Vol. V, pp. 57-58, 156-157, 220 and 226-227).

[1] See e.g. Libyan Memorial p. 90, para. 6.25; p. 91, para. 6.26; p. 92, para 6.28; p. 102, para. 6.55; p. 127, para. 8.01; page 134, para. 9.02, etc.

[2] *Ibid.* p. 35, paras. 3.01 and 3.02; p. 40, para. 3.41; p. 42, paras. 3.49 and 3.50; p. 43, para. 3.51, etc.

[3] *Ibid.* p. 28, para. 3.10.

[4] *Ibid.* p. 43, para. 3.52.

[5] Nonetheless, the geological history reappears in a number of places. Malta, we are told, emerged "less than 10 million years ago" (p. 40 para. 3.42). The "young" and the "recent" are themselves very relative as is shown by Professor Finetti's study (included by Libya in its *Technical Annex*): the "young rifting process" began "about 15 million years ago" (p. III–3); the "young volcanism" continued to "less than 10 million years ago" (p. III–6 and III–7). Libya also attempts to explain the shallow depths of the Malta and Medina Channels in comparison with troughs lying further west by recourse to geological history (p. 32 para 3.20 and p. 128 para. 8.04), as it does also the difference which it seeks to establish between "Rift Zone", on the one hand, and the Norwegian Trough and the Hurd Deep, on the other (p. 129 paras. 8.07 and 8.08). Even plate tectonics themselves sometimes surface again. It is "the same tectonics forces" which created the Malta Trough and "pushed up" the Maltese Islands (p. 128 para. 8.05); the Rift Zone is regarded by certain geologists as a new microplate boundary (p. 131 para. 8.12; p. 43 para. 3.51 etc.).

[6] See, for example, Libyan Memorial p. 89, para. 6.21; p. 97, para. 6.44; p. 102, para. 6.55; p. 127, para. 8.01 and also p. 163.

[7] *Ibid.*, p. 137, para. 9.12.

36. The scientific concept of natural prolongation thus defined by its geomorphological and geological elements lies at the heart of the Libyan legal argument. It is only by reference to this concept and in a manner subordinate to it that two other elements enter into the argument.

37. The first of these is the notion of relevant circumstances. In the *Tunisia–Libya* case, Libya attached an almost exclusive importance to the idea of natural prolongation (as it then conceived it). At that time Libya wrote:

> "Once the natural prolongation of a State is determined, delimitation becomes a simple matter of *complying with the dictates of nature* ..."
>
> "There can ... be no possible inequity in a delimitation which is consistent with the physical facts of natural prolongation".[1]

As the Court explained the point in summarising the Libyan argument in that Case, "for Libya, a delimitation which gives effect to natural prolongation is necessarily in accordance with equitable principles, since it respects the inherent rights of each State".[2] In contrast with this, Libya, in the present case, argues that delimitation should take into account (though under conditions which remain somewhat ambiguous – as will presently be seen) the relevant circumstances of the case and at the same time no less be submitted to the test of proportionality. Chapters III and IV in Part III will examine in greater detail these two aspects of Libya's legal case.

38. As regards proportionality, however, Libya has exerted itself to give this concept a low profile. Starting from a dictum in the Award in the *Anglo-French Continental Shelf Arbitration*, according to which "proportionality is not in itself a source of title to the continental shelf but is rather a criterion for evaluating the equity of certain geographical situations",[3] the Libyan Memorial asserts expressly that proportionality is not "a legal principle which itself gives rise to rights".[4] It sees in proportionality merely a "test of the equity of the result produced",[5] and it is under this modest heading of "test" that the Libyan Memorial examines what it calls an "ingredient" in the assessment of the reasonableness of the result.[6] Proportionality is also presented as an "element"[7] or again as a "factor or guide".[8] The Libyan Memorial further argues that this concept does not require "nice calculations or precise, mathematical relationships between coastal lengths and shelf areas"

[1] See Libyan Memorial in Tunisia–Libya Case paras. 89–90 and the Counter-Memorial para. 191.
[2] *I.C.J. Reports* 1982, p. 44, para. 39.
[3] Decision of 30 June 1977; *International Law Reports*, vol. 54, p. 6, para. 246.
[4] Libyan Memorial, p. 115, para. 6.90.
[5] *Ibid.* p. 97, para. 6.43.
[6] *Ibid.* p. 155, para. 10.06.
[7] *Ibid.* p. 97, para. 6.43; p. 115, para. 6.92.
[8] *Ibid.* p. 115, para. 6.90.

and is satisfied with "a broad, general comparison of sufficient flexibility to *accommodate the overriding aim* of achieving an equitable result".[1] Libya pushes its concern to down-play the role of proportionality to the point of presenting it as a factor not only bound but also subordinate to natural prolongation:

> "... 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 logical consequence of this concept, since its purpose is to ensure that each natural prolongation will be accorded its proportionate weight".[2]

39. As will be seen in Part III, Chapter IV, the subordination of the proportionality argument to the natural prolongation argument, which the Libyan Memorial justifies on grounds of logic, is *logically* unsustainable. It is impossible to see by what miracle of nature the respective *natural prolongations of the two States* may be divided from each other by a feature of such a kind as the "Rift Zone" at precisely the same location as one might place a line based on the proportional relationship of the two coasts (and, even less, the proportional relationship of the areas of the two States). Even if one were to disregard Malta, and consequently identify in the so-called Rift Zone the "natural boundary" between Libya and Italy, could one then say that the test of proportionality is satisfied by the relationship between the Libyan coast and the Sicilian coast exactly as it is (according to the Libyan argument) between the coast of Libya and the coast of Malta? Again, if nature had placed a deep trench some miles from the Libyan coast – an even deeper Tripolitanian Furrow, for example – the shelf appertaining to Libya would be minuscule in comparison with that belonging to Malta. Would Libya then speak of proportionality as the "logical consequence" of *the concept of natural prolongation*? Whilst it is conceivable that a line dictated by natural prolongation may coincide with *one* dictated by proportionality it is to say the least, no less conceivable that it may also be different. In truth there is no logical connection – nor even any necessary compatibility – between the concepts of natural prolongation and proportionality.

40. Even if in practice proportionality plays in the Libyan argument a greater role than the Libyan Memorial wishes to *suggest*,[3] Malta may take courage from so restricted an assessment of the role of *proportionality*. There is, in the Libyan attitude, an implied – but significant – recognition of the legal weakness of any argument founded on proportionality.

[1] *Ibid.* p. 115, para. 6.91.
[2] *Ibid.* p. 115, para. 6.90.
[3] See below, Part III, Chapter IV.

CHAPTER III

THE KEY SCIENTIFIC CONCEPTS OF THE LIBYAN CASE: THE SO-CALLED RIFT ZONE AND THE ESCARPMENTS–FAULT ZONE

41. The argument of natural prolongation, which forms the legal basis for the Libyan claim, itself rests on two geographical concepts. The first is that of the "Rift Zone" which, according to Libya, forms the northern limit of the Pelagian Block and constitutes the natural boundary between the continental shelf of Malta to the south and the continental shelf of Libya towards the north. The second element, or geographical concept, is that of the Escarpments–Fault Zone which, according to Libya, forms the eastern boundary of the Ragusa–Malta Plateau and of the Pelagian Block and is the natural boundary of Malta's continental shelf towards the east. Libya contends that it is by the innermost of these two natural boundaries – the "Rift Zone" to the south, the Escarpments–Fault Zone to the east – that the continental shelf rights of Malta are enclosed. But for Libya, so the Libyan Memorial several times asserts, in the area east of the Escarpments–Fault Zone, continental shelf rights may extend freely in a northerly direction until they meet the continental shelf rights of Italy.

42. As Malta hopes presently to show,[1] the natural prolongation argument, as developed by Libya, entirely lacks support in international law. Whether the "Rift Zone" and the "Escarpments–Fault Zone" correspond or not to the description given in the Libyan Memorial, is entirely without legal interest. Quite different criteria are required by international law to form the basis of the delimitation of the continental shelf between Malta and Libya. It is, therefore, only out of respect for the Court that Malta proposes to review briefly in the present Chapter the errors and contradictions of the technical presentation contained in the Libyan Memorial. The Court will find a fuller scientific assessment of the two key features of the Libyan argument in a Technical Annex to this Counter-Memorial.[2] Malta is of course entirely ready to provide the Court with further explanations if these are called for.

[1] See Part III, Chapters I and II.
[2] Annex 2.

1. THE "RIFT ZONE"

43. A preliminary remark is necessary regarding the expression the "Rift Zone". The Libyan Memorial tends to give the impression that in this connection it is dealing with a physical entity which is easily identifiable and generally known under this name in maps and literature. The truth is quite otherwise. Of course – and Malta does not seek to deny this – a zone of faults and depressions exists in this part of the Mediterranean. However, it is no less true that neither the maps nor the literature identify this zone by the name "Rift Zone". Particularly noteworthy in this connection is the absence of any such reference on (11) the IBCM, which is used as a basic scientific reference work in the Libyan Memorial. No less remarkable is the fact that the study by Professor Fabricius which Libya produced as an annex to its Counter-Memorial in the *Tunisia–Libya* case[1] spoke, in relation to this area, of the "Pantelleria–Malta Trench system", of "the system of the Large Southeast-Northwest Grabens" and of "the rift system".[2] Of the "Rift Zone" (with capital letters) no mention was ever made. But there is something even more extraordinary. In the Technical Annex to the Libyan Memorial in the present case the same Professor Fabricius, after having spoken a number of times of the "Rift Zone"[3] which he says "is often called the 'Strait of Sicily'",[4] goes on to write: "To look more closely at this fault zone (*called in the Memorial the 'Rift Zone'*)...".[5] In the same Technical Annex Professor Finetti's study identifies this region of Grabens by the name "Sicily Channel"[6] or as "the rift zone area of the Sicily Channel".[7] To describe the "Rift Zone" the Libyan Memorial invokes the authority of the French geologist, Winnock, saying that he describes the Pantelleria, Malta and Linosa Troughs "as part of what he calls the 'Sicilian Channel'".[8] The supposedly relevant passages from Winnock's work are reproduced as Annex 7 to the Libyan Memorial. However, though Winnock speaks of the "Chenal de Sicile", one may look in vain in the passages quoted by Libya for any mention of the "Rift Zone". In at least two places in the Memorial Libya abandons all pretence regarding the origin of this nomenclature, to which it has attributed toponymic status. Thus one finds in the Libyan Memorial[9] the following: "What has been called in this Memorial the Rift Zone *for reasons of simplicity* ..."; and again: "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

[1] Annex 11 in Vol III.
[2] *Ibid.* pp. 13, 14 and 17.
[3] See for example, Technical Annex pp. I–4, I–5, I–11.
[4] *Ibid.* p. I–5.
[5] *Ibid.* p. II–3. Emphasis supplied.
[6] *Ibid.* p. III–2.
[7] *Ibid.* p. III–6.
[8] Libyan Memorial p. 29, para. 3.12.
[9] *Ibid.* p. 33, para. 3.20.

importance ...".[1] One could hardly recognize more clearly that the expression – even the concept – of "Rift Zone" has been conjured up by Libya without any basis in established scientific designation.[2]

44. Moreover, even what the Libyan Memorial calls the "Rift Zone" is not a trough which joins the western Mediterranean to the Ionian Sea. It is in no way comparable even with the Norwegian Trough or the Okinawa Trough and much less the Timor Trench. It does not constitute a simple "major feature". It is rather a succession of highs and lows, an accumulation of crests and winding valleys the depth of which varies from 645 metres to 1715 metres – a difference in height of more than 1 kilometre. There are it is true, in this morphological complex, three Troughs (Pantelleria, Malta and Linosa), of which the maximum depths are respectively 1314, 1715 and 1615 metres. But the Malta Channel and the Medina Channel have a depth which hardly exceeds 500 metres and even their inclusion as part of the same morphological complex is quite open to question. The passage in the report of the geologist Winnock quoted by Libya, and to which reference has already been made, does not in fact mention these Channels as part of the "Chenal de Sicile".[3]

45. Libya is evidently troubled by the shallowness of these two Channels, compared with that of the Troughs further to the west, as is shown by the embarrassed explanations which the Libyan Memorial gives for Libya's view that these two Channels constitute "eastward extensions" of the Troughs. What Libya says is, in other words, that one could assimilate the Channels to the Troughs, even though the former do not share the significant features of the latter.[4] From the Libyan Memorial one may observe, indeed, that it is in a very artificial way that the Libyan Memorial presents as a unique "Zone" a heterogeneous collection of extremely varied reliefs comprising the three large troughs, the intermediate crests, the submarine mountains and the simple channels. The considerably smaller rifting to the east of the Troughs and the consequent shallowness of the Malta and Medina Channels – as well as tactical considerations – compel Libya to ignore completely, or misrepresent as insignificant, the substantial rifting further south towards the Libyan coast, as is apparent in the Jarrafa Trough and the Tripolitanian Valley. These features will be examined shortly and are discussed in greater detail in the Technical Annex attached to this Counter-Memorial.[5] The point to be made here is that, having taken this position, it became necessary for Libya to give a geotectonic explanation for the evident difference between the Pantelleria, Linosa

[1] *Ibid.* p. 29, para. 3.21.

[2] It appears already in Figure 7 of the Libyan Counter-Memorial in the *Tunisia–Libya* case (p. 90), where its purpose was to show schematically the limits of the Pelagian Basin (see below, para. 50, on the subject of the northern limit of this Basin).

[3] See Annex 7 to the Libyan Memorial.

[4] Cf. Libyan Memorial p. 32, para. 3.20; p. 42, para. 3.50; p. 128, paras. 8.03, and 8.04; p. 131, paras. 8.11 and 8.12.

[5] Annex 2.

and Malta Troughs on the one hand and the Malta and Medina Channels on the other. As the Technical Annex will show, the explanation advanced by Libya is contradicted by well-established scientific facts. It will further show that the troughs to the northwest and those to the southeast of the Pelagian Block have the same cause.

46. But the most striking weakness in the theory of the "Rift Zone" can be seen by a mere glance at the maps produced by Libya itself. These show quite clearly that the deep and significant depressions and clefts of what the Libyan Memorial calls the "Rift Zone" (Pantelleria, Malta and Linosa Troughs) are to be found only to the west, northwest and southwest of Malta. Indeed, they lie beyond the western limits of the "relevant area" as seen by Libya itself.[1] They are, consequently, quite irrelevant to the delimitation of the shelf between Malta and Libya. In the area to be delimited between Malta and Libya the "Rift Zone" presents only a relatively elevated sea-bed and in any case one hardly sufficiently significant to warrant the weight accorded to it by Libya.

47. Nor does the "Rift Zone" have well defined contours. Its edges, especially to the south, are irregular, jagged and frayed by a variety of submarine ravines. In the east, the "Zone" is presented as terminating at approximately 16° E, at the intersection of the Heron Valley and the Sicily–Malta Escarpment. In reality, the Malta Trough is linked to the Ionian Sea by a corridor which is hardly conspicuous, very shallow and cut by crests and banks which follow the southern edge of the Malta Plateau with a swerving course. To the west, the uncertainty is even greater. On page 127, in paragraph 3.12 of the Libyan Memorial the "Zone" is described as beginning at 10° 30′. Later, on the same page and on pages 127–128, para. 8.03, it is said to begin at the Pantelleria Trough, to the east of the island of the same name. The two definitions do not correspond since the island of Pantelleria is situated at 12° E, thus well to the east of the 10° 30′ initially given. The overlay of Map 17[2] identifies the beginning of the "Rift Zone" at yet another point, more to the west-north-west than Pantelleria but less to the west than 10° 30′ – on this map at about 11° 20′. These inconsistencies regarding the limits of the so-called "Rift Zone" affect – as has already been noted – the very substance of the Libyan claim as much by the width of the "Zone" as by the lack of precision for its eastern and western limits. Thus, one may ask where in the west should the boundary line between Malta and Libya begin: at 10° 30′? at the Pantelleria Trough? or rather more to the west – and if so where? As to how a boundary line between Malta and Libya, of which the first segments evidently encroach on the delimitation effected by the 1971 agreement between Tunisia and Italy,[3] may be combined with this latter delimitation, the question is passed over in silence by the Libyan Memorial.

[1] Libyan Memorial p. 10, para. 10.17.
[2] Libyan Memorial, p. 160.
[3] See Map 15 of the Libyan Memorial.

48. The Libyan Memorial assigns to the so-called Rift Zone a precise and leading role namely that it "separates in a physical sense the natural prolongation of the Libyan landmass northward from the natural prolongation of Malta southward".[1] The "Rift Zone" is thus presented as a kind of natural frontier separating the physical feature lying to the north from that lying to the south. That is why the Memorial defines the "Rift Zone" as the northern line of the Pelagian Block (or Basin).[2] This is done in a further effort by Libya to reinforce at any cost the character of natural separation as the delimitation of the continental shelf.

49. In this connection one must heed the caution shown by Professor Fabricius in connection with the position adopted in the Memorial regarding the definition of the "Rift Zone" as the northern limit of the Pelagian Block:

> "The northern limits of the Block are defined in the Libyan Memorial as created by the Rift Zone... Other definitions adopted by *some scientists place the northern boundary of the Pelagian* Block along the African plate boundary running across Sicily or make the Block coextensive with the Pelagian Sea extending as far north as the Sicilian coastline".[3]

Refusing thus to acknowledge the paternity of the idea adopted in the Memorial, Professor Fabricius, limits himself to accepting a distinction between "a southern unit and a northern unit", the dividing line between units being the "Rift Zone"; and even such a distinction is accepted by him only for the purposes of description.

50. Nor is it without interest to recall that in the *Tunisia–Libya* case (to which the Libyan Memorial refers in connection with the Pelagian Block), Libya did not adopt the same view regarding the northern boundary of the Pelagian Block. The Libyan Memorial in that case described the Block[4] as lying "generally between 32°N and 36°N and added: "Its northern boundary runs along the Pantelleria Trough".[5] The 36°N parallel runs just north of the island of Malta and just south of the island of Gozo, so that the whole of the shelf area between Malta and Libya, apart from the area east of 15° 30'E, falls within the Pelagian Basin. Moreover in the *Tunisia–Libya* case, Libya treated this area as of fundamental continuity both geologically and geomorphologically. Figure 7 in the Libyan Counter-Memorial in that same case, of which the purpose was (according to note 2 on page 90) to set forth "the boundaries of the Pelagian Basin", placed the northern boundary of the Basin on the Sicilian coast, thus enclosing the "Pantelleria Rift Zone" within the Pelagian Basin. This basin is in turn defined in the same

[1] Libyan Memorial, p. 29, para. 3.12.
[2] *Ibid.* p. 27, para. 3.07; cf. p. 43 para. 3.52; p. 128, para. 805 etc.
[3] Technical Annex to the Libyan Memorial, p. I–4.
[4] Libyan Memorial; p. 27, para. 3.06.
[5] *Tunisia–Libya* case, Libyan Memorial para. 62 and Libyan Counter-Memorial page 10, Note 3.

Counter-Memorial [1] as "a geological and physiographic unit".[2] In an Annex to that same Counter-Memorial Professor Fabricius wrote – more explicitly than in the Technical Annex in the present case – that the Pelagian Block "*extends to Sicily in the north*".[3] And Professor Bowett, in his oral argument, told the Court that "some scientists place the boundary (of the Pelagian Block) even further north through Sicily".[4] In its 1982 Judgement, the Court itself said that the Pelagian Block "extends on the north at least as far as a series of large depressions (the Troughs of Pantelleria, Malta and Linosa)".[5]

51. It can thus be seen that the attempt in the Libyan Memorial to establish that the "Rift Zone" marks the boundary of the Pelagian Block towards the north and separates in a clear manner two distinct features is self-defeating.

52. Because of its attempt to persuade the Court of the existence of one – and one only – possible natural boundary, Libya is obliged to disregard the existence south of the "Rift Zone", between the latter and the Libyan shore, of geographical features which are at least as important as those of the "Rift Zone".[6] The Libyan Memorial refers several times to what it regards as a fairly even relief of the sea-bed between Malta and Libya: it speaks of "the gentleness of the slope",[7] of a "rather gently inclined depression"[8] and of the "smooth"[9] character of the seabed areas in this region.

53. However, this impression of topographical "mediocrity", which

[1] At page 90, para. 200.

[2] Contrary to its present position, Libya argued in the earlier case in favour of the fundamental continuity of the Pelagian Basin. By way of example here are some amongst other passages taken from the Libyan Counter-Memorial in the *Tunisia–Libya* case: "... 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 continental shelf area is much like a *gently rolling* plain with no marked feature of importance ... We are dealing here with a simple shelf, a physiographic unit, part of the Pelagian Basin" (p. 103, para. 233); – "... the shelf is a single, physiographic unit without any significant feature that would *remotely affect delimitation*" (p. 147, para. 348); – "the geological evidence demonstrates the existence of a single continental shelf ... devoid of any significant features that could conceivably affect delimitation. *That shelf forms a portion of the Pelagian Basin which is itself a geologic and physiographic unit forming a component of the stable North African plate*" (p. 158, para. 391) Emphasis supplied; "The entire Basin area is a geological and physiographic unit ... there are no geologic or physiographic features of sufficient importance to influence a delimitation of the relevant continental shelf area" (p. 197, para. 491). The *Artist Rendition* which constitutes Figure 4 of the Libyan Counter-Memorial in the Tunisia–Libya case (p. 76) illustrates this continuity perfectly, especially between Malta and Libya, as does Figure 11 in the same Volume.

[3] See Vol. III, p. 13.

[4] CR 81/20, p. 19.

[5] *I.C.J. Reports* 1982, p. 41, para. 32.

[6] Professor Fabricius notes in the Technical Annex (p.I.–12) that there exist other faults (which, according to him, are less important) to the north as well as to the south of the "Rift Zone".

[7] Libyan Memorial, p. 35, para. 3.27.

[8] *Ibid.* p. 36, para. 3.29.

[9] *Ibid.* p. 37, para. 3.34.

(11) Libya seeks thus to establish, is rebutted by the IBCM[1] itself which demonstrates the presence of two series of highly significant features which the Libyan Memorial passes over practically in silence.

54. First, one finds, to the south of the "Rift Zone" and at the very heart of the area to be delimited, two quadrilateral plateaux which rise sharply above the neighbouring bathymetric level: the Medina Bank (with a minimum depth of 146 metres) and the Melita Banks (with a minimum depth of 86 metres), which Professor Fabricius describes as being "part of a structural 'high' extending from the Lampedusa Plateau on the west to the Medina Escarpment on the east".[2] One may ask here why were these banks, of which the depth at no point exceeds 200 metres, which find themselves near enough mid-way between the two countries and which are particularly interesting in relation to hydrocarbon development, not given the same attention[3] as was given to the Malta and Medina Channels?

55. One also finds, south of the "Rift Zone", and also in the heart of the area to be delimited, several "valleys" with a more pronounced relief than Libya would have one believe[4] and of which the profiles are quite comparable to those of the Malta and Medina Channels (Jarrafa Trough, Medina Valley, Misurata Valley, Tripolitanian Valley). It is thus difficult to follow the Libyan Memorial when it states: "If one were to cross on foot a similar area by land, the "valleys" would not be discernible".[5] The Technical Annex of the present Counter-Memorial shows how mistaken the Libyan Memorial is on this point. The Jarrafa Trough, for example, is an important basin with an area of about 60 kilometres by 15, of which the gradient achieves 9.8 per thousand; and (11) the 400 metre isobath by which it is marked on the IBCM is very near the high of 86 metres of the Melita Banks. It is therefore difficult to understand the Libyan suggestion that the Jarrafa Trough "is not readily distinguishable from its immediate surroundings".[6] The figures opposite this page and those on the following pages[7] are illustrations of Malta's submissions on this matter.

56. Further to the south, as one approaches the Libyan coast lies the Tripolitanian Valley (or Furrow). In its 1982 Judgment the Court considered that:

> "The only feature of any substantial relevance is the Tripolitanian Furrow, but that submarine valley does not display

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[1] A reduced copy of the IBCM is here reproduced for the convenience of the Court.

[2] Libyan Memorial Technical Annex, p. I–10. In the *Tunisia–Libya* judgement this area was referred to as "the 'Melita–Medina Plateau' covering the banks of Melita and Medina" (*I.C.J. Reports*, 1982, p. 41, para. 42).

[3] The mention of the Medina Banks at 33/3.21 is purely allusive.

(2) [4] It is perhaps significant that on Map 6 of the Libyan Memorial (p. 26) the names of the "valleys" situated south of the 34th parallel have disappeared despite the fact that the names of the depressions north of this parallel are faithfully included.

[5] Libyan Memorial, p. 37, para. 3.34.

[6] Libyan Memorial, p. 37, para. 3.32.

[7] See Figures 1–4.

any really marked relief until it has run considerably further to the east than the area relevant to the delimitation".[1]

"The greater part of it (the Furrow), and the most *significant* from a geomorphological aspect, lies beyond Ras Tajoura ...".[2]

In the *Tunisia–Libya* case the Court attached no importance to the Tripolitanian Furrow for purposes of delimitation, and this for two reasons: because the most significant part of the Furrow lies east of Ras Tajoura and because it is "comparatively near, and running roughly *parallel to, the Libyan coast*".[3] In these circumstances it could not have been taken into consideration unless it "were such as to disrupt the essential unity of the continental shelf so as to justify a delimitation on the basis of its identification as the division between areas of natural prolongation".[4] Disregarding the assessment thus made by the Court, the Libyan Memorial treats the Tripolitanian Valley as a minor feature, even to the east of Ras Tajoura.[5]

57. In order to diminish the importance of these "valleys", the Libyan Memorial seeks to characterise them as simply the result of erosion;[6] while the "Rift Zone" is said to be the result of structural causes such as volcanic activity. The Technical Annex to this Counter-Memorial shows how wrong this view is and that the geomorphology of the area between the "Rift Zone" and the Libyan coast is no less the consequence of structural causes.

58. Whatever the description one may wish to give to these various features, Malta maintains that the continental shelf lying between Malta and Libya is characterized by a fundamental geomorphological *and geological continuity.*[7] Moreover, as will be set out more fully in this Counter-Memorial, the areas of continental shelf appertaining to two States whose coasts are adjacent or opposite each other are not to be determined, according to international law, by reference to "natural boundaries" formed by geological or geomorphological features. It is to be observed in this connection that, contrary to what appears to be suggested in the Libyan Memorial,[8] neither the Italian–Tunisian Boundary Agreement of 1971, nor the Italian–Greek Agreement of 1977 is related in any way to any geomorphological feature and even less to the "Rift Zone". The Italian–Greek delimitation does not follow the Sicily–Malta Escarpment but has been constructed on the basis of a median line between the Italian and Greek coasts and islands. Evidently the Greek and Italian Governments did not consider that it would be equitable for the Greek plateau to be extended to the very

[1] *I.C.J. Reports* 1982, p. 57, para. 66.
[2] *Ibid.* p. 64, para. 80.
[3] *Ibid.*
[4] *Ibid.*
[5] Libyan Memorial, p. 36, paras. 3.30 and 3.31.
[6] See e.g. in relation to the Jarrafa Trough, p. 37, para. 3.32.
[7] Cf. Malta's Memorial, p. 21, para. 57 and Annex 2.
[8] p. 150, para. 9.51.

windows of southern Italy and of Sicily although this would have been consistent with the logic of the Libyan approach towards the "Rift Zone".[1] A glance at this same map is enough to show that the Italian–Tunisian delimitation, far from following the so-called "northwest – southeast axis" of the "Rift Zone", is also essentially an equidistance line and its axis in no way coincides with the "Rift Zone". Malta submits that the so-called "Rift Zone" does not dictate the boundary line any more than do the Melita–Medina Plateau or the Tripolitanian Furrow. If nevertheless, despite all contrary indications one wished to achieve a delimitation along the "natural boundaries", the Melita–Medina Plateau or the Tripolitanian Furrow would constitute natural features at least as significant as the Medina Channel or the Malta Channel if not more so. If there is, in this whole area, an insignificant feature it is that part of the so-called Rift Zone which lies between Malta and Libya.

2. The Escarpments-Fault Zone

59. According to the Libyan Memorial, the Ragusa–Malta Plateau, on which, as Libya contends, Malta lies, ends in the east at the Sicily–Malta Escarpment, which thus constitutes "the physical boundary between the Ragusa–Malta Plateau and the Pelagian Block on the west and the Ionian seafloor on the east".[2] Libya sees this Escarpment not only as the end of the Ragusa–Malta Plateau but also as the end of Malta's natural prolongation[3] and concludes that the boundary line between the Maltese and Libyan continental shelves cannot extend any further east than the Escarpment.[4]

60. This Libyan argument can be valid only to the extent that it could be shown that the Escarpment – the existence of which cannot be denied – represents the eastern end of Malta's continental shelf. This Libyan contention has not been established either scientifically or legally.

61. First, on the scientific plane, it is not correct to say that the Escarpment represents the eastern end of Malta's continental shelf. According to the definition in Article 76 of the 1982 Convention on the Law of the Sea (which must in this respect be regarded as reflecting the present state of customary international law), the continental shelf extends "to the outer edge of the continental margin" and "the continental margin ... consists of the sea-bed and subsoil of the shelf, the slope and the rise". The Technical Annex annexed to this Counter-Memorial shows that it is not scientifically possible to maintain that the Escarpment forms the eastern limit of Malta's continental margin. Such

[1] Cf. Map 15 of Libyan Memorial at p. 150.
[2] Libyan Memorial, p. 34, para. 3.24; cf. p. 29, para. 3.09 and p. 41, para. 3.46.
[3] *Ibid.* p. 132, para. 8.15 and p. 133, para. 8.18.
[4] *Ibid.* p. 133, para. 8.18 and p. 153, para. 9.64.

a contention is certainly not true south of the 35th parallel; and north of the 35th parallel it is, to say the very least, disputable, with the experts divided on even whether the abyssal plain of the Ionian Basin is an old oceanic crust covered by a thick sedimentary sequence or a continental crust.[1]

62. On the legal plane, the question whether Malta's continental margin ends at the Escarpment (as Libya argues) or extends beyond it (as many scientists believe) makes not the slightest difference to Malta's continental shelf rights or to the delimitation of the continental shelf between Malta and Libya. The rule of customary international law reflected in Article 76 of the 1982 Convention defines continental shelf rights as extending "to a distance of 200 nautical miles... where the outer edge of the continental margin does not extend up to that distance". Even supposing for the sake of argument that Libya's thesis that Malta's continental margin does not extend beyond the Escarpments were correct, it would not affect either Malta's entitlement beyond those Escarpments or the delimitation of its continental shelf with Libya. The decisive importance which Libya attaches to the Escarpments as the eastern boundary of Malta's continental shelf rights is completely contradicted by present day principles and rules of customary international law. The matter need not, therefore, be further pursued.

[1] See Annex 2, para. 37.

CHAPTER IV

THE PRACTICE OF STATES DISREGARDED

63. Malta has already referred to the substantial State practice relating to geographical situations comparable to the circumstances of the present case.[1] This State practice takes the form of treaties and such agreements must be drawn up – at least in the framework of customary international law – "in accordance with equitable principles";[2] "in order to achieve an equitable result".[3] Consequently, boundary agreements carefully negotiated by governments constitute evidence of the view of those governments on the content of an equitable solution reflecting the application of equitable principles.[4]

64. Strange though it may seem, the Libyan Government has chosen to disregard the relevant State practice. It is true that the Libyan Memorial mentions State practice on three occasions but on each occasion the treatment involves a serious distortion of the significance of this important aspect of the case now before the Court.

65. The Libyan Memorial first of all mentions State practice in connection with equidistance. It notes that:

> "... in many agreements some consideration was given to other methods in delimiting the maritime areas concerned. Such methods reflected in these agreements include: modifying an equidistance line to give partial effect to islands; the use of partial or complete enclaves; lines reflecting an allocation of areas of sea-bed in proportion to respective coastal lengths; lines at right angles to a general line of coastal fronts; lines adopting a line of latitude or a fixed azimuth; and lines following a shipping route or channel".[5]

This statement is inexact in two ways. First the only precedents for "partial effect of islands" and the use of enclaves relate to *dependent islands. None of them* bear upon the position of Island *States*. Secondly even if it is true that certain agreements have used delimitation methods

[1] Memorial PART III, Chapter VII.

[2] *I.C.J. Reports* 1969, p. 53, para. 101.

[3] *I.C.J. Reports* 1982, p. 59, para. 70.

[4] In the award in the *Anglo–French Continental Shelf Arbitration* there are numerous references to the practice of States (paras. 85, 107, 200, 249, 251). Likewise the Court, which followed the same course in its 1982 judgment (p. 47, para. 45; p. 79, para. 109), has gone so far as to say that the concept of natural prolongation must be "examined within the context of customary law *and State practice*" (p. 46, para. 43).

[5] Libyan Memorial, p. 125, para. 7.12.

other than that of equidistance, it is no less true that the vast majority of agreements make use of an equidistance line, especially between States with opposite coasts. This is true as between continental States. Malta thinks it hardly necessary to provide the Court with a list of general precedents of this character. But it is also true as between States of which one is an Island State, as the examples cited by Malta in its Memorial[1] show. A recent study[2] of a substantial sample of seventy-five delimitation agreements affecting various regions in the world has led Dr. Jagota, legal adviser to the Indian Government and an expert who has had direct and extensive practical experience in the law of the sea, to draw the following conclusion:

> "... in a large majority of cases States have been satisfied that the median or equidistance line leads to an equitable solution or result".[2]

66. The second instance of recourse by Libya to State practice is in connection with depressions and troughs in the sea-bed. As will be seen in Part III, Chapter II, the Libyan Memorial seeks to draw from this practice a manifestly partial and inexact picture.

67. The third mention of State practice in the Libyan Memorial appears in connection with the position in the Mediterranean as seen by Libya:

> "In the confines of the Mediterranean and in particular in the Central Mediterranean, if delimitation by equidistance were a panacea, one would have expected delimitation agreements on the basis of equidistance to have been rapidly completed. This has not been the case".[3]

Malta does not claim that equidistance is a "panacea" in the Mediterranean any more than elsewhere. What Malta says is that, in an absolutely incontestable manner, a large number of agreements – in truth, the vast majority – adopt an equidistance line for all or part of the boundary or, at least, use such a line as a point of departure and adjust it only to a small degree. Malta does not say, and has never said, either that the use of equidistance is compulsory or that it is a universally applicable method. As regards the Mediterranean in particular, the views expressed by Libya are rather superficial – as can readily be seen by referring to Map 2 of this Counter-Memorial and to the lists of boundary agreements between the Mediterranean States provided in the Maltese Memorial.[4]

[1] Malta's Memorial, pp. 61 to 78.
[2] S.P. Jagota, *Maritime Boundary*, *Hague Recueil*, Vol. 171, 1981 – II, p. 83, at pp. 130–131.
[3] *Libyan Memorial*, p. 152, para. 9.60.
[4] See pp. 96–103, paras. 196–200.

PART II

THE TASK OF THE COURT

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68. There appears to be some difference of position between the Parties regarding the task of the Court in the present case. Malta, which discussed the matter specifically in its Memorial,[1] reached the following conclusion:

> "Malta concludes that in the present case the task of the Court 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."[2]

In its Submissions[3] Malta makes two requests to the Court which specifically mirror these conclusions and invites the Court to make two findings – one as to the applicable principles and rules of international law, the other as to the application in practice of these principles and rules by means of a median line between the Parties.

69. Libya, on the other hand, without specifically addressing itself to the problem, by implication suggests a narrower view of the function of the Court. Perusal of the Libyan Submissions[4] reveals none pertaining to any *specific* line, but only a series of abstract legal propositions culminating in the following final submission:

> "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 this Memorial."[5]

70. The difference between the two sides is thus evident. Reduced to its essentials it is that Malta believes that the Court may, and should, do in this case much as it did in the *Tunisia–Libya* case. There, at pp. 93–94 of the operative part of the judgment, the Court indicated with

[1] Maltese Memorial, Part I, pp. 7–11.
[2] *Ibid.* p. 11, para. 22.
[3] *Ibid.* p. 135, para. 273.
[4] Libyan Memorial, pp. 163–164.
[5] *Ibid.* p. 164, para. 9.

some particularity the line of delimitation, specifying the division of the line into two sectors, the starting point of the first sector, the exact direction in which that line was to run to the point at which the second sector was to start and the direction of that sector. Only the extension of this line northeastwards was held by the Court to be a matter falling outside its jurisdiction. Libya, on the other hand, attributes to the Court a less significant rôle, claiming that it is for the Parties to apply the principles and rules "by agreement on a delimitation within, and following the general direction of, the Rift Zone as defined in this Memorial".[1]

71. The basis of Malta's identification of the task of the Court lies in the interpretation of the terms of the Special Agreement between Malta and Libya on which the Court's jurisdiction in the present case rests. The process of interpretation is significantly aided by the Court's interpretation of the similar agreement in the *Tunisia–Libya* case.[2] The fact that the latter agreement was concluded later than the agreement now under consideration makes no difference to the performance by the Court of its interpretative rôle, namely, that of determining the meaning of the words actually used. To this rôle the Libyan Memorial makes no direct allusion. Although some mention is made in the Libyan Memorial[3] to the preparation of the Special Agreement, no attempt is there made to draw any conclusions from the narrative of events. It is not, therefore, for Malta now to answer arguments which Libya has not put forward.

72. It may, however, be appropriate for Malta to recall, even at this stage, that the conclusion of the Court on this point in the *Tunisia–Libya* case was one on which there was no effective division of the Court. Such disagreement as there was related to the ground on which the Court reached its conclusion on this point, rather than on the conclusion itself. Thus Judge Gros in his dissenting opinion expressed his opposition to the Libyan position in terms of principle rather than interpretation alone,[4] and this approach also marked the statements made in his separate opinion by Judge Jiménez de Aréchaga.[5]

73. The position which Malta therefore reaches on this matter is that at this stage there is nothing more that it needs to say on the question of the task of the Court. It has set out its positive case in its Memorial, the main features of which are recalled above; and it adheres to that position.

74. At the same time, it is perhaps worth adding that Libya's final submission, to the effect that the principles and rules of international law can in practice be applied by the Parties "by agreement on a delimitation within, and following the general direction of the Rift

[1] *Ibid.* p. 164, para. 9.
[2] See Malta's Memorial, pp. 8–11.
[3] Libyan Memorial, pp. 66–69.
[4] *I.C.J. Reports* 1982, pp. 143–147.
[5] *Ibid.* pp. 101–103.

Zone"[1] is hardly responsive to the second part of Article I of the Special Agreement. *It does not show 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*[2] delimit such area by an agreement as provided in Article III." Even if Libya were to be one hundred per cent successful in its submissions, there would be no realistic prospect of the Parties agreeing "without difficulty" upon a line which even now Libya is not prepared to particularize. The "Rift Zone" exceeds 100 km at its widest, greater in width at the middle than at the ends. It is not straight but shaped like a boomerang. Such an area is capable of containing not simply one line but literally scores of lines, on the location and precise direction of which dispute could be endless. Given that the object of the present proceedings is to lead swiftly and surely to the resolution of the dispute between the Parties, the approach of Libya represents a prescription not for the settlement but for the indefinite prolongation of the problem.

[1] Libyan Memorial, p. 164, para. 9.
[2] Emphasis supplied.

PART III

CRITIQUE OF LIBYA'S SUBSTANTIVE CASE

CHAPTER I

THE PRINCIPLES AND RULES OF INTERNATIONAL LAW GOVERNING THE DELIMITATION OF THE CONTINENTAL SHELF

75. The Special Agreement asks the Court to decide, in the first place, "[W] hat 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". Chapter 6 of the Libyan Memorial contains "a succinct statement of the applicable law, as perceived by Libya",[1] and Chapters 7 to 10 apply the principles and rules there developed to the facts and circumstances of the present case. Malta submits that the statement of the applicable law contained in Chapter 6 of the Libyan Memorial contains a number of serious errors: the principles and rules of international law which Libya requests the Court to apply are not those principles and rules which international law has in fact developed in relation to the delimitation of the continental shelf. Although in disputes of this kind the Parties usually differ less on the principles and rules of the applicable law than on their application to the immediate facts, there exist in this case important differences of opinion between Malta and Libya on even the content of the applicable principles and rules. That is why Malta considers it necessary to proceed first, in the present Chapter, to a critical examination of the applicable law "as perceived by Libya" and to show briefly how Malta itself understands the relevant principles and rules of international law governing the delimitation of the continental shelf. The Chapters that follow in this Part will be devoted to a detailed examination, both in legal terms and in relation to its application to the present case, of the manner in which the Libyan Memorial resorts to natural prolongation, to relevant circumstances and to the test of proportionality.

1. The Sources of the Applicable Law

76. As regards the sources of the rules applicable to the resolution of the dispute, the Libyan Memorial states:

> "In the present case, neither the 1958 Convention nor the Convention on the Law of the Sea apply – in the first case because

[1] Libyan Memorial, p. 81, para. 6.0.

> Libya is not a Party and in the second case because the Convention on the Law of the Sea is not yet in force and has not been signed by Libya. Given the absence of any treaty or convention providing rules directly applicable in the present dispute, it follows that the Court is asked to give expression to the principles and rules of customary international law".[1]

Malta agrees with this statement. The principles and rules of customary international law which the Court is invited by the Parties to determine and apply are those which result from the practice of States (including the evolution reflected in the Law of the Sea Convention of 1982) and from jurisprudence.

77. Of course, these rules of customary international law are not unchangeable and it is in the light of customary international law as it exists at a given moment that it is necessary to assess the concepts pertinent to a delimitation of the continental shelf. Thus the Court has referred to "the historic evolution of the concept of the continental shelf, from its inception in the Truman Proclamation ...[2] through the Geneva Convention of 1958, through the *North Sea Continental Shelf* cases and subsequent jurisprudence, up to the draft convention of the Third Law of the Sea Conference, and its evolution in State practice" and has also stated that it has "endorsed and developed those general principles and rules which have thus been established".[3] More particularly, on the question of natural prolongation the Court says that it "was and remains a concept to be examined within the context of customary law and State practice".[4] The concept of natural prolongation is thus one of which the scope and content may change – and have changed – with the evolution of customary international law. The same observation is applicable to all the other concepts relevant in this case: relevant circumstances, equitable principles, equitable result, proportionality, etc.

78. More particularly, as regards the Law of the Sea Convention, it is plain that no provision of this Convention binds the Parties as a treaty rule as such. It is no less evident, however, that the absence of a strictly contractual quality does not prevent this or that provision of the Convention from being regarded as embodying or crystallising a pre-existing or emergent rule of customary law.[5] It appears that Libya shares this opinion since it has relied in its Memorial on certain provisions of the Convention in support of its arguments. This is so particularly of articles 76 and 77[6], article 83[7] and article 121.[8] However,

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[1] Libyan Memorial, p. 84, para 6.10.

[2] Proclamation 2667, Reproduced as Annex 3 to this Counter Memorial.

[3] *Tunisia–Libya Continental Shelf* Case, *I.C.J. Reports*, 1982, p. 92, para. 132.

[4] *Ibid.* p. 46, para. 43.

[5] Cf. *North Sea* Cases; *I.C.J. Reports* 1969, p. 41, para. 69 and *Tunisia–Libya* Case, *I.C.J. Reports* 1982, p. 38, para. 24.

[6] See Libyan Memorial, p. 82, paras. 6.04–6.07.

[7] *Ibid.*, p. 82, para. 6.04; p. 97, para. 6.42; p. 124, paras. 7.09–7.10.

[8] *Ibid.*, p. 111, para. 6.81.

when a provision of the Convention appears to Libya to be unfavourable to its argument it does not hesitate to disregard it, claiming that the Convention does not establish law between the Parties. It does this for example with what it calls "the new feature of the Convention on the Law of the Sea which uses distance..."[1]

79. When one mentions, as has just been done, provisions of the Convention on the Law of the Sea which reflect or express a customary rule, it is more broadly to the whole ensemble of the work of the Third Conference on the Law of the Sea on the pertinent question that one is referring.[2] This work obviously could not reflect new law during the first years of the Conference, at a time when the evolution of certain provisions was not yet sufficiently advanced. This explains the evident prudence with which this work was approached by the Court in the *Fisheries Jurisdiction* case in 1974[3] and by the Court of Arbitration in the *Anglo–French Continental Shelf Arbitration* in 1977.[4] In 1982, in the *Tunisia–Libya* case, the Court showed less reserve since at that moment the work of the Conference was much further advanced: the text of the draft Convention had been adopted by the Conference and the only step remaining was that of signature – a step which was taken a few months later. When referring to its observations of 1974, the Court said "it must however take note that the law-making process in this respect has now progressed much further",[5] and it added:

> "Furthermore, the Court would have had *proprio motu* to take account of the progress made by the Conference even if the Parties had not alluded to it in their Special Agreement; for it could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallises a pre-existing or emergent rule of customary law".[6]

At present the draft Convention has become a Convention signed by numerous States, and it is clear that the position taken by the Court in the *Tunisia–Libya* case today finds itself considerably reinforced.

80. Among the provisions of the 1982 Convention which reflect the state of customary international law, particular attention must be directed to paragraph 1 of Article 76. In the *Tunisia–Libya* case the Court referred expressly to this provision and said that "the definition given in paragraph 1 cannot be ignored".[7] This text expresses two rules of customary international law. The first is that the rights of each coastal State in the continental shelf extend to a distance of 200

[1] *Ibid.*, pp. 89–90, para. 6.22.
[2] Cf. the remarks of Judge Oda in the *Tunisia–Libya* Case, *I.C.J. Reports* 1982, p. 172, para. 26.
[3] *I.C.J. Reports* 1974, pp. 23–24, para. 53.
[4] Decision of 30 June 1977, *International Law Reports*, Vol. 54, p. 6, paras. 47 and 96.
[5] *I.C.J. Reports* 1982, p. 37, para. 23.
[6] *Ibid.*, p. 38, para. 24.
[7] *Ibid.*, p. 48, para. 47.

nautical miles from its coasts – a provision which means, according to the language of the Court, that "the distance of 200 miles is in certain circumstances the basis of the title of a coastal State".[1] The second rule is that when the continental margin of a State extends beyond 200 miles the continental shelf rights of this State apply "throughout the natural prolongation of its land territory to the outer edge of the continental margin". If the Court did not, in the *Tunisia–Libya* case, take direct note of the concept of distance, it is – according to explanations which it gave in its Judgement – because the two Parties invoked only "the principle of natural prolongation" and "have not advanced any argument based on the 'trend' towards the distance principle".[2] The terms of Article 76, and particularly those concerning the "distance principle", also figured in several separate and dissenting opinions, as Malta has noted in its Memorial.[3]

81. In the same way, it is beyond doubt that the concept of the exclusive economic zone "may be regarded as part of modern international law", as the Court said in the *Tunisia–Libya* case.[4] The United States proclamation of an Exclusive Economic Zone on 10 March 1983[5] constitutes an additional confirmation of this recognition of the economic zone concept by customary international law. As a result, each coastal State possesses, to a distance of 200 nautical miles from its coasts, continental shelf rights over the sea-bed and subsoil and economic zone rights over the superjacent water column.[6]

82. The provisions just mentioned relate to the extension of coastal State rights towards the open sea and do not govern the determination of the limits between the maritime jurisdictions of States with opposite or adjacent coasts. It will presently be seen, however, that these provisions have a direct bearing on questions of delimitation.

2. Libya's Legal Case

(1) *Libya's Legal Presentation*

83. The Libyan Memorial adopts as the starting point of its legal reasoning what it presents as "an important legal distinction of considerable consequence for the present case".[7] On the one hand, so it argues, there is "the legal basis of a State's *entitlement* to shelf", the "basis or 'root' of title"; on the other, there are the rules governing the

[1] *loc.cit.*
[2] *Ibid.*, pp. 48–49, para. 48.
[3] Malta's Memorial, p. 123, paras. 251–252.
[4] *I.C.J. Reports* 1982, p. 74, para. 101.
[5] Reproduced as Annex 4 to this Counter-Memorial.
[6] Cf. the separate opinion of Judge Jiménez de Aréchaga in the *Tunisia–Libya* case, (p. 115, paras. 55–56) and the dissenting opinions of Judge Oda (p. 247, para. 145 and p. 249, para. 146) and Judge Evensen (p. 287, para. 9).
[7] Libyan Memorial, p. 81, para. 6.01.

precise *delimitation* of shelf boundaries. The Libyan Memorial suggests that international law accords an important, and sometimes even decisive, rôle to the concept of natural prolongation both in the determination of the legal basis of title and in the delimitation of the boundaries of the shelf between two States, but in different ways.

84. Where it is a question of determining the legal basis of a State's *entitlement* to shelf, natural prolongation, according to the Libyan Memorial, has not ceased to be the key concept which it has been from the Truman Proclamation[1] up to and including the Law of the Sea Convention. "The deliberations at the Law of the Sea Conference, have reinforced, rather than weakened, the fundamental concept of the continental shelf as being the natural prolongation of the land domain".[2] In a word, for the Libyan Government, "natural prolongation remains the fundamental basis of legal title".[3] Consequently, when one is delimiting the continental shelf of a State towards the open sea, "where no problems of delimitation with neighbouring States arise", the "outer limits" are controlled exclusively and directly by reference to natural prolongation – "entitlement and delimitation (in terms of absolute outer limits) go hand in hand when the issue is one of distinguishing between an area within natural jurisdiction and an area beyond it".[4]

85. But when it becomes a matter of "*delimitation*" between the areas of continental shelf belonging to two or more States, the function of the concept of natural prolongation is, according to the Libyan Memorial, more complex. The argument proceeds as follows. Before being able to claim a delimitation which attributes to a coastal State any area of shelf, the State must first establish that it has an "*entitlement*", a "*basis of title*", to such an area:

> "... as a first step, each Party has to prove that the natural prolongation of its land territory extends into the area in which the delimitation is to be effected".[5]

Once this is done the delimitation, properly so-called, may take place on the basis of a distinction which Libya characterises as "vital", "basic", or "fundamental" and which is set out in detail in two forms:[6]

(a) Where there exist two separate shelves, i.e. where neighbouring States are located on different shelves, in terms of distinct natural prolongations, "the evidence of 'natural prolongation' ... serves to establish the boundary between different shelves"; "legal entitlement and delimitation go hand in hand", and "the boundary should lie along the general line of that fundamental discontinuity".

[1] Annex 3.
[2] Libyan Memorial, p. 89, para. 6.20.
[3] *Ibid.* p. 89, para. 6.21.
[4] *Ibid.* p. 82, para. 6.06.
[5] *Ibid.* p. 89, para. 6.21.
[6] *Ibid.* p. 83, paras. 6.08 and 6.09; pp. 90–92, paras 6.24–6.29.

(b) Where there exists one continuous shelf adjoined by two or more States, i.e. where natural prolongations meet and overlap and where the shelf area may be regarded as much the natural prolongation of the one as of the other on the geological and geomorphological evidence, legal entitlement on the basis of natural prolongation and delimitation no longer have any necessary correlation. No doubt, the geological or geomorphological structure of the shelf, which characterizes natural prolongation, "remains the basis of the title of each and every adjoining State". Natural prolongation "in its traditional character as a physical concept" is, however, no longer "conclusive for delimitation purposes", no longer "sufficient to be determinative of a delimitation". The physical elements which determine the natural prolongation of a State do not, however, even in this situation, lose all legal relevance. Basing itself on paragraph 68 of the *Tunisia–Libya* judgement[1] the Libyan Memorial states that "a feature, which is not sufficiently substantial as to divide two distinct natural prolongations may continue to have significance as a relevant circumstance"; in this case, "the geological and geomorphological factors must be considered with other factors"[2]

86. Natural prolongation may thus be seen to lie at the heart of Libya's legal case. The Libyan Memorial speaks of the "double aspect" of natural prolongation: "as being, on the one hand, the basis of legal title to continental shelf areas and, on the other hand, a relevant factor in determining these areas between neighbouring States".[3] There are however three aspects of natural prolongation between which the Libyan argument suggests one must distinguish:

— as a basis of legal title: something which, according to Libya, exists in every case;

— as "conclusive" or "determinative" for delimitation between neighbouring States: something which exists in those cases where there are two physically distinct shelves;

— or as one of the relevant circumstances to be taken into account amongst others in seeking an equitable result: which is the case where neighbouring States abut on the same, continuous, shelf.

87. The fact that Libya defines natural prolongation by reference to physical evidence renders all the more surprising – and awkward – those passages in which Libya slides from the indisputable propositions that "the land dominates the sea"[4] and that "continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State"[5] towards a totally different

[1] Quoted at p. 101, para. 16.52 of the Libyan Memorial.
[2] *Ibid* p. 102, para. 6.53 and para 6.55.
[3] *Ibid.* p. 90, para. 6.23.
[4] *North Sea* Cases, *I.C.J. Reports* 1969, p. 51, para. 96.
[5] *Aegean Sea Continental Shelf* Case, *I.C.J. Reports* 1978, p. 36, para. 86.

concept. The Libyan Memorial appears not to hesitate to speak of "the geographic correlation between landmass and sea-bed which is the basis of title".[1]

Elsewhere the Libyan Memorial dots its i's when it says:

> "... *the size of* the landmass should have some correlation with the extent and 'intensity' of its natural prolongation into and under the sea".[2]

88. Malta must immediately respond to such a proposition. Where the Court has said quite clearly:

> "The geographic correlation *between coast and submerged areas off the coast* is the basis of the coastal State's title".[3]

the Libyan Memorial appears to say:

> "... the geographic correlation *between landmass*[4] and sea-bed ... is the basis of title".

As the Court said in the continuation of the same passage quoted above:

> "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 ...".

The Court's emphasis is always on the "*coast*", not the "*landmass*", and even less on "the *size* of the landmass". The maritime jurisdiction of the coastal State depends on its coasts, not on the extent of its territory. The natural prolongation of a large coastal State does not have an "*intensity*" greater than that of a coastal State of smaller dimensions. The "size of the landmass" has absolutely nothing to do with the present case. To repeat the point, it is the equality of States in relation to maritime rights which is here put in question.

89. This said, the central argument of the Libyan Memorial is that, in relation to the present case, the natural prolongations of each of the two countries are geologically and geomorphologically separated from each other by the so-called *Rift Zone*. The "*Rift Zone*" thus marks simultaneously the limits of Malta's southern entitlement and Libya's *northern entitlement* and the boundary of the shelf between these two neighbouring States:

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[1] Libyan Memorial, p. 114, para. 6.88. In support of this unexpected proposition, the Libyan Memorial refers to two passages in the *Tunisia–Libya* judgment. The first (p. 54, para. 62) speaks of "the natural prolongation of the landmasses into and under the sea ..." but does so as part of the statement of the Libyan argument (and not that of the Court) regarding the northward prolongation of the African landmass. As for the second (p. 61, para. 73), far from speaking of "landmass" – the word is not there – it stresses, on the contrary, that the only matter that counts is "the geographic correlation between *coast and submerged areas off the coast* ...".

[2] *Ibid* p. 137, para. 9.12.

[3] *Tunisia–Libya* Case, *I.C.J. Reports* 1982, p. 61, para. 73 Emphasis supplied.

[4] Emphasis supplied.

"... the Rift Zone constitutes a fundamental discontinuity existing today in the sea-bed and subsoil and forms an actual separation in the natural prolongations of Libya northward and Malta southward. As such, the Rift Zone serves to 'point up' those portions of the continental shelf that are appurtenant to Libya and Malta inasmuch as it marks the limits of each State's area of entitlement to areas of continental shelf lying between them".[1]

For similar reasons the Libyan Memorial maintains that Malta is not entitled to claim continental shelf rights beyond the Sicily-Malta Escarpment, since this "terminates any natural prolongation east of Malta".[2]

90. Libya's legal argument as developed in its Memorial does not stop there. Although in the present case natural prolongation is, according to Libya, "conclusive" and "determinative" for the delimitation – since, in Libya's view, there are here two physically distinct shelves separated by the "Rift Zone" –, the delimitation thus obtained cannot be treated as definitive until after verification of its equitable character. Although in such a case, according to Libya's views, "legal entitlement and delimitation go hand in hand",[3] the determination of the limit of the natural prolongation of each country (in this case up to the "Rift Zone") is no more than "a first step",[4] and this limit may only be retained as the boundary of the areas of continental shelf belonging to each country "provided an obviously inequitable result is not reached".[5] The Memorial further acknowledges expressly that "there are situations in which natural prolongation is not in itself sufficient to be determinative of a delimitation, but where consideration of other relevant factors is required".[6]

91. If Malta has properly understood the Libyan argument, this control of the equity of the result achieved with the assistance of the criterion of natural prolongation (in the case always of two physically distinct shelves) is implemented in two forms. First, in checking whether

[1] Libyan Memorial, p. 132, para. 8.13; cf. p. 133, para. 8.17.
[2] *Ibid* p. 132, para. 8.15 and p. 133, para. 8.17.
[3] *Ibid.* p. 83, para. 6.09.
[4] *Ibid.* p. 89, para. 6.21; p.127, para. 8.01.
[5] *Ibid.* p. 91, para. 6.25.
[6] *Ibid.* p. 90, para. 6.23. In the *Tunisia–Libya* case, Libya maintained, as has already been noted, that, since the natural prolongation was in that case "determinable as a matter of scientific fact", there was no scope for according a rôle to equitable principles. A delimitation giving effect to the principle of natural prolongation, so Libya maintained, must necessarily conform with equitable principles (cf. *Tunisia–Libya* case, p. 44, para. 39). The Court rejected Libya's contention and stated that a delimitation in conformity with natural prolongation is not necessarily "appropriate" (*ibid.*, p. 46, para. 43). It said: "the two considerations – the satisfying of equitable principle and the identification of the natural prolongation – are not to be placed on a plane of equality" (*ibid.* p. 47, para. 44). For the Court, "satisfaction of equitable principles is, in the delimitation process, of cardinal importance" (*ibid.*). It is in order to fall in with this position of the Court that Libya has abandoned its previous contention and that it now quite properly introduced relevant circumstances for the purpose of verifying whether natural prolongation leads to an equitable result.

the circumstances relevant to the case allow one to consider the delimitation established "as a first step" as being equitable – in which case the delimitation may be confirmed; if not it must be modified. Secondly, *in submitting the provisional delimitation* to the "test of proportionality". Chapter 10 of the Libyan Memorial pursues this approach.

92. In considering the Libyan view of *relevant circumstances* conceived as a means of checking the equity of the result obtained by recourse to natural prolongation, attention must be paid to the last paragraph of Chapter 8 of the Libyan Memorial. There, after having determined "The Physical Limits of Natural Prolongation", which is the title of the Chapter, the Memorial says: "In the Chapter which follows it remains to be considered whether a delimitation boundary within the Rift Zone... would lead to an equitable result in light of the other circumstances relevant to this case".[1] It is also pertinent to observe that Chapter 9, which is concerned with "The Relevant Circumstances of this Case", defines these circumstances precisely as those "relevant to an equitable result in the particular case".[2] This Chapter concludes with the observation that the various relevant circumstances "... either support, or are compatible with, the view that *an equitable result would* be achieved by a delimitation within the Rift Zone..."[3].

93. The Libyan Memorial reveals a number of uncertainties and vagaries *in the exposition and application of* this juridical approach. Thus, so Libya maintains, in the case of two physically distinct shelves natural prolongation is "conclusive" or "determinative" of the delimitation (subject to the condition that *the result be equitable in the* light of the relevant circumstances and of the test of proportionality) while, in the case of a single and continuous shelf, natural prolongation is no more than one relevant circumstance amongst others. *Given that*, according to the Libyan argument, the so-called "Rift Zone" amounts to a marked separation of the continental shelves of Malta and Libya, it is difficult to understand why the Memorial examines at length and on two occasions the physical elements of natural prolongation in the present case as a relevant circumstance.[4] This contradiction at least indicates a lack of confidence in the thesis of marked separation.

94. Another uncertainty deserves to be mentioned. To the extent that it is the function of relevant circumstances, according to the Libyan argument, to verify the equity of the result obtained by reference to the concept of natural prolongation, it is difficult to see why *those circumstances* deemed to be relevant must – or even should – have some sort of relationship with the geological and geomorphological facts which define the continental shelf. There is certainly no such *relationship in the circumstances* invoked as relevant by the Libyan

[1] Libyan Memorial, p. 133, para. 8.18.
[2] *Ibid.* p. 134, para. 9.01.
[3] *Ibid.* p. 153, para. 9.64; cf. also p. 126, para. 7.15 *infine*.
[4] *Ibid.* at page 97 et seq. and again at page 134 et seq.

Memorial: geography, conduct of the Parties, security interests, islands, delimitations with third States. Why, then, does the Libyan Memorial reject economic considerations as not being relevant *per se* under the pretext that "such considerations have nothing whatever to do with the physical facts of prolongation of the land territory into and under the sea and the geographic correlation between landmass and sea-bed which is the basis of title"?[1] If this argument has any value – which it has not – none of the other relevant circumstances introduced by the Libyan Memorial would warrant a moment's retention.

95. Regardless of these relatively minor uncertainties and contradictions, the Libyan argument represents an interesting attempt at legal construction in an area where the rapid evolution of the law hardly facilitates the statement of clearly defined principles and rules. On certain points, as the Court will notice, Malta raises no objection to the way in which Libya perceives the relevant law. As to others, on the contrary, Malta cannot associate itself with the Libyan presentation. Malta will, therefore, in the pages which follow, identify those points in the Libyan argument which appear to diverge from customary international law and will at the same time set out its own view of the principles and rules of the international law applicable in the present case.

2. An Assessment of Libya's Legal Presentation

(a) *Entitlement and Delimitation : Outer limits and Boundaries*

96. Malta sees no objection to the legal distinction developed in the Libyan Memorial between the basis of title, which confers on a State an "entitlement to shelf", and delimitation. The first is a matter of determining the concepts on the basis of which a State is legally entitled to exercise a certain jurisdiction in maritime areas situated beyond its coasts; the second is a matter of drawing the boundary between maritime jurisdictions of two neighbouring States whose coasts are opposite or adjacent to each other. These two problems are clearly not identical; but at the same time they bear an intimate relationship to each other.

97. The "entitlement" or "basis of title" raises the question of the nature of the relationship between land and sea. It is because this relationship has developed from the sole purpose of the protection of coasts to the safeguarding of the resources of the sea-bed and subsoil thereof and, ultimately to an appropriation of all the resources of the sea lying beyond the coast, that the nature of the entitlement has changed and the different zones of maritime jurisdiction have come to be defined. Entitlement and legal basis of title are therefore intimately linked to the fundamental concepts of the law of the sea. Entitlement

[1] *Ibid.* p. 114, para. 6.88.

and basis of title thus refer essentially to the extension of maritime jurisdiction towards the sea.[1]

98. The dynamism of the extension of maritime jurisdiction towards the open sea is, however, restrained by the concern of the international community as a whole to avoid an indefinite enlargement of the marine areas which fall under national jurisdiction to the detriment of those areas which remain truly international. This is why international law has been led to fix outer limits for each of the different types of jurisdiction which have evolved over the course of the years, as is particularly shown by the evolution of the outer limits of the continental shelf between the time of the adoption of the 1958 Convention on the Continental Shelf and the conclusion of the Law of the Sea Convention of 1982. According to present day customary international law, the outer limits of the Continental Shelf may be considered as those which are defined in Article 76 of the Convention on the Law of the Sea.

99. As for delimitation, this term may be used *largo sensu* to include at the same time both the fixing of outer limits and the establishment of limits between the jurisdictions of neighbouring States. However it seems preferable – the two Parties are in agreement on this point – to reserve the term "delimitation" for the determination of maritime boundaries *between* neighbouring States with opposite or adjacent coasts. Thus understood, delimitation implies the necessity of fixing with precision, according to appropriate methods, the maritime rights of each of the States concerned. In the *Tunisia–Libya* case, the contrast drawn by Libya between "the outer limits of the shelf" and "boundaries between States" was even stronger than in the present case.[2]

100. The Court has itself had occasion to draw this distinction between the legal basis of title to the continental shelf and the delimitation of areas of continental shelf belonging to neighbouring States. In the *North Sea* cases, after having defined the "basic continental shelf doctrine" by reference to the concept of natural prolongation, the Court stated that this definition does not entail as a consequence "the existence of some rule by which those areas can be obligatorily delimited" between neighbouring States: "The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries...".[3] In the *Tunisia–Libya* case the Court confirmed, with reference to the passage just quoted, the distinction "between a principle which affords the justification for the appurtenance of an area to a State and a rule for determining the extent and limits of such area".[4] The Court added: "Adjacency of the sea-bed to the territory of a coastal State has been the paramount criterion for

[1] The Libyan Memorial considers the definition contained in this Article as an "absolute" definition in the sense that it is applicable only in the case of "outer limits *where no problems of delimitation with neighbouring States arise*" (p. 82, para. 6.06).

[2] Libyan Counter-Memorial, pp. 130 and 132.

[3] *I.C.J. Reports* 1969, p. 32, para. 46.

[4] *I.C.J. Reports* 1982, p. 47, para. 44.

determining the legal status of the submerged areas, *as distinct from their delimitation* . . .".[1]

101. This said, the nature of the distinction between the legal basis of title and delimitation needs to be clearly appreciated. It does not signify that the nature of the legal basis of title is without any bearing on the criteria and methods of delimitation. This is not a case of concepts which are unrelated one to the other. The Court clearly said in 1982:

> ". . . the 'principles and rules of international law which may be applied' for the delimitation of continental shelf areas must be derived from the concept of the continental shelf itself, as understood in international law . . .".[2]

Developing this thought, the Court expressly stated that to the extent that contemporary international law makes the distance measured on the surface of the sea "the basis for the title of the coastal State" and, in consequence, "departs from the principle that natural prolongation is the sole basis of the title", it is this new legal basis which must intervene and be taken into consideration when a question arises of delimiting the continental shelf areas belonging to each of the two States:

> "It is only the legal basis of the title to continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having consequence for the claims of the Parties".[3]

The direct impact of the legal basis of title on the rules governing delimitation could not be established more forcibly.[4] The Libyan attempt to isolate in some way the rules relating to delimitation from the evolution undergone by the theory of the continental shelf and the appearance of the concept of distance as the legal basis of title to continental shelf rights cannot be accepted.

102. To sum up: while the distinction drawn by the Libyan Memorial between *entitlement* and *delimitation*, and between *outer limits* and *boundaries between neighbouring States*, is valid in itself, it possesses neither the content nor the scope which Libya seeks to give it. The comments just made show that this distinction cannot justify the proposition in the Libyan Memorial that "as a first step, each Party has to prove that the natural prolongation of its land territory extends into the area in which the delimitation is to be effected"[5] and that, in certain cases (such as the present case), "the evidence of natural prolongation . . . serves to establish the basis for the boundary between different shelves. Thus legal entitlement and delimitation go hand in hand".[6] Chapter 8 of the Libyan Memorial, which seeks to examine

[1] *Ibid.* p. 61, para. 73. Emphasis supplied.
[2] *Tunisia–Libya* case, *I.C.J. Reports* 1982, p. 43, para. 36. This link was also affirmed in the *Anglo–French Continental Shelf Arbitration*, para. 77 *in fine*.
[3] *Tunisia–Libya* case, *I.C.J. Reports* 1982, p. 48, para. 48.
[4] See also *Aegean Continental Shelf* case, *I.C.J. Reports* 1978, p. 35, para. 84.
[5] Libyan Memorial, p. 89, para. 6.21.
[6] *Ibid.* p. 83, para. 6.09.

"the physical factors of geomorphology and geology... in order to determine the limits of the natural prolongation of Libya and Malta relevant to a delimitation in this case",[1] is therefore radically *outside the legal principles which the Court has laid down.*

(b) The Delimitation Process

103. As has been shown above, Libya sees what the Court in the *Tunisia–Libya* case has called the "delimitation process"[2] as an operation in two stages:

(*a*) the first, common to all cases, consists of the establishment of the natural prolongation of each Party in its physical sense "as a first step";

(*b*) the second depends on whether one is faced by one or the other of the following two situations:

– where there are two physically distinct shelves, delimitation must be effected along the line of their physical separation (subject to achieving an equitable result in the light of the relevant circumstances and the application of the test of proportionality);

– where there exists only a single continuous plateau within which the delimitation is to take place, the physical features of this plateau are one relevant circumstance amongst others to be taken into consideration.

104. Libya's argument is that in the present case the first situation exists so that the determination of the respective physical and natural prolongation of Malta and Libya operates by itself to delimit their continental shelf rights, subject to the control of achieving an equitable result.

105. On the other hand, the Libyan Memorial is not very explicit in the way in which it conceives the operation of delimitation in the second situation. Until now, it has been this second situation – that is to say, the existence of one and the same continuous continental shelf on which there is no physical feature sufficiently "significant" to constitute "a natural submarine frontier" – which has existed in all the cases hitherto submitted to judicial or arbitral settlement. As regards the Pelagian Basin (or Block) itself, it has been seen that Libya insisted strongly in the *Tunisia-Libya case on its fundamental geological unity* and resisted Tunisia's attempts to identify in this Basin (or Block) those natural features which might serve as the natural boundaries of the two countries.[3] Malta has shown that the continental shelf between Malta and Libya is effectively characterized by an essential unity and a fundamental continuity on the physical plane. However that may be, Libya has chosen to assert in the present case the existence of a so-

[1] *Ibid.* p. 127, para. 8.01.

[2] *I.C.J. Reports* 1982, p. 47, para. 44.

[3] Cf. Judgement in the *Tunisia–Libya* case, *I.C.J. Reports* 1982, p. 57, para. 66. See also above para. 50 and footnote 3.

called "Rift Zone" interrupting the physical continuity of the shelf and creating two physically distinct shelves, one belonging to Malta, the other to Libya. That is probably why Libya did not consider it useful to set out in detail in its Memorial the rules which it considers applicable to the delimitation of a single and continuous continental shelf.

106. The proof which the Libyan Memorial requires each Party to provide "as a first step" that its natural prolongation "extends into the area in which the delimitation is to be effected" does not really help the delimitation process since each Party can provide this proof for the whole extent of the shelf which is to be delimited. It is no more a question of verifying a delimitation achieved on the basis of physical and natural prolongation by testing it against the relevant circumstances, geographical and otherwise. The relevant circumstances may certainly be taken into consideration but it is then they who directly dictate the solution, and are not merely a method of *verifying* the equity of the solution reached on the basis of natural prolongation. Instead of an operation in two stages, there is really only one single operation – in which natural prolongation plays no more than the associated rôle of being one factor amongst others.

107. The concept of the delimitation process developed by the Libyan Memorial is flawed, in Malta's opinion, by two objections. One – which will be examined immediately – relates to the rôle which relevant circumstances are required to play in this process. The other – even more fundamental, if this is possible – relates to Libya's understanding of the legal basis of title to continental shelf rights – and will be examined in Chapter II.

108. Relevant circumstances certainly occupy a leading place in the delimitation process. This concept does not appear as such in the 1958 Convention on the Continental Shelf, of which Article 6 mentions only "special circumstances" of such kind as to lead to a delimitation other than by means of an equidistance line. The difference between the two concepts is clear: while "special" circumstances do not exist in every concrete situation, "relevant circumstances" exist inevitably in every case. The award in the *Anglo–French Continental Shelf Arbitration* has however shown that the operation of the "combined equidistance – special circumstances rule" leads in practice to "the full liberty of the Court in determining the geographical and other circumstances relevant to the determination of the continental shelf boundary".[1] It was the Court which in 1969 introduced for the first time the expression "relevant circumstances" into the law relating to the delimitation of the continental shelf ("delimitation is to be effected... taking account of all the relevant circumstances...")[2] and this term was subsequently much used in the award in the *Anglo–French Continental Shelf Arbitration* of 1977 and in the *Tunisia–Libya* judgment of 1982. The fact that the

[1] Decision of 30 June 1977, *International Law Reports*, Vol. 54, p. 6, para. 69.
[2] *I.C.J. Reports* 1969, p. 53, para. 101.

expression does not appear in Article 83 of the new Convention on the Law of the Sea does not mean that it has lost its importance in the delimitation process. But its precise rôle has yet to be defined.

109. First, it is certain that the task of the judge or arbitrator cannot be reduced to a mechanical or automatic one, allowing a predetermined solution to be drawn from relevant circumstances. Relevant circumstances do not amount to a *diktat*, but require the active intervention of a judge or arbitrator who takes a decision "having regard to relevant circumstances" within the framework of his discretionary power. The judicial or arbitral decision "is very much a matter of appreciation in the light of the geographical and other circumstances".[1] Similarly, in the *Tunisia–Libya* case the Court held that its task consists of "balancing up the various considerations which it regards as relevant".[2]

110. Secondly, the power of appreciation of the judge or arbitrator must keep a reasonable distance from two extremes. On one side the judge or arbitrator must avoid the application of any too general or abstract a rule. Recourse to relevant circumstances, differing in kind from one case to another, enables him easily to avoid this risk. Thus he can achieve his objective of an equitable or reasonable solution, since "it is clear that what is reasonable and equitable in any given case must depend on its particular circumstances".[3] In other words "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 ... to overconceptualize the application of the principles and rules relating to the continental shelf".[4] As in any other situation, excessively general rules of law, neglecting the particular facts of a case, will lead to unjust or unreasonable solutions.

111. On the other hand however, an excessive individualisation of the rule of law, which changes from one case to another, would be incompatible with the very concept of law. Every legal rule presupposes a minimum of generality. A rule which is elaborated on a case by case basis rests on the discretionary power of the judge, on conciliation, on distributive justice – in brief, on *ex aequo et bono*. The risk of excessive individualisation is even more real when there exists no definition which permits one to identify the circumstances to be treated as relevant or the criteria enabling one to assess the respective weight of the circumstances. The Court recognised this as early as 1969: "In fact, there is no legal limit to the considerations which States may take account of... The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case".[5] In other words, the taking of relevant circumstances into consideration avoids the application of any automatic rule, but this

[1] *Anglo–French Continental Shelf Arbitration*, Decision of 30 June 1977, para. 70.
[2] *I.C.J. Reports* 1982, p. 60, para. 71.
[3] *Ibid.* p. 60, para. 72.
[4] *Ibid.* p. 92, para. 132.
[5] *I.C.J. Reports* 1969, p. 50, para. 93.

must be done in such a way as not to deprive the delimitation of its intrinsic legal character. The Court said this in 1982: "While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice".[1]

112. It follows that the taking into consideration of relevant circumstances never occurs on its own in the delimitation process, but it always and in every situation, plays a rôle of extreme importance. This statement will be considered in its two parts.

113. In the first place, *relevant circumstances never suffice by themselves to establish the boundary line.* As has been seen they do not dictate this line to a judge or arbitrator in an automatic fashion. Nor are they the sole element of which a judge or arbitrator must take account in exercising the power of "appreciation" accorded to him by the jurisprudence. Although the judge or arbitrator does "take into account" relevant circumstances, his decision will still not be a direct and exclusive consequence of the examination of relevant circumstances alone. Another element plays an important part – that of identifying the legal basis of title to continental shelf. The legal nature of "entitlement" to continental shelf rights has a decisive rôle in the delimitation process, and it cannot be otherwise unless one considers delimitation as a mere mechanical operation having no relationship with the fundamental concepts of the continental shelf – something to which the Court was clearly opposed both in 1969 and 1982. The Libyan Memorial is open in this connection to two objections. The first is that it satisfies the requirement of taking into consideration the legal basis of title only when the situation is one of two physically separated shelves, and it neglects it when the case is one of a single and continuous shelf. Secondly, as Malta will show in the next Chapter, even in the case of physically distinct shelves, Libya has recourse to a legal basis of title which is out of harmony with the present state of customary international law.

114. Secondly, *relevant circumstances are always present in the process of delimitation.* The two Parties appear to be in agreement on this point. As to their function, the Libyan Memorial properly describes it as consisting of verifying whether the delimitation suggested by the recourse to the legal basis of title is equitable and reasonable. *Relevant circumstances thus do not have the rôle of suggesting, and still less of dictating, to the judge or arbitrator a given boundary line, but rather of enabling him to achieve an equitable and reasonable solution.* The examination of relevant circumstances forms an integral part of the search for an equitable result, and it is at the stage of seeking an equitable result that it is proper to conduct this examination. The *Tunisia–Libya* judgment speaks of "... circumstances considered to be the elements of an equitable solution",[2] and mentions in the dispositif

[1] *I.C.J. Reports* 1982, p. 60, para. 71.
[2] *I.C.J. Reports* 1982, p. 58, para. 68.

"the relevant circumstances... to be taken into account in achieving an equitable delimitation".[1] As for equitable principles, ultimately they signify nothing other than the requirement of looking at the relevant circumstances of the case for the purpose of achieving an equitable result. This is reflected in the passage of the award in the *Anglo–French Continental Shelf Arbitration* which says: "Any ground of equity, the Court considers, is rather to be looked for in the particular circumstances of the present case..."[2]. The same was, with equal clarity, stated by Judge Jiménez de Aréchaga in his separate 1982 opinion when, to the question "What... is the meaning of equity in this field?", he replied – referring to the 1977 Award – that the latter "gave a positive content to the notion of equitable principles as applicable in this context by linking them to the circumstances of each case".[3]

In sum: relevant circumstances do not provide the original basis for delimitation, but rather have the status of criteria for evaluating the equitableness of a delimitation *prima facie* indicated by the geographical facts.

115. If the analysis in the above paragraphs is correct the description of the delimitation process in conformity with the principles and rules of international law gives rise to no further difficulties.

116. As a first step, it is necessary to take account of the legal basis of title, or, alternatively, of the very concept of the continental shelf itself since, according to the dictum in the *Tunisia–Libya* judgment, the principles and rules of international law applicable to delimitation "must be derived from the concept of the continental shelf itself, as understood in international law".[4]The following chapter will show that, contrary to the position of the Libyan Memorial, it is not natural prolongation "in its physical sense" which is the appropriate basis of title, but natural prolongation in its legal sense of a spatial distance from the coasts measured at the surface of the sea. The same chapter will show that giving due consideration to the distance principle leads, as a first step - provisionally, not definitively – to an equidistance line.

117. This first approach, purely provisional and tentative, is followed at a second stage by taking into consideration the relevant circumstances of the case. If this consideration leads to the conclusion that the line emerging from the first stage is inequitable or unreasonable it must be adjusted or even, in certain cases, combined with other methods. The question of proportionality, when the concrete situation renders recourse to it appropriate, will also be examined in order to assess the reasonable or equitable character of the result. Chapters II to IV which follow will be devoted to a specific examination in relation to the delimitation process of the legal basis of title, of relevant circumstances and of the test of proportionality.

[1] *Ibid.* p. 93, para. 133B.
[2] Decision of 30 June 1977, *International Law Reports*: Vol. 54, p. 6, para. 195, cf. para. 97.
[3] *I.C.J. Reports* 1982, p. 105, para. 22.
[4] *Ibid.* p. 43, para. 36.

CHAPTER II

THE LEGAL BASIS OF TITLE AND THE DELIMITATION PROCESS: THE CONCEPT OF NATURAL PROLONGATION

118. It is appropriate to recall that, according to the Libyan Memorial, natural prolongation has a "double aspect". First, it constitutes the basis of legal title to continental shelf areas. Secondly it has a rôle in the delimitation process: that of identifying the boundary when there exist two sharply distinct natural prolongations; that of a simple circumstance or relevant factor when the separation of the two natural prolongations is not sufficiently marked.

119. It is also appropriate to recall that natural prolongation is seen by Libya "in its traditional character as a physical concept", that is to say, by reference to its present geomorphological elements. On the basis of this legal concept, Libya presents the so-called Rift Zone as the appropriate boundary in the present case. Geomorphologically, Libya argues, the "Rift Zone", with its succession of troughs and channels, presents features of great depth, in contrast to the surrounding sea-bed, appears "to have steep flanks and to be of considerable size"[1] Geologically, so the Libyan Memorial suggests, the "Rift Zone" is "the result of recent and current rifting activity". The result of this conjunction of geomorphological and geological factors, Libya suggests, is that "the Rift Zone constitutes a fundamental discontinuity existing *today in the sea-bed and subsoil and forms an actual separation in the* natural prolongations of Libya northward and Malta southward".[2] Towards the east, adds Libya, the natural prolongation of Malta ends in the Sicily–Malta Escarpment, as a result of which Malta has no continental shelf rights extending beyond this other geological and geomorphological "feature of major importance."[3]

[1] Libyan Memorial, p. 128, para. 8.03.
It should be remembered that it is above all in relation to the three Troughs (Pantelleria, Malta and Linosa) that the Libyan Memorial insists on the marked character of the depth and shape. The Libyan Memorial recognises that the Malta and Medina Channels, are more discrete features and it is content to present them as an "extension eastward" of the Troughs (see above, para. 44). Between Malta and Libya there are no troughs but only channels. For a particularly graphic illustration see Figure 11 in the Libyan Counter-Memorial in the *Tunisia–Libya* case, opposite page 104, and Figure 4, page 76.
[2] Libyan Memorial, p. 132, para. 8.13.
[3] *Ibid.* pp. 132–133, paras. 8.14–8.18.

120. Malta will in the present Chapter show, first, that the theory developed in the Libyan Memorial is legally unsound.[1] In the purely physical sense given to it by Libya, natural prolongation does not constitute the legal basis of title to continental shelf rights and, by the same token, cannot play the rôle that Libya wishes to accord to it in the delimitation process. Malta will then set out the rules of international law applicable to the delimitation process in the light of the entitlement to continental shelf rights as understood by Malta.

1. Libya's Conception of Natural Prolongation is not in Accordance with International Law

121. By way of dealing with the Libyan theory of natural prolongation, it will be convenient to recall some elements in an evolution which has often been described – the latest occasion being the Court's own judgment in the *Tunisia–Libya* case.

(1) Legal Basis of Title

122. There can of course be no doubt that physical considerations lie at the origin of the continental shelf concept – as was stated by the Court itself, not only in 1969[2] but also in 1982.[3] Nor can there be any doubt that "the legal concept, while it derived from the natural phenomenon, pursued its own development"[4] and that this development consisted of a "widening of the concept for legal purposes".[5] The definition given by the Court in 1969 still remains valid fifteen years later; the continental shelf of a State "constitutes a natural prolongation of its land territory into and under the sea ... a prolongation or continuation of that territory, an extension of it under the sea".[6] But the meaning and content of the concept of prolongation has evolved. Prolongation is no longer defined by reference to physical features, whether geological or bathymetric, but by reference to a certain distance from the coasts. It is this fundamental development that the Libyan Memorial disregards, overlooking in doing so the principle stated by the Court: "The concept of natural prolongation ... was and remains a concept to be examined within the context of customary law and State practice".[7]

123. In truth, natural prolongation in the physical sense – geomorphological and geological – has at no time alone formed the legal basis of title to continental shelf rights. Before the 1969 Judgment, in which

[1] Errors of fact affecting the description of the region in the Libyan Memorial have been set out in Part I of the present Counter-Memorial paras. 41–62.
[2] *I.C.J. Reports* 1969, p. 51, para. 95.
[3] *I.C.J. Reports* 1982, p. 45, para. 41.
[4] *Ibid.* p. 46, para. 42.
[5] *Ibid.* p. 45, para. 41.
[6] *North Sea* cases, *I.C.J. Reports* 1969, p. 22, para. 19 and p. 31, para. 43.
[7] *Tunisia–Libya* Case, *I.C.J. Reports* 1982, p. 46, para. 43.

the expression "natural prolongation" was introduced "as part of the vocabulary of the international law of the sea",[1] neither the work of the International Law Commission nor Article 1 of the Geneva Convention of 1958 on the Continental Shelf had seen the theory of the continental shelf and natural prolongation in its physical sense to be identical. From that moment there was thus established what the Court has called "the lack of identity between the legal concept of the continental shelf and the physical phenomenon known to geographers by that name",[2] in particular by the introduction of the criterion of exploitability. It is interesting to note that from the time of the first work of the International Law Commission in 1953, certain members had suggested defining the continental shelf by reference to distance from the coast, regardless of depth.[3] At that time the attention of the Commission was also drawn to the case of those States which do not have a continental shelf in the physical sense and to the inequality that an exclusively physical definition of the continental shelf might introduce to the detriment of such States. One member of the Commission observed that "If a geological definition were now adopted, States like Chile and Peru, which had no continental shelf in the geological sense of the word, would be placed at a serious disadvantage."[4] It was also in 1953 that the Commission envisaged the case of areas of which the depth exceeded 200 metres situate near the coast of certain countries and separating these from areas with a depth of less than 200 metres. In such cases the Commission recognised that the physical concept must admit of an exception.[5] This opinion was confirmed by the Commission in the commentary on its Draft Articles of 1956.[6]

124. The 1969 Judgment in the *North Sea* cases confirms the limited rôle of physical features in the definition of the continental shelf.[7] In 1969 the Court had no intention to reopen the question of the rights of Norway over the areas of continental shelf in the North Sea situate beyond the Norwegian Trough acknowledged by the delimitation agreements concluded with the other States bordering on that sea.[8] As Judge Jiménez de Aréchaga concluded:

> "Consequently, it is not possible to interpret the term 'natural prolongation' in the 1969 Judgment as reintroducing into the definition of the continental shelf the geological and geomorphological elements which had been left out by the International Law Commission in 1956 and by the Conference in 1958".[9]

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[1] *Ibid.*
[2] *Ibid.* p. 46, para. 42.
[3] *Yearbook of the International Law Commission* 1953, Vol. II, p. 9.
[4] *Ibid.* Vol. I, p. 73.
[5] *Ibid.* Vol. II, p. 214, para. 66, *Report to the General Assembly.* Cf. Judge Jiménez de Aréchaga, Sep. Op. *I.C.J. Reports* 1982, p. 111–2, para. 43.
[6] *Yearbook of the International Law Commission* 1956, Vol. II.
[7] Cf. *Tunisia–Libya* Case, *I.C.J. Reports* 1982, p. 46, para. 42 *infine.*
[8] *North Sea* cases, *I.C.J. Reports* 1969, p. 32, para. 45.
[9] *I.C.J. Reports* 1982, Sep. Op. p. 112, para. 46.

125. The award in the *Anglo-French Continental Shelf Arbitration* of 1977 fully supports these views. It said: "the very fact that in international law the continental shelf is a juridical concept means that its scope and the conditions for its application are not determined exclusively by the physical facts of geography but also by legal rules"[1].

126. The work of the Third Law of the Sea Conference pushed even further this lack of identity between the concept of the continental shelf and the purely physical elements. To the end, essentially, of assuring the equality of all coastal States – whether or not they had a continental shelf in the physical sense of the term and whatever might be its extent – the Conference recognized to all States continental shelf rights to a distance of 200 nautical miles from their coasts. In other words, the natural prolongation of each coastal State today automatically extends at least to a uniform distance of 200 miles from its coast. The concept of natural prolongation has thus become a purely spatial concept which operates independently of all geomorphological or geological characteristics. It is only beyond 200 miles that it resumes a physical significance, since the States which possess a more extensive physical natural prolongation enjoy continental shelf rights to the edge of their continental margin. Up to a distance of 200 miles from the coast, it is, therefore, in a combination of these concepts of coast and distance – that is to say essentially on geographical ideas – that one finds the contemporary definition of the continental shelf and the legal basis of title thereto. Article 76 of the Convention on the Law of the Sea gives expression to these new ideas.

127. One may thus readily identify the error of interpretation which Libya commits when, referring to Article 76, it says:

> "Not only does the physical fact of natural prolongation operate throughout the shelf area (unlike the 200 mile limit which is an arbitrary limit and which operates only as an outer limit)...".[2]

No doubt one may say that the concept of natural prolongation operates as well within, as outside, the 200 mile limit, but only on the understanding that it does so in two totally different senses: up to 200 nautical miles natural prolongation is defined exclusively by the distance from the coasts; and it is only beyond 200 miles that it is defined by reference to its physical characteristics. Indeed, subject to limited exceptions, even this outer limit is defined by distance, namely 350 nautical miles.

128. These new considerations are highlighted by the judgment in the *Tunisia–Libya* case in several places. The legal notion of the continental shelf, it states, has:

> "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 an area

[1] Decision of 30 June 1977, para. 191.
[2] *Libyan Memorial*, p. 83, para. 6.08.

presented the specific characteristics which a geographer would recognize as those of what he would classify as 'continental shelf'"[1]

"... in certain circumstances (i.e. up to 200 miles) the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State... The legal basis of the title to continental shelf rights – the mere distance from the coast – ...".[2]

"... 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... (T)he coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it".[3]

"The coast... constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas... extend in a seaward direction...".[4]

"... The physical factor constituting the natural prolongation is *not taken as a legal title*...".[5]

129. It is hardly necessary to recall that the two ways of identifying natural prolongation – by the physical elements and by the distance from the coast – are not the same. One can understand that, since Libya is anxious to relate its approach closely to physical prolongation, it has made no more than discrete allusions to distance and to coasts.[6] If, as the Libyan Memorial contends, it is the existence and extent of the physical and natural prolongation which determines the continental shelf rights of a State, neither the configuration of the coast nor the distance from it has any rôle to play. If, on the other hand, as is true of present day customary international law, the distance from the coast is the generative element of the continental shelf rights of a State, the physical characteristics of the sea-bed (its geological structure and geomorphological configuration) are irrelevant for the purposes of determining the extent of the rights of the coastal State unless its physical continental shelf extends beyond 200 nautical miles. The Libyan Memorial acknowledges that one of the trends during the Third Conference on the Law of the Sea was to approach the continental shelf "on the basis of a simple distance criterion of 200 miles *and thus disregard natural prolongation*".[7] What the Libyan Memorial does not state is that it is precisely this trend which has come to be accepted by customary international law.

130. It is clear that in this conception of the continental shelf the extent of the rights of a coastal State is not affected by the presence of features such as trenches and channels. Judge Jiménez de Aréchaga put the point thus:

[1] *I.C.J. Reports 1982*, p. 45, para. 41.
[2] *Ibid.* p. 48, para. 48.
[3] *Ibid.* p. 61, para. 73.
[4] *Ibid.* p. 61, para. 74.
[5] *Ibid.* p. 58, para. 68.
[6] Libyan Memorial pp. 87–89, paras. 6.17–6.20; p. 104, para. 6.61.
[7] *Ibid.* p. 87, para. t.17.

> "This new method of defining the continental shelf by laying down an agreed distance from the baselines definitely severs any relationship it might have with geological or geomorphological facts. The continental shelf extends, regardless of the existence of troughs, depressions or other accidental features, and whatever its geological structures, to a distance of 200 miles from the baselines, unless the outer edge of the continental margin is to be found beyond that distance".[1]

131. A second consequence of this approach to the legal basis of title is that all coastal States have the same continental shelf rights. This equality of States underlies the evolution of customary international law in this matter – as has already been mentioned. To quote Judge Jiménez de Aréchaga once more, the natural prolongation – *in the* present spatial sense of that expression –

> "... exists in every case, whatever may be the characteristics of depth or geological composition of the sea-bed. To enjoy continental shelf rights all that a State needs is a coastal front to the sea ...".[2]

132. From what has been said above there can be no doubt that the theory of the Libyan Memorial according to which natural prolongation in its physical sense – geomorphological and geological – *constitutes the legal* basis of title to continental shelf rights does not accord with international law.[3]

(2) *Delimitation*

133. In these circumstances it is hardly surprising that the Libyan theory of delimitation based on the identification of the natural prolongations of Malta and Libya in the physical sense is also in conflict with international law.

134. On this point, as on the previous one, the evolution began very early. As the judgment in the *Tunisia Libya* case noted, even in 1969 the Court "did not regard an equitable delimitation and a determination of the limits of 'natural prolongation' as synonymous" and only indicated that the delimitation must be "effected in such a way as to *leave 'as much as possible'* to each Party the shelf areas constituting its natural prolongation".[4] Even within this limit, the "physical and geographical facts were not placed by the Court among the legal rules which govern or determine delimitation ... but as factors which the Parties may take into account in negotiating their delimitation".[5] The refusal

[1] *I.C.J. Reports 1982*, Sep. Op. p. 114, para. 51.

[2] *Ibid.* p. 117, para. 59.

[3] In the *Tunisia–Libya* case, Libya expressed more precise opinions on the legal basis of title to continental shelf rights: "The criterion of depth or bathymetry has ceased to have any relevance to the definition of the shelf within 200 miles from the baseline" (Counter-Memorial, p. 140, para. 317).

[4] *I.C.J. Reports 1982*, p. 46, para. 44.

[5] *Ibid.* Sep. op. by Judge Jiménez de Aréchaga, p. 117, para. 60.

of the arbitral award of 1977 to attribute a delimitative effect to "so substantial a feature as the Hurd Deep"[1] is in the same line of thought.

135. But it is principally the *Tunisia–Libya* case which has permitted the Court to reject categorically the argument that the delimitation of areas of continental shelf appertaining to two States must be effected by reference to their natural prolongations in the physical sense of the term. The position taken by the Court in this case is even more remarkable since the two Parties had maintained that the delimitation should reflect their respective natural prolongations. The scientific determination of the natural prolongation appeared to the two Parties as an essential element of the delimitation.[2] The Court did not accept that the delimitation should be carried out according to physical criteria of a scientific character (whether there was a question of essential geological considerations, as Libya demanded, or a question of geomorphological ones, as Tunisia contended). The Court considered that in certain cases it was not "possible" to "identify", "define", or "determine" the limits of the physical and natural prolongations of the two Parties and that even if this were possible, "the idea of natural prolongation" would not be "sufficient, or even appropriate in itself to determine the precise extent of the rights of one State in relation to those of a neighbouring State".[3]

136. The Court certainly did not exclude completely the possibility that a very marked physical separation might serve as a basis for delimitation. Nor did it exclude the possibility that a physical separation which was not so marked might have a function "as one of the several circumstances considered to be the elements of an equitable delimitation".[4]

However the Court also said in the same case, that unless the physical feature "were such as to disrupt the essential unity of the continental shelf so as to justify a delimitation on the basis of its identification as the division between areas of natural prolongation, it would be an element inappropriate for inclusion among the factors to be balanced up with a view to an equitable delimitation".[5]

137. That two States may adopt physical features as the boundary of their continental shelves (as did Australia and Indonesia in relation to the Timor Trench) is one thing. That a judge or arbitrator should make these same features into a compulsory legal criterion is quite another.[6]

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[1] *Ibid.* p. 57, para. 66.

[2] See the Judgment in that case, p. 43, para. 36 and p. 44, paras. 38–39.

[3] *Ibid.* p. 46, para. 43, at page 47, para. 44. The Court further stated that "It would be a mistake to suppose that it will in all cases, or even in the majority of them, be possible or appropriate to establish that the natural prolongation of one State extends, in relation to the natural prolongation of another State, just so far and no farther, so that the two prolongations meet along an easily defined line".

[4] *Ibid.* p. 58, paras. 67 and 68.

[5] *Ibid.* p. 64, para. 80.

[6] Judge Jiménez de Aréchaga was also categorical in his condemnation of the argument that a continental shelf should be delimited by reference to the natural prolongation of the two States in the physical sense of the term. In his Separate Opinion,

138. There is another reason which runs counter to the Libyan argument seeking to find a decisive factor for delimitation in the identification of natural prolongation in the physical sense. As the Court in the *Anglo–French Continental Shelf Arbitration* said in relation to the Hurd Deep, the location features of this kind is matter of chance – "a fact of nature" – and "there is no intrinsic reason why a boundary along this axis should be the boundary"[1]. What justification could there be for accepting this element of chance when the feature which one seeks to retain as a kind of natural boundary is situate very close to the coast of one of the Parties? In such a case the inherent right of the State concerned to the exploration and exploitation of the submarine resources of its natural prolongation (i.e. to a certain distance from its coast) would be denied. There would also be a risk of compromising its security interests thereby infringing one of the dominant principles in the theory of the continental shelf, namely, that third States must not be allowed to exploit the resources of the sea-bed and subsoil of the marine areas close to the coast. A separation of the physical prolongations situate near the coast of one of the States would produce at the same time an "encroachment" of one of the States upon the natural prolongation, spatially defined, of the other and the "cutting-off" of the latter from areas directly situate in front of its coast.

139. These basic interests of a State are not simply a relevant circumstance showing up the inequity of the result achieved and the need to change it. It is something more than that: it amounts to a restriction upon one of the constitutive elements of the concept of the continental shelf, namely, equality between coastal States, whether or not they possess a physical natural prolongation and regardless of the extent of the latter. Nearly all the sea-bed to one, virtually nothing to the other: that is precisely the kind of delimitation that the principles and rules of international law cannot justify. That is precisely the kind of situation which would arise in this case if the Libyan argument of the "Rift Zone" and of the "Sicily–Malta Escarpment" were to be accepted: Malta would see its continental shelf rights – rights inherent in it as a coastal State – reduced to almost nothing in relation to its southern and eastern coasts; while Libya would be enabled to explore and exploit the resources of the sea-bed as far, so one may say, as the very "windows" of Malta. Libya would have Malta wedged between narrow boundaries set by Libya's artificial conception of a limited prolongation towards the south and east. Malta would thus be virtually enclaved, while the maritime rights of Libya would spread broadly towards the north and skirt the Medina Escarpment towards the east.

140. The Libyan Memorial does not seek to conceal this fact.[2]

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at page 117 para. 61, he states that "Physical features such as depressions, channels, seabed contours, geological structures, etc. cannot by themselves govern the determination of continental shelf boundaries".

[1] Decision of 30 June 1977, *International Reports*, Vol. 54, p. 6, para. 108.

[2] *Libyan Memorial, pp. 132–133, paras. 8.15–8.16.*

(8)(9) Figure 4[1] and Map 17[2], moreover, leave not the least doubt as to the practical consequences of the Libyan legal argument. Rarely would encroachment and cut off have been clearer. Rarely would a State have seen itself so substantially deprived of the largest part of its natural prolongation in the name and under the pretext of conformity with natural prolongation (physically defined). Recalling the agreement of 1965 by which the United Kingdom and Norway delimited their continental shelves in the North Sea on the basis of a median line and without taking account of the Norwegian Trough, situate near the Norwegian coast, the Libyan Memorial states:

> "Otherwise 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".[3]

Does not Libya realise that it thus destroys the argument which it develops against Malta in its Memorial?

141. Like land boundaries, maritime boundaries are not a product of nature but of man, a political fact. This is true not only in terms of customary international law but also in terms of State practice: "The concept of natural prolongation... was and remains a concept to be examined within the context of customary law *and State practice*".[4] As already pointed out, the Libyan Memorial says little about such practice. At most it mentions the agreement of 1972 between Australia and Indonesia, which takes account of the Timor Trench for the delimitation of the continental shelf,[5] as well as the agreements between the United Kingdom and Norway of 1965,[6] Italy and Greece of 1977[7] and between Italy and Tunisia of 1971.[8] These references are quite insufficient to reflect the relevant practice; more so since the Libyan interpretation of these agreements is not even correct.

142. As in relation to customary law, it is convenient to distinguish between state practice relative to the legal basis of title and state practice bearing on delimitation.

143. As regards legal entitlement, it is sufficient to refer to such State measures as decrees and concessions which identify the outer limits of the shelf without regard to trenches, depressions, troughs, etc.[9]

144. As to the delimitation, the essential fact is that State practice

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[1] *Ibid.* p. 132.
[2] *Ibid.* p. 160.
[3] *Ibid.* p. 101, para. 6.51.
[4] *Tunisia–Libya* case, *I.C.J. Reports* 1982, p. 46, para. 43.
[5] Libyan Memorial, p. 99, para. 6.48.
[6] *Ibid.* p. 101, para. 6.51.
[7] *Ibid.* p. 149, paras. 9.46–9.48.
[8] *Ibid.* p. 150, paras. 9.50–9.52.
[9] As was stated by Judge Jiménez de Aréchaga, in his Sep. Op. in the *Tunisia–Libya* case (p. 118, para. 64), "This is the case, for instance, of the Soviet Union, Norway off its northern coast, Brazil, Venezuela, Canada and the United States off the coasts of California".

does not take account, with but one exception,[1] of trenches, troughs, channels, depressions and other features even if they are of a kind which could mark the limits of the physical natural prolongations of the States concerned. This feature was noted in the award in the *Anglo-French Continental Shelf* case:

> "... 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".[2]

Commenting on this passage the Libyan Memorial states:

> "The reference to the 'whole tendency of State practice' was not further amplified, and *it is not entirely clear what practice the Court of Arbitration has in mind.* There is, however, clear evidence that the Parties to the Australia/Indonesia Agreement of 9 October 1972 took account of the Timor Trench in determining the boundary between their respective shelves".[3]

145. Libya apparently had some difficulty in finding delimitation agreements which disregarded trenches or depressions. Instead, the Memorial has found precedent in the reverse sense, namely, that of the unique agreement between Australia and Indonesia which takes into consideration the Timor Trench and it is this agreement which Libya represents as reflecting State practice. If however Libya in this case had thought to look back its own Counter-Memorial in the *Tunisia–Libya* case it would have found some interesting information on this matter. There it would have seen the settlement described not as reflecting State practice but rather as an exception to this practice, as an example which: "discloses how significant the 'discontinuity' must be" before States agree to pay heed to it in the delimitation of their continental shelves.[4] The Timor Trough is effectively "huge": according to the source just mentioned, "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 over 10,000 feet".[5] In any case, as Judge Jiménez de Aréchaga has observed, the fact that in one case or another States may decide to fix the boundaries of their continental shelves at a trench or

[1] See below in this paragraph.

[2] Decision of *30 June 1977*, *International Law Reports*, Vol. 54 p. 6 para. 10. See also Reduced Map No. 1 on following page.

[3] Libyan Memorial, p. 99 para. 6.48.

The map opposite, Reduced Map No. 1, is clear and substantial evidence of State practice ignoring physical features. It is a map of the North Sea showing the main physical features of the area and the actual lines of delimitation between the countries concerned. It also shows, contrary to Libya's assertion, that the United Kingdom did in fact acquire about half the area whilst Norway, Denmark and the Netherlands (and of course Germany) had to share the other half between them.

[4] *Ibid.* p. 133, para. 297.

[5] For more details see Libyan Counter-Memorial in *Tunisia–Libya* case, p. 133 and note 4 and Libyan Memorial in the present case, p. 100 note 1.

depression may not be interpreted as being significant unless there was a legal obligation for them to proceed in this way.[1] The agreement between Australia and Indonesia is in fact an isolated case confronting a substantial practice to the contrary.

146. From this practice the authors of the Libyan Memorial in the present case would have found some equally significant examples in the Libyan Counter-Memorial filed in the *Tunisia–Libya* case. Libya then wrote:

> "Delimitation agreements between States commonly cover areas of shelf up to depths of 4,000 metres",[2]

And this proposition was accompanied by a footnote providing a long list of examples. Among these examples a number relate directly to troughs or trenches of considerable depth.[3]

147. To these examples one must add three agreements which are referred to in the Libyan Memorial but which are there incorrectly interpreted.

148. Reference has already been made to the agreement between the United Kingdom and Norway which establishes the continental shelf boundary between the two countries along the median line and takes no account of the Norwegian Trough. This Trough is 300 nautical miles long, has a depth of between 530 and 742 metres and is 20 to 80 nautical miles wide.[4] As it is separated from the Norwegian coast by an area or strip of shelf which is only 2 to 10 miles wide and which is less than 200 metres deep, this Trough should have, in the logic of the Libyan argument, marked the separation of the natural prolongation (and thus, of continental shelf rights) of Norway and the United Kingdom. The Court said unambiguously in 1969 that "the shelf areas in the North Sea separated from the Norwegian coast by the 80–100 kilometres of the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation". But this did not prevent the Parties, said the Court, from deciding that the areas situate west of the Trough, although not forming part of the natural physical prolongation of Norway, should be part of its continental shelf as far as the median line.[5]

149. Passing next to the two other agreements which are mentioned in the Libyan Memorial, the same observations may be made. The agreement between Italy and Tunisia of 20 August 1971 is presented by Libya as "related to a major geomorphological feature: the Rift Zone" as well as to the Pantelleria and Linosa Troughs.[6] It appears clearly from Map 15 of the Libyan Memorial[7] that the boundary established

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[1] *Tunisia–Libya* case, Sep. Op. p. 117, paras. 60–61.

[2] *Tunisia–Libya* case, Libyan Counter-Memorial, p. 138, para. 312.

[3] See also Rhee in 21 *Harvard International Law Journal* 667 at p. 678, note 48.

[4] The discontinuity is such that wells on the Norwegian shelf seawards of the trough are connected by pipeline to the United Kingdom rather than to Norway. See also Reduced Map No. 1.

[5] *North Sea* Cases, *I.C.J. Reports* 1969, p. 32, para. 45.

[6] Libyan Memorial, p. 150, para. 9.51.

[7] At page 150.

by this agreement has absolutely nothing to do with the "Rift Zone" or with the Pantelleria and Linosa Troughs, of which it does not follow the so-often-mentioned northwest–southeast axis. Article I of the Agreement refers to a median line and Article II defines the boundary around the islands of Pantelleria, Lampione, Lampedusa and Linosa by simple distances (of 12 or 13 miles as the case may be) measured from various coastal points. Far from supporting the Libyan argument this Agreement is a perfect example of delimitation based on distance from coasts.

150. The Agreement between Italy and Greece of 24 May 1977 is also presented by the Libyan Memorial as having a relationship with geological and geomorphological facts in the sense that the most southerly point of this delimitation lies in the Ionian Abyssal Plain, "the major geomorphological and geological feature in the Ionian Sea".[1] Libya apparently hesitates to go so far as to invoke this Agreement in support of its thesis of natural prolongation in the physical sense. This hesitation is understandable since it is sufficient to
(11) look at Map 15 of the Libyan Memorial or the ICBM to see that the physical natural prolongation of Sicily toward the east is of small extent and that if one applies to Sicily the Libyan argument, according to which the natural prolongation of Malta stops at the Sicily–Malta Escarpment, Italy's rights to the continental shelf east of Sicily would also end at this same Escarpment. It was not this solution, but the opposite one, which was adopted by the Parties to the Agreement of 1977: the boundary line was established, according to the Preamble of the Agreement, "on the basis of the principle of the median line", or, in other words, on a "spatial" or "area" basis and without in the least taking into account the physical elements of the sea-bed – geology, bathymetry or geomorphology.

151. One may conclude therefore that the Libyan view of natural prolongation as the legal basis of title, or as a factor in the process of delimitation, is not in accord with international law. Malta now wishes briefly to present its own conception of the first phase in the delimitation process.

2. The Rules of International Law Governing the Delimitation Process: Malta's Views

152. Malta will restate its case in Part IV of this Counter-Memorial. Here it will do no more than indicate its views regarding the manner in which, in a case such as this, the delimitation process should unfold.

[1] *Ibid.* p. 149, para. 9.47. The Court will no doubt recall the critical attitude adopted by Libya in the *Tunisia-Libya* case in relation to what Libya then named the "*so-called* 'Ionian Abyssal Plain'" (*I.C.J. Pleadings*, Vol. II, Counter-Memorial, p. 106, para. 234; Vol. IV, Reply, pp. 42-43, para. 90; examination of Professor Fabricius by Professor Bowett, Vol. V, p. 196).

(1) *The Starting Point: an Equidistance Line*

153. For reasons which have already been given, the starting point of the delimitation process is to be found only by consideration of the concept of continental shelf, that is to say, in the legal basis of title to continental shelf rights. On this point the two Parties are in agreement. Where they diverge is on the content of this legal basis of title. Libya places this basis in natural prolongation in its physical sense. Malta hopes that it has established that this approach is not in accordance with international law. Each coastal State is entitled to continental shelf rights to a certain distance from its coast, whatever may be the physical characteristics of the sea-bed and subsoil, and it is only beyond 200 miles from the coast that natural prolongation in its physical aspect resumes a rôle. To take due account of this evolution one might even say that the concept of natural prolongation has lost its importance. Such proposition is however correct only if one states that it relates to the physical conception of natural prolongation.[1] Detached from its purely physical aspects, the concept of natural prolongation remains however entirely valid. The continental shelf of a State is today, as it has always been, the natural prolongation of its land territory; but the natural prolongation is no longer (if it ever was) the physical source of the rights of the State over certain parts of the sea-bed; it is the result of a legal operation which acknowledges that each coastal State, independently of the physical characteristics of the sea-bed adjacent to its coast, has an inherent exclusive right, *ipso jure* and *ab initio*, to the exploration and exploitation of the natural resources of its sea-bed up to a certain distance from its coasts.

154. This right includes a positive aspect. The possibility is open to each coastal State to explore and exploit the natural resources lying at a certain distance from its coasts. It also includes a negative aspect, which was important, as has been seen, in the evolution of the law on this subject. This is the faculty possessed by each coastal State to prevent third States, which happen to be richer or more powerful, from exploring or exploiting the natural resources close to its coast. In this way all coastal States are safeguarded from encroachment by third States. In this way, also, the equality of all coastal States is assured in relation to the exploration and exploitation of the sea-bed lying off their coastal fronts.

155. The point of departure in the delimitation process must of necessity reflect these elements in the international law of the sea. When it is a matter of establishing the limits of the continental shelf zones between two neighbouring States, the basic concept of distance between the coasts forms the necessary point of departure of the whole process:

> "It is only the legal basis of the title to continental shelf rights – the mere distance from the coast – which can be taken into

[1] cf. Judge Oda; Diss. Op. in *Tunisia–Libya* case, *I.C.J. Reports* 1982, p. 222, para. 207: "... the fading away of the geomorphological notion of natural prolongation.".

account as possibly having consequences for the claims of the Parties".[1]

156. In the *Tunisia–Libya* case the Court considered that since the two Parties had invoked the principle of natural prolongation in its physical sense, it was not for the Court to treat the "distance principle" as a "criterion for delimitation".[2] In order to avoid any such misunderstanding in the present case Malta expressly requests the Court to recognize this principle as the controlling element in the delimitation in the present case.

157. Given that there does not exist between the coasts of Malta and Libya a sufficient space for each of the two States to benefit from continental shelf rights up to the full distance of 200 miles recognized by international law, the delimitation process must in the submission of Malta, necessarily begin by taking into consideration an equidistance line between the two coasts. This is because equidistance is the most appropriate technique to give effect at the same time to the two components of the concept of natural prolongation: distance and coasts.

158. That equidistance gives full weight to the fact of distance is too evident a proposition to require any demonstration. By very definition it consists in tracing a line each point of which is equidistant from the nearest point on the baselines of each of the Parties.

159. It is also clear that equidistance gives full weight to the second component in the concept of continental shelf and of the legal basis of title to continental shelf rights, namely, the coasts. This link between delimitation and the coasts was underlined by the Court as early as 1969 in relation to the idea of natural prolongation as it was understood in the state of customary international law of that date: "it is ... necessary to examine closely the geographical configuration of the coastlines".[3] The same link was recalled, always in relation to the idea of natural prolongation, in the decision in the *Anglo–French Continental Shelf Arbitration* of 1977.[4] It was confirmed with particular force in the judgment of the Court in the *Tunisia–Libya* case in 1982, once more in relation to the idea of natural prolongation: "The coast of each of the Parties ... constitutes the starting point from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend ... in relation to neighbouring States ...".[5]

160. In this connection it is necessary to emphasise that both those who oppose and those who support equidistance are in agreement that equidistance achieves a reflection of the coastline in the process of delimitation (while natural prolongation in its physical sense is independent of the coastline and does not take into account this essential

[1] *Tunisia–Libya* case, *I.C.J. Reports* 1969, p. 48, para. 48.
[2] *Ibid.*
[3] *North Sea* cases, *I.C.J. Reports* 1969, p. 51, para. 96.
[4] Decision of 30 June 1977, paras. 100 and 248.
[5] *I.C.J. Reports* 1982, p. 61, para. 64.

feature of the legal basis of title to continental shelf rights). The Court has itself noted that with equidistance "the delimitation line is directly governed by points on the coasts concerned",[1] and it has declared that:

> "... it should be recognized that it is the virtue – although it may also be the weakness – of the equidistance method to take full account of almost all variations in the relevant coastlines".[2]

161. Libya's contention that "The attempt to use equidistance is precisely an attempt to equate the two coasts"[3] is unjustified since the line of equidistance reflects precisely the respective configurations of the two coasts *including their differences*. As for the "weakness" mentioned by the Court, namely, that of being too faithful a reflection of almost all variations in the coastlines, it is easy to remedy that, as Judge Oda has pointed out, by an appropriate selection of basepoints and baselines.[4] Besides, an equidistance line does not reflect every irregularity of the coast in its smallest detail since, by definition, it is constructed on the basis of the nearest point, that is to say, on the basis only of a certain number of "control points". As Judge Oda pointed out: "only salient points or convexities on the coastline can affect the drawing of this line".[5]

162. It should here be observed that the taking into consideration of the coasts of the Parties as a geographical element is not to be done in the abstract. In applying the concept of distance from coasts within the framework of the process of delimitation, what really matters is the concrete relationship of the relevant coasts. Hence the interest which international law has never ceased to have in the distinction between "opposite" and "adjacent" coasts.[6] Equidistance as the primary element in the delimitation has even greater relevance, if such is possible, in the case of a relationship between "opposite" coasts than in that of a relationship between "adjacent" coasts. But it is at the stage of control, by reference to the equitable character of the result, that this distinction produces its principal effects. To this further reference will presently be made.

163. Before proceeding further, and in order to avoid all misunderstanding, Malta considers it necessary to state that in adopting this equidistance line as the starting point of the delimitation process, it does not intend in any way to suggest that the equidistance line must necessarily be – in some inherent way – the appropriate boundary in every case, or even in the present case. Malta is perfectly aware of the criticisms which have been levelled at equidistance seen as a legal rule

[1] *Ibid.* p. 62, para. 76.
[2] *Ibid.* p. 88, para. 126.
[3] Libyan Memorial, p. 155 para. 10.04.
[4] *Tunisia–Libya* case, *I.C.J. Reports* 1982. Diss. Op., p. 262, para. 168.
[5] *Ibid.* p. 272, para. 185. See also below para. 275 and Reduced Maps Nos. 12 to 15.
[6] The decision in the *Anglo–French Continental Shelf Arbitration*, which attached considerable importance to the "actual geographical relation to each other and to the continental shelf", states that "the relationship of 'opposite' or 'adjacent' States is nothing but a reflection of the geographical facts" (paras. 94–95).

to be compulsorily applied in every case. It appreciates that in certain cases equidistance can lead to an inequitable or unreasonable result. Malta in no way intends to place in question the primordial importance of equity as a legal principle nor the "toning down of equidistance".[1] Malta advocates the use of the equidistance line – in this case as in every other – only as a kind of primary delimitation dictated by the geographical facts. These are: the coasts of the Parties and their opposite relationship, on the one hand; the distance from these coasts, on the other. It is in relation to this primary delimitation that the question of whether the result achieved is equitable and reasonable can then be asked. If, on the basis of this "control", one can be assured of the equitable and reasonable character of the solution then it may be maintained as the boundary; if not, the equidistance line must be adjusted or combined with some other method of delimitation.

164. Thus, for the moment, it is simply as a primary delimitation that equidistance is seen as starting the delimitation process. To object to such an approach it would be necessary to concede that the "toning down" of which one has been aware for the last 15 years was inspired by the conviction that equidistance is always and in every case necessarily inequitable. Malta is not aware that any such proposition has ever been asserted. The contraposition between "equidistance" and "equitable principles" has never meant that equidistance would not be equitable in *any* case or that to advocate equidistance would amount to arguing in favour of inequity. What this contraposition signifies is that equidistance cannot *always* be regarded as equitable and that equity *sometimes* requires another solution. Even those judges and arbitrators who have been most reticent regarding equidistance as a principle have not hesitated to recognize the possibility that as a method it could lead to an equitable solution if the particular situation so permits. If judicial and arbitral decisions have denied to equidistance the character of a necessarily equitable method, they have not at any time asserted that it is a necessarily inequitable method. On the contrary, the 1969 Judgment of the Court states that equidistance is a method "the use of which is indicated in a considerable number of cases".[2] The award in the *Anglo–French Continental Shelf* case of 1977, while eschewing equidistance as a solution which is always equitable and thus legally compulsory, nonetheless expressely applies equidistance as the primary method of delimitation both within the Channel and in the Atlantic Region.[3] The Court of Arbitration approves the fact that the Parties have retained the equidistance solution for the greater part of the delimitation.[4] The Court's Judgement of 1982, however little favourable to equidistance it seems, was far from excluding *a priori* the use of the concept and

[1] See sep. op. Judge Jiménez de Aréchaga in *Tunisia–Libya* case, *I.C.J. Reports* 1982, p. 109, para. 36.

[2] *I.C.J. Reports* 1969, p. 23, para. 22.

[3] Decision of 30 June 1977, paras. 84-86, 95, 103, 109, 182 and 239.

[4] *Ibid.* paras. 15, 22, 87, 103, 111, 120 and 146.

expressly mentioned that it might in certain cases lead to an equitable solution.[1]

165. One may thus conclude that the criticisms which have been levelled against equidistance seek only to exclude the suggestion that as a method it is always equitable and thus universally applicable; they do not seek to deny that equidistance is in certain cases equitable and thus applicable. Nor can one oppose the use of equidistance at the beginning of the delimitation on the ground that "any specific reference to equidistance" was eliminated from the final version of article 83 of the Convention of the Law of the Sea.[2] It should be recalled that this compromise text[3] adopted on the eve of the closure of the Conference, deleted simultaneously the *two* expressions around which controversy had centred within the Conference for nearly 10 years namely those of "equitable principles" and "equidistance". As the Court says in the *Tunisia–Libya* case, "in the new text, any indication of a specific criterion ... has been excluded. Emphasis is placed on the equitable solution which has to be achieved".[4] Neither the jurisprudence nor the work of the Third Conference on the Law of the Sea permits one to believe that a radical objection of principle could be raised to the use of equidistance.

166. No doubt this analysis will be confronted by the criticisms made of equidistance on the grounds of the unreasonable or inequitable result to which it occasionally leads. However this objection is irrelevant for two reasons: first, because a primary delimitation based on the geographical relationship is in itself *prima facie* equitable; secondly, because this primary delimitation must be subjected to such adjustment as may prove to be necessary in the light of all relevant circumstances. The equitableness and reasonableness of a result cannot be assessed *in abstracto*, but only by reference to a given line. It is only by reference to equidistance as a starting point that this assessment can and must be made.

167. Under these circumstances one can understand why even those earlier cases which decided to "abate" the operation of equidistance in the particular case, in order to control the result, did not decline to treat equidistance as the point of departure.

168. In its 1969 Judgment the Court said:

> "... 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".[5]

How could the Court know that equidistance does not provide an

[1] *I.C.J. Reports 1982*, p. 79, para. 109; p. 88, para. 126. Judge Jiménez de Aréchaga, while showing some reserve towards equidistance, in no way asserts that it could never lead to an equitable result (cf. Sep. Op. p. 107, para. 31 and p. 109, para. 35).

[2] Libyan Memorial, p. 97, para. 6.42 and p. 124, para. 7.10.

[3] See observations of Judge Oda, Diss. Op. *Tunisia/Libya I.C.J. Reports 1982* p. 246, para. 143.

[4] *I.C.J. Reports 1982*, p. 49, para. 50.

[5] *I.C.J. Reports 1969, p. 50, para. 92.*

equitable solution in a specific case without having first taken it into consideration?

169. The decision in the *Anglo–French Continental Shelf* case of 1977 raises "... the question whether the effect of individual geographical features is to render an equidistance delimitation 'unjustified' or 'inequitable'" and speaks of "the effect of individual geographical features on the course of an equidistance line".[1] With reference to the Scilly Isles, the decision says that "the essential point... is to determine whether, in the actual circumstances of the Atlantic region, the prolongation of the Scilly Isles...[2] renders 'unjust' or 'inequitable' an equidistance boundary...". It would hardly be possible to identify more clearly a delimitation process which began with the use of equidistance and then went on to test the equitableness and reasonableness of the result by reference to the circumstances relevant to the case.

170. The 1982 Judgment of the Court at first sight seems to take a different position since it states that "equidistance is not, in the view of the Court,... a method having some privileged status in relation to other methods" and since it declined to begin by examining the establishment of an equidistance line.[3] But a more careful reading of the Judgment shows that the Court's position was stated specifically in relation to the particular case: "Nor does the Court consider that it is *in the present case* required, as a first step, to examine the effects of a delimitation by application of the equidistance method, and to reject that method in favour of some other only if it considers the results of an equidistance line to be inequitable".[4] The Court's view may be explained by two considerations specific to that case which were mentioned by the Court in the same passage. One is that the two Parties themselves excluded an equidistance solution and, as the Court itself says, "the Court must take this firmly expressed view of the Parties into account". The second consideration is that this was not in any way a case involving opposite coasts – as is shown by the reference to the *North Sea* case, "which also concerned adjacent States".[5] Again – and better – at the end of paragraph 109 the Court spells out in words that it had arrived at the conclusion that:

> "... equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed".

How could the Court tell whether equidistance does, or does not, lead to an equitable solution if equidistance had not first been considered in the delimitation process? And in effect the Court clearly took equidistance as a starting point of its delimitation of the second sector of the demarcation line.[6]

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[1] Decision of 30 June 1977, *International Law Reports*, Vol. 54, p. 6, para. 240.
[2] *Ibid.* para. 243.
[3] *I.C.J. Reports* 1982, p. 79, para. 110.
[4] *Ibid.* emphasis supplied.
[5] *Ibid.* p. 79, para. 109.
[6] *I.C.J. Reports* 1982, p. 88, para. 126.

171. The separate and dissenting opinions in the 1982 case do not detract from this analysis. Judge Jiménez de Aréchaga, though denying equidistance the character of "a privileged method or one having pride of place",[1] and excluding any "presumptions in favour of equidistance"[2] nonetheless says:

> "Naturally, in all cases the decision-maker looks at the line of equidistance even if none of the Parties has invoked it".[3]

It may be noted also that Judge Jiménez de Aréchaga emphasises even more than the Court the objection which the two Parties had raised to the use of equidistance in the case. In his view, the Court was not entitled to contemplate of its own initiative any solution upon which neither of the Parties had presented detailed arguments; consequently to use equidistance in such a case would have led to what he described as a "procedural inequity". Other members of the Court go even further and expressly stated that it was necessary – even in this case – to begin by using equidistance and then verify whether the result thus obtained was reasonable. Judge Gros says:

> "The Court's first task was thus to see what an equidistance line would produce in order to identify the 'extraordinary, unnatural or unreasonable', result to which, it is said, this method might lead",[4]

and he considers that it is proper in all cases to "cross-check the equity of the result" – "*proceder au controle de l'equitable*".[5] Likewise, Judge Oda considers that the equidistance method "should be tried before all others",[6] as does Judge Evensen.[7]

(2) *Checking the equitable and reasonable character of the result: relevant circumstances*

172. At the first stage, as has just been described, equidistance must be seen as a formula founded on the legal basis of title to the continental shelf. It follows that the definitive solution to the question of delimitation cannot be reached at this stage since the fundamental rule of international law is that the delimitation must be equitable and reasonable. As the Court has said: "equidistance must be applied if it leads to an equitable solution; if not, other methods should be employed".[8] To pass from the first stage to the delimitation properly so-

[1] *Ibid.* Diss. Op. p. 109, para. 35.
[2] *Ibid.* Diss. Op. p. 105, para. 18.
[3] *Ibid.* Diss. Op. p. 134.
[4] *Ibid.* Diss. Op. p. 149, para 12. The adjectives quoted are from the 1969 Judgment.
[5] *Ibid.* Diss. Op. p. 151, para. 15.
[6] *I.C.J. Reports* Diss. Op. p. 270, para. 181.
[7] *Ibid.* Diss. Op. p. 297, para. 15.
cf. A recent study by P. J. Allott, Power Sharing in the Law of the Sea, *American Journal of International Law* Vol. 77 (1983), p. 1; stresses "... the prominence that Geneva, State practice and the International Court had given to the method (of equidistance) as the *natural point* of departure for sea boundary delimitations" (p. 22. Emphasis supplied).
[8] *Tunisia–Libya* case, *I.C.J. Reports* 1982, p. 79, para. 109.

called it is necessary to check, with the aid of equitable principles, whether an equitable result has been obtained. This is why, as has already been stated, it is necessary to weigh all the relevant circumstances and to balance up the equities, in order to reach an equitable result. It is at this stage that other geographical and additional circumstances of the situation intervene. These various circumstances will be examined in the next Chapter.

173. The fact that the application of equitable principles is effected by taking into consideration relevant circumstances highlights a particularly important aspect of the process of delimitation. This is that the equities of the situation must be assessed by reference to objective facts. As early as 1969 the Court emphasized that "there is no question ... of any decision *ex aequo et bono*" and that it is necessary that "the decision finds its objective justification in considerations lying not outside but within the rules".[1] In 1982 the Court strongly affirmed this distinction and stated that the assessment of relevant circumstances "is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice".[2] The judge or arbitrator does not develop a personal and subjective conception of what amounts to a just delimitation, but only a view based on the objective facts of the situation.

174. State practice shows in an incontrovertible manner that in a large number – indeed, the largest number – of cases equidistance commended itself to the Parties as the appropriate solution. This is true especially, as has already been shown in the Maltese Memorial, in the situations of Island States opposite mainlands concluding boundary agreements. In opposite coasts situations, judges and arbitrators have recognized that equidistance is normally the appropriate solution. This is acknowledged by the Court in the 1969 Judgment because, says the Court, "such a line must effect an equal division of the particular area involved".[3] It is also recognized by the 1977 Arbitral Decision, which expressly commends the two Parties for having considered that "in principle, the method applicable in the English Channel is to draw a median line equidistant from their respective coasts".[4] As the Court of Arbitration says later, "in a situation where the coasts of the two States are opposite each other, the median line will normally effect a broadly equal and equitable delimitation".[5] And this is confirmed by the Court in its 1982 Judgment which acknowledges that the situations of opposite coasts lend themselves more easily to a delimitation on the basis of equidistance than did those of adjacent coasts.[6] The importance of these precedents for the present case cannot be overstressed. What may

[1] *I.C.J. Reports* 1969, p. 48, para. 88 (Emphasis supplied).
[2] *I.C.J. Reports* 1982, p. 60, para. 71.
[3] *I.C.J. Reports* 1969, p. 36, para. 57.
[4] Decision of 30 June 1977, *International Law Reports*, Vol. 54, p. 6, para. 87.
[5] *Ibid*, para. 239; cf. paras. 95, 103 and 182.
[6] *I.C.J. Reports* 1982, p. 88, para. 126.

be necessary to add is that even when examination of relevant circumstances leads to some modification of the equidistance formula. This is normally done by means of an adjustment of this method rather than by its abandonment.

175. As regards the practice of States, the decision in the *Anglo–French Continental Shelf Arbitration* of 1977 deals with this matter at two points.[1] The well known work (twice cited in the Libyan Memorial) of Professor Conforti and Professor Francalanci,[2] summarises the practice as follows:

> "... the instances are very rare of agreements in which the equidistance criterion turns out to be radically departed from, unless 'special circumstances' of a geographical nature require it".

3. Conclusions

176. In Malta's submission the previous paragraphs state the principles and rules of international law which govern the delimitation process. As has been said, the process of delimitation does not involve two successive stages any more than the application of equity, in other spheres of international law, involves the *successive* application of a general rule *followed* by the application of a particular rule which derogates from it. Equity consists not in that, but in a reasonable application, taking into consideration all the circumstances of the case, of the general rule.[3] The delimitation process as thus conceived assures the satisfaction of the double requirement of every rule of law: on the one hand, the reflection of a sufficient degree of generality to avoid the subjective quality of decisions *ex aequo et bono* and, on the other, the acceptance of a sufficient degree of adaptation to the circumstances of each case to achieve a conclusion which is "reasonable" and "equitable". The procedure which customary international law has developed ensures a proper balance between these two requirements: enough flexibility, but not too much. As Malta understands it, this procedure offers the advantage both of being based on the fundamental concept of the continental shelf and of having its roots in the legal basis of title, while at the same time taking into account the fact that, although they are intimately linked, entitlement and delimitation are nonetheless distinct ideas. Malta submits that it is in these considerations which brings together the experience both of State practice and of international jurisprudence – that the Court may find the equitable and reasonable solution to the issues submitted to it.

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[1] Decision of 30 June 1977, paras. 85 and 249.

[2] *Atlante dei confini Sottomarini* (Milan, 1979).

[3] *Cf. Barcelona Traction, I.C.J. Reports* 1970. Sep. Op. by Sir Gerald Fitzmaurice, pp. 85–86, para. 36.

CHAPTER III

"OTHER RELEVANT FACTORS"

177. Malta now turns to consider the remaining relevant factors to which reference has been made in the Libyan Memorial.

178. Libya has referred in its "Statement of Principles and Rules of International Law Applicable to the Present Case" to five "Other Relevant Factors": (a) Conduct of the Parties; (b) Delimitations with Third States; (c) Security interests; (d) Islands; and (e) Economic and related factors.[1] This reference was made on a relatively abstract, almost academic, level; and it was only pursued in a more specific way in Part III, on "The Application of the Law to the Facts and Relevant Circumstances of the Case" in relation to (a) the Conduct of the Parties and (b) Delimitations with Third States.

179. Malta will now examine these various factors, by reference both to the Libyan and the Maltese positions.

1. Conduct of the Parties

180. Libya concedes in general terms that the conduct of the Parties is, in principle, a relevant circumstance.[2] But the Libyan Memorial's first treatment of the subject then goes on to identify a number of circumstances which may affect the value of three specific forms of conduct: positions adopted in negotiations, grants of concessions and legislation.[3] There seems little point in commenting upon these abstract considerations in comparably abstract terms. That there may be circumstances in which State conduct is not material to the question of continental shelf boundary delimitation goes without saying. The real questions are (i) whether, in relation to the aspects of State conduct invoked by Malta and with which some parts of the Libyan Memorial coincide, there is anything in the Libyan case to diminish the value of the factor as relied upon by Malta; and, (ii) conversely, whether Libya introduces any element of conduct in its own favour which calls for comment from Malta.

181. It is convenient to deal with these matters by responding directly to the five "conclusions" which Libya seeks to draw from its "brief résumé" of the conduct of the Parties.[4]

[1] Libyan Memorial, Chapter 6, pp. 107–114.
[2] Libyan Memorial, p. 107, para. 6.70.
[3] *Ibid.* pp. 107–109, paras. 6.70–6.73.
[4] *Ibid.* p. 147, para. 9.43.

182. The *First Libyan Conclusion* is that:

> "No specific line of delimitation or *de facto* arrangement appears from the conduct of the Parties since the emergence of the dispute."[1]

Malta has not asserted that any specific line or *de facto* arrangement *appears* from the conduct of the Parties. *What Malta has said* is:

(a) that Malta's conduct from the start (that is, in 1965) has involved the assertion of a median line as the correct boundary line and has always been consistent with that;

(b) Libya took no position in opposition to that of Malta until, at the earliest, 1973. In that year, eight years after Malta's first formal assertion of the median line, Libya put forward its own proposal for a line, quite close to Malta, calculated by reference to the ratio of the respective coastlines of the two countries. This line was in no way constructed by reference to Libya's now dominant concern to reflect its own "natural prolongation".

183. The public assertion by Malta of an equidistance line by the enactment on 28 July 1966 of Malta's Continental Shelf Act[2] was in fact preceded by a specific communication from Malta to Libya making the same assertion. This is the Maltese Note Verable to Libya of 5 May 1965[3] in which Malta advised Libya that it had assumed from the United Kingdom treaty rights and obligations made applicable to Malta prior to its independence, that Malta intended to accede to the 1958 Convention on the Continental Shelf, and that "in determining the boundary of the continental shelf appertaining to Malta, the Government was guided by the provisions relating to an equidistance line contained in Article 6(1) of the Convention." The Note Verbale concluded with the following words: "the Government of Malta will be grateful to know that the Government of Libya is in full accord with this determination". Libya refers to this Note in paragraph 4.27, p. 54, of its *Memorial, without any suggestion that Libya reacted to the* Note in any way. And it is a fact that Libya did not. Thus the period of public assertion of Malta's median line position referred to in Malta's Memorial as beginning on 28 July 1966, in fact, vis-à-vis Libya began at least a full year earlier, in May 1965; and the period of Libyan inactivity in relation to this issue is consequently eight years.

184. It is, of course, necessary to consider these two events of 1965 and 1966 in the light of the Court's own treatment, in the *Tunisia–Libya* case, of the effect upon Tunisia of Libya's Petroleum Law and Petroleum Regulations No. 1 of 1955. There the Court held that the line referred to in the Libyan legislation of 1955 was not opposable to Tunisia and could not be taken into consideration for the purposes of the judgment.[4] But the situation in that case is clearly distinguishable

[1] Libyan Memorial, p. 147, para. 9.43.
[2] Malta's Memorial, p. 16, para. 34.
[3] Libyan Memorial, Annex 34.
[4] *I.C.J. Reports* 1982, p. 69, para. 92.

from the one in the present case. There the Court found three features or considerations which served to deny effect to the Libyan measure. Each of them will now be mentioned, together with an indication of why that feature is not operative in the present case.

185. The first consideration was that the Libyan legislation could hardly be considered as a unilateral claim for maritime lateral boundaries with Tunisia. Malta's comment is that in view of the express terms of the 1965 Note Verbale, coupled with the 1966 Continental Shelf Act, it is quite clear that in 1965/1966 Malta did assert as against Libya a claim to an equidistance boundary.

186. The second consideration was that there was no evidence that Libya was claiming jurisdiction and control over a contiguous zone of about 50 miles beyond the territorial sea of Libya. Malta's submission is that in the present case the nature and extent of the Maltese claim was quite clearly expressed. And the fact that the Government of Malta adopted the courtesy of saying in the Note Verbale that it would "be grateful to know that the Government of Libya is in full accord with this determination" does not detract from the legal quality of the "determination" or make its efficacy conditional upon receiving express Libyan consent. Libya's silence over the ensuing period of eight years, in the light of which Malta eventually felt free to make the 1973 concession offers and grants, is sufficient to amount to the necessary consent, if consent be found to be required.

187. Thirdly, the Court considered the facts of the case as not allowing any assumption of acquiescence by Tunisia, whose manifested attitude excluded the possibility of speaking of such acquiescence. In the present case, on the other hand, as already indicated, the only attitude of Libya manifested in the situation was one of silence for eight years.

188. It is, indeed, pertinent to recall some of the observations made by Libya on the nature and importance, in its relations with Tunisia, of Libya's own conduct and of Tunisia's silence in relation thereto:

> "... such a method (Libya's proposed practical method) would conform to the first concrete and uncontested indication of sovereignty by one of the Parties, i.e. the limits of the Libyan Petroleum Zone No 1 of 1955"[1]
>
> "It is not conceivable that this legislation was unknown to Tunisia... Yet Tunisia has made no protest or reservation at any time regarding either the Law or the Regulations"[2]
>
> "... it is quite clear that Tunisia from 1968 was well aware that a concession following the direction of this line had been granted by Libya to the same company, Aquitaine... Where are the protests by Tunisia?... It is futile, in the light of this evidence and the facts as they are known, for Tunisia to say... that the area of the Concession has never been officially publicized by Libya...".[3]

[1] *Libya–Tunisia* case, Libyan Counter-Memorial, p. 209, para. 524.
[2] *Ibid.*, p. 18, para. 30.
[3] *Ibid.*, p. 25, para. 50.

189. The *Second Libyan conclusion* reads as follows:

> "The different approaches taken by the maritime legislation of Libya and Malta make clear that Libya left open the northern limits to its continental shelf by virtue of its legislation whereas the Maltese legislation specified the extent of what it claimed to be its maritime jurisdiction. The concessions offered and granted by Malta pursuant to its legislation therefore are relevant to its boundaries of Malta's claims: they followed geomorphological features in a manner consistent with the 'exploitability criteria'. Libya, on the other hand, in granting its concessions did not purport thereby to limit the extent to [*sic*] its jurisdiction over the continental shelf."

In reply Malta makes the following points:

(*a*) The instruments to which Libya refers as "leaving open" the northern boundaries of its continental shelf were the Petroleum Law of 1955 and the Petroleum Regulations of the same year. These were promulgated a year before the final draft articles on the law of the sea prepared by the International Law Commission and three years before the 1958 Continental Shelf Convention, and therefore at a time when, though the general concept of the continental shelf was established, the details relating to delimitation were not. It is, therefore, hardly surprising that at that time Libya did not commit itself to a method of delimitation; and no importance can be attached to that omission one way or the other.

(*b*) As already stated, it is true that Malta, from the earliest days of its independence, openly claimed that the boundary of its shelf was an equidistance line. It adhered to that line consistently from then onwards – for eight years without Libyan reaction and, thereafter, notwithstanding Libyan reaction. It is correct to say that the concessions offered and granted by Malta are relevant to its claims. They show, indeed, that Malta treated areas up to the median line as falling within its jurisdiction and as being subject to its control. As appears very clearly from Map 3 of this Counter-Memorial and from Map 13 in the Libyan Memorial, the *southern* boundaries of Maltese blocks 12, 13, 14, 15 and 16 all coincide exactly with the median line.[1] The Libyan contention[2] that the sixteen offshore blocks offered by Malta in 1973 "followed the geomorphology of the area" partly misstates and partly misconstrues the situation. The misstatement lies in the pretence that the blocks in their entirety follow the geomorphology of the area. The blocks are quite clearly laid out on a geometric pattern with rectilinear boundaries unrelated to bathymetry except superficially in the eastern limits of Blocks 6, 11 and 16. The misconstruction lies in suggesting that the eastern limits of these three blocks reflect a Maltese conviction that its

[1] See Malta's Memorial, Vol. III, Map 3, and Map 3 of this Counter-Memorial.
[2] Libyan Memorial, p. 145, para. 9.33.

entitlement stopped at the edge of the Escarpment. There is no evidence of that and the explanation lies elsewhere in a simple practical consideration. One element in the payments due from a licensee to the Government is related to the surface area of the Concession. A licensee may reasonably be expected to pay for areas which are potentially relatively easily exploitable. But the attraction of paying a rental and other payments for an area of deep sea-bed, when other more interesting areas lie at lesser depths, is evidently small – or, at any rate, was so in the technology of 1973. For that and other entirely pragmatic reasons Malta limited the boundaries of the three blocks in question by, be it noted, straight, not bathymetric, lines which correspond only in the roughest terms to the edge of the escarpment.

(*c*) It is difficult to know exactly what significance to attach to Libya's statement that in granting its concessions it did not purport to limit the extent "to" [*sic*] its jurisdiction over the continental shelf. If these words are to be taken at their face value, they appear to suggest that there is no correlation between Libya's grant of concessions and its continental shelf boundaries. If this is so, every reference to the grant of concessions by Libya must be deemed to be entirely without relevance as a factor in the determination of the boundary.

(*d*) At the same time, Malta is bound to draw to the attention of the Court a substantial and misleading distortion of the situation regarding Libya's grant of concessions. At p. 61 of the Libyan Memorial[1] there appears a reference to an offshore concession NC53. This is the most northerly and north-westerly of Libya's concessions, at any rate as (7) illustrated on Map 11 opposite p. 62 of the Libyan Memorial. There is, however, strong ground for doubting the accuracy of the representation on the map. A different version of the area of the same concession can be seen in Map 3 contained in Volume III (Maps) of the Maltese Memorial. In this different version the northern line of the concession is close to and appears generally to follow the direction of Malta's equidistance boundary. This discrepancy regarding the boundary of NC53 will, no doubt, be resolved once Libya produces a copy of the original text of the Concession from which the area granted can be verified. Until Libya does this, however, Malta must adhere to its view that this concession in particular reflects a measure of Libyan acceptance of the median line rather than any clear disregard for it. The basis on which Malta maintains its position is more fully set out in Annex 5.

190. Generally in this connection it may be recalled that the Court, in para. 96 of the 1982 Judgment, acknowledged the effect upon the boundary of the grant of concessions:

> "... The line of adjoining concessions, which was tacitly respected for a number of years, and which approximately corresponds furthermore to the line perpendicular to the coast at the frontier point which had in the past been observed as the *de facto* maritime

[1] Para. 4.44.

> limit, does appear to the Court to constitute a circumstance of great relevance for delimitation".

At the same time, it is important to note that the Court's emphasis on the grant of concessions was not limited to concessions as such but was really concerned with the grant of concessions as

> "indicia ... of the line or lines which the Parties themselves may have considered equitable or acted upon as such".[1]

Thus viewed, what matters is not so much Malta's 1973 Concessions as Malta's 1965 and 1966 actions, which were unequivocal in a declaration of an equidistance line, coupled with the absence of adverse reaction thereto by Libya.

191. In the *Third conclusion* Libya argues that:

> "The position set forth by Libya in 1973 taking account of coastal lengths ... lies far to the north of a median line and has been maintained by Libya. This line lies within the boundary zone which Libya proposes in this Memorial should be the basis for negotiations between the Parties to arrive at a precise line of delimitation".

Again, it is difficult to identify the thrust of this "conclusion". Is it meant to support some alleged "consistency" in Libya's position from 1973 to the present day? Or is it intended to show that that position is dictated by some clear and guiding principle? Such questions must remain for answer by Libya. But it is a fact that the stated theoretical basis for the 1973 Libyan line is not the same as that now advanced for resort to "the boundary *zone*" (the "Rift Zone") as the possible location of a negotiated line. It must be borne in mind that even on the Libyan approach to the task of the Court, which Malta does not share,[2] the negotiation following the Judgment of the Court must take place in the light of whatever applicable principles and rules of international law the Court may identify. Chance and coincidence have not been pleaded by Libya as relevant principles of international law. Yet the idea that there is greater force in the Libyan claim to a "border zone" in the "Rift Zone" because the 1973 line happens, so Libya asserts, to fall within it, appears to elevate accident to the level of guidance.

192. In its *Fourth conclusion* Libya asserts that

> "Libya has protested any activities of Malta falling within the areas considered to lie within Libya's continental shelf and has itself refrained from drilling in disputed areas until the matter of delimitation has been settled between the Parties. Similar restraint has not been exercised by Malta which, apparently pressed by its concession holders, has attempted to drill in areas which Libya considers fall under its jurisdiction".[3]

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[1] *Tunisia–Libya* case. *I.C.J. Reports* 1982, p. 84, para. 118.

[2] See Part II above, paras. 68–74.

[3] Libyan Memorial, p. 148, para. 9.43.

Malta's reply:

(*a*) If by "any" Libya means "all", Libya has not protested *any* activities of Malta as aforesaid. Malta's "activities" in the area preceded Malta's 1973 concession grants and took the form of the open assertions of right to the area extending to the median line evidenced by the Note Verbale to Libya of 1965 and the continental shelf legislation of 1966.

(*b*) However, that is a small point compared with the fantasy of Libya's "restraint". Restraint is something normally thought of as a commendable virtue, involving some element of sacrifice or tolerance. In the period from 1976 to 1980, Libya's oil revenues amounted to over U.S. $75 billion,[1] equal to U.S. $3 million per head of the Libyan population. Libya itself has described its position in its Counter-Memorial in the *Tunisia–Libya* case in the following terms:

> "The growth of oil production from onshore sources in Libya was rapid and *Libya soon took its place among the major oil exporting countries of the world. Offshore Libya has also been fortunate*".[2]

Malta's revenues from oil were nil. At that level of income, Libya's disinclination to seek further oil is understandable. Malta, on the other hand, has to devote a very substantial part of its hardly earned foreign exchange to the purchase of oil. But if considerations of this kind are to be brought into the picture, it is material to recall Libya's persistent and successful efforts to prevent even the entry into force of the Special Agreement submitting the present dispute to the Court. Despite all endeavours by Malta, Libya procrastinated continuously by taking three years to negotiate the agreement and a further six to ratify it. Moreover the events of 1980 which prevented Malta from carrying on exploration activities in a location lying some 50 miles north of the median line are too well known to need repetition. The kind of thinking behind this use of language resembles that which underlies the Libyan contention, discussed above, that to the rich shall be given, even at the expense of the poor. In such thinking there is no place for the fundamental principle of international law relating to the equality of States.

193. The *Fifth* and last of *Libya's conclusions* drawn from its "brief resumé" of the conduct of the Parties, is that

> "Malta has consistently advocated delimitation along a median line and Libya has consistently refused to accept equidistance as the basis for an equitable delimitation in this situation."

To this *Malta replies:*

(*a*) It is true, of course, that Malta's position has been consistent throughout; and Malta welcomes Libya's admission to this effect.

[1] *International Financial Statistics* I.M.F., sec. 1982.
[2] P. 21, para. 41 Emphasis supplied.

(*b*) It is less true that "Libya has *consistently* refused to accept equidistance". On the contrary Libya's silence for eight years amounts to an acceptance of Malta's equidistance line. It is only since 1973 that Libya has expressed itself otherwise on the matter and in so doing it has varied its choice of guiding principle. In 1973 the argument was exclusively based on a certain version of proportionality and led to the proposal of a specific line; this has now been abandoned in favour of an undetermined line somewhere within the vast area described by Libya as the "Rift Zone".

194. To conclude on the issue of the conduct of the Parties, Malta submits that by its conduct over the years Malta has constantly and consistently applied the principle of equidistance and that Libya for eight formatively important years, from 1965–1973, refrained from giving Malta any reason to doubt the validity of that approach. This simple pattern of "conduct" can be viewed either as a cogent reflection of the equitable character of Malta's position or as evidence of acquiescence by Libya in Malta's position or as precluding Libya, in law as in fact, from challenging the validity of Malta's position. The words of Judge Ago are particularly pertinent here: "... consent evinced by inaction...".[1] Moreover, regardless of the way in which this conduct is viewed, the other feature of the conduct of the Parties, namely, Libya's own conduct is, as shown both in Malta's Memorial and elsewhere in this Counter-Memorial, consistent only in its assertive and self-seeking character from the time when it was first put forward in 1973. But in terms of law it rests upon no consistent foundation. Libya's case to-day is in principle quite different from Libya's case a decade ago.

2. Delimitations with Third States

195. Libya appears to base its recourse to delimitations with third States as a relevant consideration upon the following phrase lifted from the Court's 1982 judgment:

> "... the circumstance of the existence and interests of other States in the area, and the existing or potential delimitations between each of the Parties and such States".[2]

As will be noticed, however, the words quoted are no more than a phrase. They lack an operative verb and the critical reader of the Libyan Memorial is left wondering what significance, if any, the Court attached to this "circumstance".

196. To find an answer one has to look at the Judgment as a whole. As a result, the following may be discerned.

197. The Court first refers to third States at p. 35, para. 20, in a section of the Judgment which opens with the words:

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[1] *I.C.J. Reports* 1982, p. 97, para. 4.

[2] Libyan Memorial, p. 148, p. 9.44, quoting from the judgment in the *Tunisia–Libya* case, *I.C.J. Reports* 1982, p. 64, para. 81.

> "It should be emphasized that the only purpose of the description which follows is to outline the background, and not to define legally the area of delimitation nor to say how the Court views the various geographical features for the purposes of their impact on the legal situation.[1]

There then follows, on the next page, the first mention of third States:

> "So far as limits seawards are concerned, no delimitation agreement has been concluded by either Party with Malta; Tunisia has concluded an Agreement ... with Italy ..."

Up to this point then the mention of third States is entirely matter-of-fact.

198. The Court reverts to third States at p. 42, para. 33. Again in a "factual" context, the Court identifies

> "the Pelagian Block ... as a much wider region than that which can possibly be available to be delimited between the Parties",

and continues:

> "The northern and north-eastern parts of the Pelagian Block, where conflicting claims of the Parties exist, are situated in a region where claims of other States regarding the same areas have been made or may be made in the future. The Court has no jurisdiction to deal with such problems in the present case and must not prejudge their solution in the future."

199. Then, coming closer to the passage cited by Libya, the Court at p. 62 seeks to define the area which is legally relevant to the determination and says (at the end of para. 75):

> "The conclusion that these areas are not legally relevant to the delimitation between the Parties does not however lead to the conclusion by way of corollary that the whole area bounded by the coasts of both countries and by such seaward boundaries is reserved in its entirety for division between Libya and Tunisia. As mentioned above, the rights of other States bordering on the Pelagian Sea which may be claimed in the northern and north-eastern parts of that area must not be prejudged by the decision in the present case."

This reference, therefore, is no more than a formal saving of the position of third States.

200. From here the Court moves on to describe the positions of the Parties regarding "relevant circumstances". It records that Tunisia had specified among such circumstances "the situation of Tunisia, opposite States whose coasts are relatively close to its own, and the effects of any actual or prospective delimitation carried out with those States"[2] and

[1] *I.C.J. Reports* 1982, p. 34, para. 18.
[2] *Ibid.* p. 62, para. 76.

that Libya had mentioned "as a related factor, the existence of actual or prospective delimitations with third States in the region".[1]

201. Eventually, the Court begins its own discussion of "the relevant circumstances which characterize the area" and it is here that, entirely in passing, the Court used the phrase quoted so portentously in the Libyan Memorial:

> "Apart from the circumstance of the existence and interests of other States in the area, and the existing or potential delimitations between each of the Parties and such States, there is also the position of the land frontier ... to be taken into account".[2]

Seen thus in perspective, the Court's reference to third States is not a statement of a relevant factor, save to the extent that the Court is concerned not to prejudice the position of non-Parties to the case. The Court is in no way saying that consideration of the position of third States is an independent factor which can affect the delimitation between the Parties.

202. This analysis is borne out if, as one continues reading of the Judgment, one asks the question: Does the Court come back to this in any significant way? The answer is No. The only further references to third States are in its discussion of proportionality and in the operative paragraphs. In paragraph 130,[3] the Court states that

> "how far the delimitation line will extend north-eastwards will, of course, depend on the delimitations ultimately agreed with third States on the other side of the Pelagian Sea".

and concludes:

> "It is legitimate to work on the hypothesis of the whole of that area being divided by the delimitation line between Tunisia and Libya; because although the rights which other States may claim in the north-eastern portion of that area must not be prejudged by the decision in the present case, the Court is not dealing here with absolute area, but with proportions."

Lastly, in paragraph B(1) of the operative paragraphs the Court reserves the rights of third States and in paragraph C(3) declares that

> "the extension of this line northeastwards is a matter falling outside the jurisdiction of the Court in the present case, as it will depend on the delimitation to be agreed with third States."[4]

203. If this analysis of the Court's judgment of 1982 in its bearing upon reference to third States seems a trifle extended, it is so only because there is no other way, apart from unsupported assertion, in which one can counter the apparently intentional implication in the

[1] *Ibid.* p. 63, para. 77.
[2] *Ibid.* p. 64, para. 81.
[3] *Ibid.* p. 91.
[4] *Ibid.* p. 94.

Libyan Memorial that in some way the Court supports consideration of relations with third States generally as "a relevant circumstance" in a delimitation between two Parties. The Court is concerned with third States only for the purpose of ensuring that – as non-Parties – their positions are not formally affected by the decision of the Court.

204. It is, therefore, entirely irrelevant and inadmissible for Libya to introduce a suggestion that Malta's claim to continental shelf east of 18° E line of longitude "would therefore cut off any meaningful delimitation between Libya and Italy in the Ionian Sea".[1] What has that got to do with a delimitation between Libya and Malta? The Libyan proposition pre-supposes what has to be established and decided, namely, that there is (contrary to Malta's contention) an area of Libyan continental shelf which projects so far north in the Ionian Sea that there is a need for a "meaningful" (whatever that may mean!) delimitation between Libya and Italy. Equally self-serving is the proposition in the same paragraph that Malta's claim "would erase the obvious relationship that exists across this Sea between the coasts of mainland Italy and Libya". What is this "obvious relationship" other than *petitio principii*.

205. Turning to Libya's second "delimitation of interest", namely, that between Italy and Tunisia concluded in 1971, one must ask how does that affect the situation between Libya and Malta? If the argument is that the treatment of the islands of Pantelleria, Lampedusa, Linosa and Lampione detracts from the principle of equidistance, the point is one to be made in the context of the treatment of islands generally, not under the heading of "Delimitation with third States". If the argument is that in some way the agreement reflects the view of Italy and Tunisia that Malta should be disregarded when constructing the boundary, then it proceeds on an incorrect basis of fact. The Libyan Memorial is wrong in suggesting that

> "Apparently, the control points which served for the construction of the line are to be found along the baselines representing, on the Italian side, the entire southern coastline of Sicily ... and on the Tunisian side, the coast from Cap Bon to about the latitude of the Kerkennah Islands ..."[2]

As a moment's work with a pair of dividers will demonstrate, the extreme south-easterly terminus of the Italian–Tunisian line, Point 32,[3] is constructed as an equidistance point between Lampedusa and Malta.

206. The fact that in the west there may be an inconsistency with the Italian–Tunisian delimitation is a matter between Malta, Italy and Tunisia. But it cannot be invoked as a ground for rejecting the underlying principle of Malta's claim to equidistance. Nor is there, contrary to the Libyan suggestion, "a potential conflict" in the south

[1] Libyan Memorial, p. 149, para. 9.49.
[2] Libyan Memorial; p. 150, para. 9.50.
[3] Libyan Memorial, Map 15, opposite page 150.

with the Tunisian/Libyan delimitation "which should flow from the Court's 1982 Judgment". That is expressly excluded by the terms of the Judgment.

207. The full extravagance of Libya's recourse to the positions of third States appears in paragraph 9.57. In the east Malta is said to be making a "vast" claim extending into areas lying between Libya and third States (unspecified). But why is Malta's claim said to be "vast"? It is certainly not as vast as Libya's entitlement on an equidistance basis along the whole of its coastline. What must not be forgotten is that by virtue of the simple geography of this case, it involves, proportionally speaking, much more of Malta's continental shelf than it does of Libya's and that Libya's claims upon Malta make much greater inroads proportionally upon Malta's overall continental shelf rights than do Malta's claims upon Libya. Even if Malta were accorded more than its full claim Libya would still be left with a continental shelf which by comparison with Malta's would deservingly merit the description "vast".[1]

208. But apart from these inherent defects in this part of the Libyan argument, the most striking flaw in Libya's recourse to "delimitations with third parties" is its evident inconsistency with the essentials of the Libyan case. Malta, we are repeatedly told, can have no rights extending beyond her limited "natural prolongation" in the physical sense and, in particular, cannot have rights which project beyond the edge of the Sicily–Malta and the Medina Escarpments. Libya, however, does not regard itself as bound by these limitations but, so it argues, should be allowed to develop its claims right through this "forbidden" area in order to establish a delimitation with "third States". Why is it, one is bound to ask, that considerations of geology, geomorphology and of the principle of natural prolongation which are so strenuously adduced as the basis of Libya's case against Malta, have no reciprocal applicability in relation to Libya's ambitious claims?

3. Security Interests

209. Having devoted additional consideration in Chapter 9 of its Memorial to the "Conduct of the Parties" and to "Delimitations with Third States"[2], the Libyan Memorial is content to limit its discussion of the remaining factors "Security interests", "Islands" and "Economic and related factors" to the much shorter treatment accorded to them in the chapter on the "Principles and Rules of International Law Applicable to the Present Case". Nonetheless, the relative brevity of their examination by Libya does not relieve Malta of the need to respond, however briefly, to some of the observations made in those pages.[3]

210. As to the relevance of security interests, Malta concurs with

[1] See Malta's Memorial, pp. 36–37, paras. 117–118 and p. 125, para. 257; cf. pp. 119 and 121 and Figures A and B on pp. 118 and 120.

[2] Libyan Memorial pp. 143–153.

[3] Malta's treatment of this subject in its Memorial is to be found at p. 114, para. 232.

Libya in identifying them as material to the present case. However, Malta's view of the facts is entirely different from Libya's. The Libyan Memorial is quite wrong in seeking to emphasize that the weight of Malta's security interests lies to the north of the Maltese islands, with the implication that Malta does not have significant security interests in other directions. The fact is that, as an island, Malta has security interests in every direction and all of them are seawards; these interests are the greater in whatever direction it is that the threat comes from. As Libya recalls in opening this section of the argument, it is not tolerable to have a foreign State or its licensees exploit resources off one's own coasts.[1] The impact upon the security, or sense of security of a State, is related not to geology, geomorphology, bathymetry or natural prolongation, but to simple considerations of distance. In view of this, in a situation where what is sought is an equitable result, considerations of security would appear to militate in favour of equidistance more heavily than they do in favour of a line which lies closer to the territory of one State than to that of the other. This approach operates with particular cogency when the claim of one State is brought so close to the territory of the other as Libya's is to Malta.[2] For the moment it is enough to point out that the distance from the northern edge of the "*Rift Zone*", as defined by Libya for the purposes of delimitation, to the nearest point on the coast of Malta is barely 7 nautical miles while the distance from the southern edge of the same zone to the nearest point on the Libyan coast is about 140 nautical miles. Considerations relevant to Malta's interest in exercising political authority in respect of continental shelf areas appurtenant to it are developed in paras. 286–292 below.

4. Islands

211. Whatever advantages there may be in the system of simultaneous exchange of written pleadings in a case such as the present, the system does carry with it the risk that the opening pleadings may not focus on identical issues. This is nowhere more strikingly apparent than in Libya's treatment of "islands" as a relevant factor. The question of islands is dealt with extensively in Malta's Memorial[3] and the matter will be mentioned again in this Counter-Memorial. Libya, for reasons which are presumably tactical in nature, has dealt only briefly with this question and even then only by reference to islands generally, without identifying the situation of Malta in its true and dominant terms, as one of an island *State*.[4] Indeed, the only authority adduced on the subject in the Libyan Memorial is a passage in the *Anglo-French Arbitration* dealing with the Channel Islands. These islands, of course, are in no

[1] Libyan Memorial, p. 110, para. 6.67.
[2] See Map 4 opposite.
[3] See especially Chapter VI, pp. 43–58 and Chapter VII pp. 61–96.
[4] Libyan Memorial pp. 110–113, paras. 6.79–6.86.

relevant way comparable to Malta, being not an independent State, but dependent Islands with an extreme dislocation from the mainland territory of the parent State coupled with close proximity to the opposite State.

5. Economic and Related Factors

212. Libya has dealt no more extensively with economic and related factors than it has with security interests,[1] contenting itself with a general admonition against attributing weight to arguments of relative wealth or size of population. This is entirely understandable in view of the fact that the whole weight of economic advantage is with Libya.

213. Malta has opened up the subject in its Memorial in the short statement at the beginning under the heading "Importance to Malta of the Present Case",[2] in the statement of the economic background[3] and, in more detail, in the section entitled "Certain Equitable Considerations of Particular Relevance in the Present Case".[4] In particular, it has commented on the very passage from the Court's 1982 Judgment which Libya has cited at p. 113, para. 6.87. There is therefore, nothing to be gained by developing further at this point Malta's case relating to the relevance of economic considerations. Malta's basic position is, however, restated below, particularly in Chapter X.

[1] *Ibid.* pp. 113–114, paras. 6.87–6.89.
[2] Malta's Memorial, p. 3, paras. 4–6.
[3] *Ibid.* pp. 15–16.
[4] *Ibid.* pp. 109–114.

CHAPTER IV

PROPORTIONALITY

1. The Rôle Allotted to Proportionality in the Libyan Memorial

(1) *In Principle*

214. The genesis of the argument of the Libyan Government related to proportionality appears to be the position adopted by the Libyan delegation in the course of the talks on 23 and 24 April 1973.[1] The Libyan delegation stated that in the draft agreement the respective lengths of the portion of the coastline of Libya facing Malta (from the Tunisian border eastwards to Misurata) had been taken into consideration in determining the dividing line. Thus the distance between the two coastlines was divided "in the same proportion that the two shorelines bear to each other". At these meetings the Maltese delegation maintained the legal validity of the equidistance line.

215. Chapter 6 of the Libyan Memorial is devoted to a fairly extensive statement of "The principles and rules of international law applicable to the present case" from Libya's point of view. In this *exposé* the main headings are as follows:-

"A. Principles and Rules Governing a State's Legal Basis of Title to the Continental Shelf".

"B. Principles and Rules Governing the Delimitation of the Continental Shelf".

"C. The Rôle of Proportionality".

216. It is clear from both the ordering and the content of the chapter that proportionality is accorded a secondary significance. Much of the chapter is devoted to the topic of natural prolongation, and the list of "principles and rules"[2] does not include a reference to proportionality. Moreover, in the "Conclusions" to the chapter[3] there is no emphasis upon and, indeed, no single reference to, the question of proportionality.

217. In paragraph 6.43 it is stated that "the element of proportionality will be discussed in the light of its rôle as a test of the equity of the result produced", and the subordinate rôle of proportionality indicated by this formulation is reinforced by the passages which elaborate upon "the rôle of proportionality".[4] Thus proportionality is stated to be a "test".[5]

[1] See Libyan Memorial para. 4.35 and Annex 39 and 40.

[2] *Ibid.* pp. 92 to 114.

[3] *Ibid. para.* 6.94.

[4] *Ibid.* paras. 6.90–6.93.

[5] *Ibid.* Twice in para. 6.90, twice in para. 6.91, twice in para. 6.92 are four times in para. 6.93.

218. The primary statements of principle relative to the rôle of proportionality are as follows. First, the Libyan Memorial quotes from the Court of Arbitration in the *Anglo–French Arbitration*[1] when it said:

> "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."

In the same connection the Libyan Memorial reiterates the view that proportionality is "not a legal principle which itself gives rise to rights".[2]

219. Part III of the Libyan Memorial is concerned with "the application of the law to the facts and relevant circumstances of this case" and consists of four chapters, of which the last, Chapter 10, is entitled "the achievement of an equitable result". In a first part, the text of Chapter 10 emphasises the "physical factors of natural prolongation" and other "relevant circumstances" of a "geographical character".[3] In the second part of the chapter[4] the Libyan Memorial returns to "the test of proportionality" and explains how, in the Libyan view, the test is to be applied in the present case. The question of the applicability of the test will be reserved for later examination.[5] For present purposes, it is sufficient to note that the Libyan Memorial applies the "test" in the particular form of "proportionality in the light of the ratios between the lengths of the coasts of the Parties".[6]

220. The overall treatment of the issue of proportionality in the Libyan Memorial displays two characteristics. First, the relevant formulations and exposition take up only slightly more than *seven* pages in a Memorial consisting of 160 pages of text. Secondly, the position of principle adopted is to the effect that proportionality is not an independent source of rights, but a "test" of the equity of the result produced by the application of the pertinent principles and rules governing the delimitation of the continental shelf.

(2) *In Practice*

221. As a matter of practice, the rôle accorded to the element of proportionality in the Libyan Memorial is much more substantial than the formulations offered in that pleading indicate. Far from being used as a means of checking, testing or verifying the equitable nature of a result achieved by the application of the pertinent principles and rules, the Libyan Government has relied upon proportionality as a dogmatic basis for what is in effect a delimitation. Indeed, in the history of the

[1] Decision of 30 June 1977, para. 101.
[2] Libyan Memorial, para. 6.90.
[3] Libyan Memorial, pp. 154–155, paras. 10.01–10.05.
[4] *Ibid.* pp. 155–160, paras. 10.06–10.18.
[5] See below paras. 237–251.
[6] Libyan Memorial, pp. 159–160, para. 10.18.

dispute the meetings of 23 and 24 April 1973[1] reveal the primary reliance upon a certain conception of proportionality. While the Libyan Government has continued to rely upon this conception of proportionality in its Memorial it must be noted that the actual basis of its claim is now the "Rift Zone", has therefore changed.

222. The use of proportionality as a primary criterion or method of *delimitation is, of course,* incompatible with legal principle, and the Libyan argument necessarily involves an unhappy tension between the radical and arbitrary rôle actually accorded to proportionality, and the rôle justified by legal principle. Stripped of the detail, the Libyan position is based upon a highly abstract conception involving a partition of the seabed in accordance with a specialised version of the test of proportionality, which in effect becomes an independent criterion advanced as the basis for a claim to a just and equitable share. This approach appears very clearly in the course of the meetings of 23 and 24 April 1973 and it is evident in the following passage in the Libyan Memorial:

> "In the present case, although the dispute came to a head as a result of conflicting petroleum concessions granted by the Parties, it emerged out of differences of view regarding the principles of international law which should govern the delimitation of the continental shelf between Malta and Libya. Malta has persistently adhered strictly to "the Median Line", i.e. the "principle" of strict equidistance. Libya, on the other hand, has taken the view that, in the circumstances of the very small island group of Malta, and the large continental State of Libya with its extended coastline on the southern side of the Mediterranean, the "equidistance principle" is wholly inappropriate and inapplicable. *From an early stage, Libya has taken the view that the solution should be fair and reasonable, taking fully into account the circumstances of the particular case.*"[2]

223. This passage from the Libyan pleadings occurs in the context of an account of "the emergence of the dispute" and, as subsequent passages indicate,[3] the basis of the solution regarded by the Libyan Government as "fair and reasonable" (and propounded in 1973) was a version of proportionality in terms of the ratio of the lengths of the coastlines considered relevant for the purpose of such apportionment. The use of proportionality as an independent method of apportioning the intervening areas of seabed thus appears in the diplomatic record, and in the Libyan Memorial this episode is linked directly with the legal argument and submissions of the Libyan Government in the present proceedings.

224. The employment of proportionality in the form proposed by the Libyan delegation at the talks in April 1973 involves the adoption of

[1] See Malta's Memorial, p. 23, para. 65; also see Annex 3 to that Memorial.
[2] Libyan Memorial, p. 53, para. 4.24, Emphasis supplied.
[3] *Ibid.* pp. 57–59, paras. 4.33–4.35.

the position that each State should have a "just and equitable share" of the continental shelf areas in dispute. This approach is incompatible with the relevant legal principles and the doctrine of the just and equitable share has been consistently rejected by international tribunals.

225. In the *North Sea Continental Shelf* cases this Court expressed the following views:

> "[T]he 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 seabed and exploiting its natural resources. ...
>
> 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."[1]

226. Similarly, in the *Anglo–French Continental Shelf Arbitration* the Court of Arbitration related the same thinking to certain French arguments based upon proportionality. In the words of the Court:

> "The equitable delimitation of the continental shelf is not, as this Court has already emphasised 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 emphasised in the *North Sea Continental Shelf* cases (I.C.J. Reports 1969, paragraph 91), there can never be

[1] *I.C.J. Reports*, 1969, p. 22, paras. 19, 20.

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."[1]

227. Finally, this Court was careful to emphasise the difference between equity, as a vague appeal to distributive justice, and the application of equitable principles, as a part of positive international law, in its Judgment in the *Tunisia–Libya Continental Shelf* case:

"Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the Parties agree (Art. 38, para. 2, of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. *While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.*"[2]

228. The reliance upon a proportionality doctrine lying outside the framework of legal principle involves the Libyan Government in an appeal to a self-serving version of distributive justice which entails not a delimitation but an apportionment. The position is underlined by Map

[1] Decision of 30 June 1977, *International Law Reports*, Vol. 54, p. 6, para. 101.
[2] *I.C.J. Reports*, 1982, p. 60, para. 71. Emphasis supplied.

(5) 9 in the Libyan Memorial, which represents the Libyan proposal of April 1973.[1] The line indicated reflects no known method of delimitation in accordance with law and is impressionistic and arbitrary, as befits an approach based upon apportionment.

(3) *Contradictions in the Libyan Argument*

229. The argument of the Libyan Memorial in respect of the issues concerning proportionality is disfigured by two major contradictions. The first lies in the assertions of principle – that proportionality is "not a legal principle which itself gives rise to rights".[2] These assertions stand in opposition to the large significance *in effect* accorded to proportionality in the general economy of the Libyan case and in the *Submissions* addressed to the Court. This aspect of the Libyan Memorial has been explored in the preceding paragraphs.

230. The second contradiction stems from the insistence of the Libyan Memorial on a large rôle *in practice* for proportionality (in a certain extra-legal version) and the prominent rôle also accorded to "the principle of natural prolongation". Thus in the *Submissions* of the Libyan Government paragraphs 2 to 4 relate to "the principle of natural prolongation" and paragraphs 5 to 7 relate to the issue of proportionality.

231. The Court is, in the Libyan Memorial,[3] asked to approve the principle that the delimitation should be "within, and following the general direction of, the Rift Zone as defined in this Memorial".[4] In the pages of the Libyan Memorial considerable effort is devoted to establishing the legal significance of natural prolongation and, consequently, the factual relevance of the "Rift Zone" as an alleged "fundamental discontinuity" in the continental shelf.[5]

232. Here is a remarkable curiosity of legal logic. Paragraph 4 of the Libyan Submissions invokes "the principle of natural prolongation", and the existence of "a fundamental discontinuity in the seabed and subsoil" as "a criterion for delimitation of continental shelf areas in the present case". *However, there is no logical connection between the lengths of coastlines and the ratio of those lengths, on the one hand, and the incidence of geological and geomorphological features in the seabed, be they "fundamental discontinuities" or not, on the other.* Thus the concept of proportionality, in the form of the ratios of lengths of coastlines, has no relation whatsoever to the principle of natural prolongation. Indeed, this view is given clear and emphatic expression in the Libyan Counter-Memorial addressed to this Court in the *Tunisia–Libya* case, in the following passage:-

"In Libya's view, the concept of proportionality is applicable

[1] See also Map 4 of this Counter-Memorial which reproduces the line proposed in 1973.
[2] Libyan Memorial, p. 114, para. 6.90.
[3] *Ibid.* pp. 163–164.
[4] *Ibid.* p. 159, para. 10.18 and the Submissions, para. 9.
[5] Libyan Memorial, pp. 84–92 and 97–104.

> solely to areas where the application of the principle of natural prolongation leads to conflicting results, or where (as in the present case) the question put to the Court requires it to give effect to relevant circumstances which might create a "marginal area" of divergence .... Proportionality has no place in connection with *de jure* appurtenance. Indeed, to impose proportionality as a restraint upon a delimitation of areas of shelf that *de jure* and *ab initio* appertain to State A, in favour of State B, because of the proportion borne by its smaller (theoretical) area of shelf to the length of its longer (theoretical) coastlines, would be contradictory to the fundamental legal concept that the continental shelf is the natural prolongation – in that example – of the landmass of State A into and under the sea."[1]

233. In the Submissions,[2] and generally, the Libyan Memorial presents the "natural prolongation" argument and the "proportionality" argument as producing a coincident result, namely a line somewhere within the "Rift Zone".[3] Such coincidence where it occurs at all is only a chance result, and it can have no persuasive value. *Unless the coincidence has some legal significance, it is a meaningless correlation* (like that between the stork population on the island of Bornholm and the human population on the mainland of Sweden: the standard example of such a correlation).

234. The insignificance of the coincidence can be demonstrated in the following way. Each principle or criterion is given equal importance, and if the two approaches had produced non-coincident lines of division, some method of reconciliation would have been necessary. However, when proportionality is offered as a method *tout court* of achieving distributive justice, rather than a retrospective test of the overall equity of a delimitation, it can only operate on its own plane and thus bears no relation either to geology in general or to natural prolongation in particular. In short, the reliance upon natural prolongation as a principle is logically in collision with the substantial rôle given to proportionality virtually as a method of delimitation. The invention of a casual coincidence of result in the Libyan Memorial provides no genuine way out of the logical difficulty.

235. The illogicality of the Libyan argument can be summarised thus. If the proportionality argument is valid, the natural prolongation principle is irrelevant. If the latter principle is valid, the proportionality argument is irrelevant. A factual "coincidence" of the solutions produced by the two principles does not obviate the contradiction between the two principles. After all, in this case the physiography of the seabed has nothing to do with the lengths of the coastlines of the two

[1] Libyan Memorial in *Tunisia–Libya case*, p. 205, para. 310. In the following paragraph the Libyan pleading quoted the decision of 30 June 1977 in the *Anglo–French Arbitration*, para. 101 (quoted in the present Counter-Memorial, above, para. 226).

[2] Paragraph 9.

[3] As shown on Map 17, with overlay, following p. 160.

States. No Legal or other connection exists between the "Rift Zone" and the Libyan coastline between the Tunisian border and Misurata, which is the basis of the Libyan "ratio of coastal lengths" calculation. Moreover, as a matter of historical fact, the Libyan proposal of April 1973 was not based upon geological features either in conception or in fact.

236. The only attempt in the Libyan Memorial to reconcile the two principles occurs in the following passage:

> "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."[1]

Far from effecting a reconciliation, this passage simply restates, indeed underlines, the problem. The final assertion, that the purpose of proportionality is to give each natural prolongation its "appropriate weight", makes no sense and effectively contradicts the use of proportionality in the Libyan Memorial, which depends not on the alleged extent of natural prolongations but on the lengths of coastlines, or at least selected coastlines.

2. The Correct Approach to the Issue of Principle

(1) *The Proper Function of Proportionality*

237. The correct view of proportionality, in legal terms and justified by precedent and principle, is that the rôle of proportionality must depend upon the general legal framework. Thus the concept of proportionality is "inherent in the notion of a delimitation in accordance with equitable principles", as the Court pointed out in the *Anglo–French Continental Shelf* case.[2] The same Court emphasised 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".[3] Indeed, such statements of principle are to be found in the Libyan Memorial itself and the Memorial refers to "proportio-

[1] Libyan Memorial, p. 115, para. 6.90.

[2] *Op. cit.*, para. 98.

[3] *Op. cit.*, para. 246; and see also paras. 99, 100. The latter paragraph deserves quotation in full:-

> "100. A State's continental shelf, being the natural prolongation under the sea of its territory, must in large measure reflect the configuration of its coasts. Similarly, when two "opposite" or "adjacent" States abut on the same continental shelf, their continental shelf boundary must in large measure reflect the respective configurations of their two coasts. But 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"

nality" as a "test" of the equity of the result produced by the application of other principles.[1]

238. In the same connection it is the general framework which matters in the choice of a method of delimitation. This choice in any given case is to be determined in the light of the geographical and other relevant circumstances and of the fundamental norm that the delimitation must be in accordance with legal principles.[2] Consequently, the concept of proportionality has no *a priori* rôle in delimitation cases and whether it has a rôle and, if so, the precise nature of that rôle, must be dependent on the circumstances of each case. In the *Anglo–French Continental Shelf* case the Court stated the position with great clarity in the passage of the decision set forth above.[3]

239. In the present proceedings the Libyan Government not only invokes the test of proportionality but invokes a particular version of proportionality based upon the ratio of the lengths of the respective coastlines regarded as relevant for the purpose. This version of the concept was formulated by this Court in the *North Sea* cases but in such a way as to make clear that the rôle accorded to proportionality, and the version employed, depended on the particular situation of three adjoining States located on a concave coast.[4] Thus the Court of Arbitration in the *Anglo–French Continental Shelf* case expressed the point in these terms:

> "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."[5]

240. It may be recalled that in the *Anglo–French Continental Shelf* case the French Government had invoked the "ratio of the lengths of the respective coasts" argument in two respects: first, with reference to the boundary in the Channel Islands region, and secondly, the course of the boundary in the Atlantic region. The Court specifically rejected this

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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."

[1] Libyan Memorial p. 114, para. 6.90 and p. 97, para. 6.43.

[2] *Anglo–French Continental Shelf* case, Decision of 30 June 1977, para. 97; *Tunisia–Libya Continental Shelf case, I.C.J. Reports*, 1982, pp. 59–60, paras. 70, 71.

[3] See para. 226.

[4] *I.C.J. Reports*, 1969, p. 49, para. 91 (at p. 50); p. 52, para. 98; pp. 53–54, para. 101.

[5] *Op. cit.*, para. 99.

form of the French argument and did so in both respects,[1] thus underlining the proposition (in paragraph 99 of the decision, above) that this criterion "is not one for application in all cases".

(2) *Irrelevance of Proportionality in terms of Coastal Lengths in the Present Case*

241. The rôle, such as it is, of proportionality in the case of opposite States abutting upon the same continental shelf may take two forms. Proportionality may be invoked as a general test of the equity of a solution arrived at by means of various equitable principles. In the case of opposite States, the use of the method of equidistance involves a more or less *ex hypothesi* compatibility with the test of proportionality, since both coasts are given equal value.

242. The second form which proportionality may take involves the need to make adjustments to abate disporportionate effects resulting from "the presence of islets, rocks and minor coastal projections",[2] or from the presence of islands "wholly detached" from the mainland and anomalous in relation to the "primary" equitable boundary.[3] No such causes of distortion exist in the circumstances of the present case; and the equidistance method produces the solution which satisfies the "test of proportionality", as a general means of evaluating the overall equitableness of that result.

3. THE GENERAL TEST OF EQUITY ESTABLISHES THE VALIDITY OF MALTA'S CLAIM TO A MEDIAN LINE

(1) *Proportionality: Rebuttal on the Facts*

243. It is Malta's position that the test of proportionality in terms of the ratio of the lengths of coastlines considered to be relevant for the purpose is not applicable in the circumstances of the present case. At the same time it is necessary to point out that the result of applying the method of equidistance is by no means incompatible with equitable principles.

244. The actual relationship of Maltese and Libyan coasts, demonstrated by the trapezium figure included in the Memorial of Malta,[4] produces a situation in which the equidistance method reflects the essential elements in the geographical framework. Consequently, Libya receives a broad wedge of shelf which reflects the west to east extension of Libyan coasts, and conforms in terms of lateral reach with the principles of non-encroachment and of the equality of coasts in generating shelf rights. Malta receives an area of shelf which reflects the same principles of non-encroachment and of equality of coasts.

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[1] *Op. cit.*, paras. 98–99; para. 166; paras. 195 *et seq.*; para. 246.

[2] *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 36, para. 57; *Anglo–French Continental Shelf* case, *op. cit.*, paras. 100, 101, 248–251.

[3] *Anglo–French Continental Shelf* case, *op. cit.*, paras. 199, 201, 202.

[4] Malta's Memorial, p. 120.

245. The entitlement of Malta depends upon the *relationship* (opposite) and the *distance between* Libya and Malta. The distance factor (21) has a certain effect demonstrated by Diagrams A and B in Figure 5. If it is assumed that the coastal lengths of States 1 and 2 remain constant, then the effect of State 1 (as the apex of a trapezium) receding from (Diagram A) or advancing toward (Diagram B) State 2 can be assessed. The ratio of the areas of the two sectors of the trapezium, divided by the equidistance line, remains constant, whatever the value of *h*, the distance between the two coasts. The effect of the equidistance method is always to reflect the *equal* lateral reach of jurisdiction from the coasts of States 1 and 2. Thus the value *h* is always shared:[1] whereas in the Libyan scheme of things State 2 receives a very high proportion of the areas dividing the two States, however great the distance between them.

(2) *The Median Line does not call for the Refashioning of Geography*

246. The fundamental doctrine of continental shelf law is that the framework of equitable delimitation is established by the dominant geographical features. Such dominant features may include both the coastal features and the relationships of such coastal features. They also may include mainland coasts, such as those of Libya, and island States, such as Malta. There are 38 island States in existence and the coasts of such States generate continental shelf rights in the same way as other coasts.

247. It is the dominant geographical features which indicate the equitable delimitation, and only "incidental special features" can justify some abatement of the effects of geographical data.[2] The Libyan argument based upon proportionality by reference to the length of coastlines is inconsistent with legal principle since it is a call for a substantial refashioning of geography and such a course of action has been rejected by this Court in the *North Sea* cases[3] and also by the Court Arbitration in the *Anglo–French Continental Shelf* case.[4]

248. Given the relationship of the coasts of Malta and Libya there is no basis for resort to proportionality in the form invoked by the Libyan Memorial. The purpose of proportionality is to maintain equity *within the general framework of geographical data and relevant legal principles.* It cannot be used to *re-order* the dominant geographical (and political) features of the particular case. The requirement of equity – indeed, "the only absolute requirement of equity" – is that "one should compare like with like", as the Court pointed out in the *Tunisia–Libya Continental Shelf* case.[5] The difference in the geographical identity of Malta and Libya is so marked that the introduction of the Libyan version of proportionality would be incompatible with that "absolute require-

(22)

[1] See Figure 6.

[2] *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 50, para. 91. See also the *Anglo–French Continental Shelf* case, *op. cit.*, paras. 100, 101.

[3] Ut supra.

[4] *International Law Reports*, Vol. 54, p. 6, paras. 101, 248.

[5] *I.C.J. Reports*, 1982, p. 76, para. 104.

ment" of equity. In consequence the respective coasts of the opposite States, Malta and Libya, must be given their normal effect in generating shelf rights, on the basis of the principle of distance, the significance of which has been considered in the Memorial of Malta,[1] and again in this Counter-Memorial, both in relation to entitlement and to delimitation.[2]

(3) *The Libyan Position disregards the Principle of Non-Encroachment*

249. The argument of the Libyan Memorial based upon proportionality is offered as an autonomous principle and it necessarily lacks a context, a proper relation to other pertinent legal and equitable principles. It has already been pointed out that the argument derived from the ratio of coastal lengths has no logical connection with the principle of natural prolongation, and is in fact antipathetic to that principle.[3] The argument is similarly incompatible with the principle of non-encroachment, which remains a fundamental aspect of the law relating to continental shelf delimitation.

250. In the case of opposite States abutting upon the same continental shelf the equidistance principle takes care of the problem of "cut-off" with which the Court was preoccupied in the *North Sea* cases.[4] The matter can be expressed by saying that the issue of encroachment does not arise. The Libyan argument, precisely because it seeks to refashion geography, proposes a massive breach of the principle of non-encroachment.

251. The Libyan argument rests upon a misconception: that the generation of shelf rights rests upon *length* of coasts. It does not. The generation of shelf rights depends upon the pertinent control points and the measurements taken from them in order to give effect to the distance principle; and, in the case of opposite States, this will produce an equidistance line. In other words, coasts have a "distance" significance and not merely a "length" significance. Indeed, even when the Libyan version of proportionality is applicable, resort is to be had to "coastal fronts" in making the necessary calculation, an example of the relative significance of coastal length.[5]

4. The Equity of the Median Line Confirmed by the Practice of States

(1) *Delimitations Involving Island States*

252. In its Memorial[6] Malta recalled the considerable body of State

[1] Malta's Memorial, paras. 248–255.
[2] See above, in particular, paras. 122–132 and 153–158.
[3] See above, paras. 230–236.
[4] *I.C.J. Reports*, 1969, p. 31, para. 44; pp. 34–36, paras. 51–57; pp. 46–47, para. 85; p. 49, para. 89; p. 53, para. 101. See also the *Tunisia–Libya Continental Shelf* case, *I.C.J. Reports*, 1982, pp. 118–122, paras. 65–76, Separate Opinion of Judge Jiménez de Aréchaga.
[5] *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 52, para. 98; p. 54, para. 101, D(3).
[6] Chapter VII, sections 2–5.

practice supporting the view that, in circumstances comparable to those of the present case, the equidistance method produces an equitable result. This body of State practice necessarily establishes that the equidistance method, in the cases of island States opposite both distant and non-distant mainlands, satisfies the factor of proportionality *in the general form in which it can be said to apply to the case of opposite States*, that is to say, as a *test* of the overall equitableness of the result. It will be appreciated that "equity" and the test of what is equitable cannot be conceived in terms of an intellectual or legal abstraction, but must reflect values and standards current and generally accepted in the community of States at the present time. In the absence of a previous decision of this Court or another international tribunal relating to similar geographical and political circumstances, the practice of States is the only sure guide to generally accepted and current notions of what is equitable in the sphere of continental shelf delimitation.

253. One of the striking features of the Libyan argument based upon proportionality is the air of unreality with which it is attended. This is immediately apparent when the Libyan *modus operandi* is applied to a sample of existing delimitations in comparable geographical circumstances. Four such cases may be taken:

(a) Denmark (Faroes) – Norway
(b) Bahrain – Iran
(c) Norway – United Kingdom (Shetlands)
(d) India (Nicobar Islands) – Indonesia

The actual delimitations resulting from the Agreements concluded between the countries involved, as well as the texts of those agreements, have already been provided by Malta in its Memorial.[1] The Reduced Maps reproduced in this Counter-Memorial in the pages which follow[2] show two lines: one is the actual line of delimitation under the appropriate Agreement – and is so indicated; the other is a line drawn on the basis of proportionality as propounded by Libya. The contrast is too evident to need any further comment.

(2) *Proportionality in Relation to Delimitations Involving Peninsular States Opposite Mainlands*

254. The isolation of the Libyan proposal of April 1973 from the general trend of the practice of States in matters of delimitation is illustrated further by the cases of peninsular States opposite mainlands. The cases set forth below are relevant in so far as they demonstrate that States have not applied a concept of proportionality in "opposite State" situations of the type adhered to by the Government of Libya. A study of the cases shows the absence of any criterion based upon the ratio of the lengths of the relevant coasts.

255. The delimitations involving peninsular States provide a general,

[1] See Reduced Maps at pp. 38, 63, 81 and 82 and Annexes 20, 22, 50 and 51 of Malta's Memorial.
[2] Reduced Maps No. 2, 3, 4 and 5.

but reliable, indication of the notions of equity actually applied by States in the practice of continental shelf delimitation. In conjunction with the evidence of the practice of States relating to island States opposite mainlands,[1] the evidence concerning peninsular States points unequivocally away from the Libyan conception of what is equitable and, in that context, of what satisfies proportionality as a *test* of what is equitable.

256. The precedents set forth below relate to delimitations involving peninsular States facing opposite "mainlands" abutting on the same shelf. The examples include the following[2]:-

(*a*) *Denmark – Norway, Agreement signed on 8 December 1965.*[3] Article 1 of this Agreement states that the continental shelf boundary shall be the median line. The alignment has a length of 255 nautical miles. The boundary is an average distance of 58.4 nautical miles from both Danish and Norwegian territory. The first five of the terminal or turning points lie off the attenuated feature which is the northern aspect of the Danish peninsula.

(*b*) *Iran – Qatar, Agreement signed on 20 September 1969.*[4] The agreement establishes a continental shelf delimitation between the two opposite States. In his analysis[5] the Geographer of the U.S. Department of State remarks that the boundary is "based on the equidistance principle with the exception that the presence of all islands in the Persian Gulf was disregarded".

(*c*) *Denmark – United Kingdom, Agreement signed on 25 November 1971.*[6] Article 1 of the Agreement also states that the delimitation of the continental shelf is in principle an equidistance line.

(*d*) *Iran – Oman, Agreement signed on 25 July 1974.*[7] The continental shelf boundary adopted in this agreement consists of a modified equidistance line. On the Omani side full effect has been given to the elongated Musandam Peninsula and the associated islands.

(*e*) *Australia – Papua New Guinea, Agreement signed on 18 December 1978.*[8] This delimitation applies to the continental shelf areas lying between the northern aspect of the Cape Yorke Peninsula and, across the Torres Strait, the southern coast of Papua New Guinea. The specific arrangements are elaborate and the alignment rests upon a negotiated compromise. Nonetheless it is evident that in principle the

[1] See paras. 252–253 above and the references to Malta's Memorial therein contained.

[2] The text of the Agreements is reproduced in Annexes 6, 7, 8, 9 and 10; but the charts annexed to the Agreements and showing the line of delimitation are reproduced in the pages which follow: Reduced Maps No. 6, 7, 8, 9, and 10.

[3] *Limits in the Seas*, No. 10 (Rev.). The 1965 Agreement was amended on 24 April 1968 following more precise geodetic calculations. The Exchange of Notes effecting the change is also reproduced as part of Annex 6.

[4] *Ibid.*, No. 25.

[5] *Ibid.*, p. 2.

[6] *Ibid.*, p. 9.

[7] *Ibid.*, No. 67

[8] *International Legal Materials*, Vol. 18 (1979), p. 291.

Cape Yorke Peninsula and its offlying islands have been given normal weighting.

5. Conclusion: The Lack of Pertinence of the Ratio of Lengths of Coasts

257. The reliance placed upon the argument based upon the ratio of lengths of coastlines in the Libyan Memorial is fundamentally in contradiction of the pertinent principles of law and equity. In the present case the equidistance method, on the contrary, satisfies the "test of proportionality" as a general means of evaluating the equitableness of the result produced by the application of the pertinent equitable principles and by reference to the relevant circumstances.

258. The lack of pertinence of the ratio of lengths of coastlines is established, in particular, by the following considerations:

(*a*) In the circumstances of the present case reliance upon the ratio of lengths of coasts constitutes a resort to a crude mode of apportionment based upon the discredited doctrine of "the just and equitable share".

(*b*) Such an approach is inapplicable as between opposite States abutting upon the same continental shelf.

(*c*) The Libyan reliance upon proportionality in this form is logically inconsistent with the prominent rôle accorded to "the principle of natural prolongation" in the Libyan Memorial.

(*d*) The Libyan position involves a substantial refashioning of geography, and "the only absolute requirement of equity" is that "one should compare like with like"; but Malta and Libya have essentially different geographical identities.

(*e*) The alignment called for by the Libyan Government would constitute a major breach of the principle of non-encroachment.

(*f*) The practice of States provides no support for the equity of the Libyan contention but confirms the equity of the equidistance method in the circumstances of the present case.

PART IV

RESTATEMENT OF MALTA'S CASE IN THE LIGHT OF THE LIBYAN MEMORIAL

CHAPTER V

THE IMPORTANCE TO MALTA OF THE APPURTENANT CONTINENTAL SHELF

259. Malta lacks natural resources and explorations carried out indicate that there is no prospect of discovering mineral resources onshore. Malta has been recognised by the United Nations as having the status of an "island developing country".[1] With a limited territory and a population of 320,000 persons, Malta has an evident need for resources and, not least, sources of energy. There are good prospects of the discovery and production of oil in the appurtenant areas of continental shelf and, indeed, the most promising areas lie adjacent to the southern sectors of Malta's equidistance line. Malta thus has a significant interest in access to the mineral resources of the shelf.

260. It is also necessary to recall the importance to Malta as a coastal State of the exercise of political authority in respect of its appurtenant continental shelf. The "sovereign rights" which coastal States may exercise over the shelf are for the purpose of exploring it and exploiting its natural resources, but the exercise of such rights involves a general competence to maintain public order in the areas concerned as an aspect of the proper management of the resources. Moreover, the coastal State has security interests in the seabed lying off its coasts. It is obvious that such security interests are no less important when the homeland consists of a small group of islands. The Convention on the Law of the Sea confirms the security interests of groups of islands in so far as "archipelagic States" are accorded a special régime in respect of the archipelagic waters, as well as their bed and subsoil: see the elaborate provisions of Part IV of the Convention.

[1] For the documentation see Malta's Memorial, I, pp. 110–114, paras. 226–230, and Vol. II, p. 240, Annex 68.

CHAPTER VI

THE LEGALITY AND CONSISTENCY OF MALTA'S POSITION SINCE 1965

1. Malta's Equidistance Line

261. In accordance with the principles and rules of international law then existing, Malta's legal rights in respect of appurtenant areas of continental shelf were confirmed in a Note Verbale of 5 May 1965 and subsequently regulated by the Continental Shelf Act adopted in 1966. The form of this legislation was in no way exceptional. Like much other legislation employed by States in regulating their shelf rights, the Maltese enactment prescribed an equidistance line. The appropriateness of the equidistance method in delimitation of shelf areas dividing opposite States was not long afterwards confirmed by the Court in the *North Sea Continental Shelf* cases.[1]

262. Moreover several important agreements involving States of the Mediterranean region concluded in the same period relied either implicitly or explicitly on the equidistance method. These agreements[2] were made in the period between January 1968 and May 1977, and the parties included Italy, Yugoslavia, Tunisia, Spain and Greece. None of these instruments makes any reference to "special circumstances" and such a reference would be unusual in terms of the practice of States.[3] Yet the Libyan Memorial makes the odd complaint that the legislation of Malta omits such a reference.[4]

263. In the period since the Note Verbale of 1955 and the Act of 1966 Malta has behaved with complete consistency and this is admitted by the Libyan Memorial when it states that "Malta appears committed to the median line"[5] and draws the conclusion (from the conduct of the Parties) that "Malta has consistently advocated delimitation along a median line".[6]

2. The Diversity of Libyan Lines and Substitutes for Lines

264. The consistency of Malta's adherence to a delimitation based

[1] See below, para. 279.
[2] Malta's Memorial, Ann. 61 to 64. See also Map 2 of this Counter-Memorial.
[3] See below, para. 301, and the references therein made to the Annexes in Malta's Memorial.
[4] Paras. 4.06, 9.34 to 9.35.
[5] Para. 9.38.
[6] Para. 9.43.

firmly upon customary international law, and reflecting the principles applicable in the geographical framework of the coastal relationships of Malta and Libya, is to be contrasted with the diversity and inconsistency which have characterised the Libyan view of delimitation in this case.

265. Malta's 1965 Note Verbale and the legislation of 1966 evoked no protest or reservation of rights from Libya, and the first expression of a different view on the issue of delimitation on the part of Libyan officials took place at the meeting of delegations in April 1973.[1] The first Libyan concessions in the area which infringed Malta's median line of 1965 were granted in September 1974.[2] These essential facts are not contradicted by the history of the dispute as presented in the Libyan Memorial.[3]

266. The Libyan Government's position since 1973 has been characterised by a significant number of variations, and this diversity contrasts with the consistency of the position of Malta dating back to its 1965 Note Verbale. The insecurity of the Libyan stance is well characterised by the loose formulation of the Libyan Submissions, of which paragraph 9 refers to "a delimitation within, and following the general direction of, the Rift Zone as defined in this Memorial". The "Rift (9) Zone", as indicated by Map 17 (and the overlay), is a feature which, in the area relevant to the present proceedings, has a breadth of more than 100 kilometres.

267. The Libyan positions on delimitation include the following:

(*a*) *Acquiescence in Malta's Equidistance Line 1965 to 1973.* It may be noted that until the meetings of the delegations in April 1973 Libya had failed to make any protest or express any reservation in response to Malta's 1965 Note Verbale and Legislation of 1966 and the equidistance line thus constituted.

(*b*) *The 1973 Ratio of Coastal Lengths proposal.* In the course of the meeting of delegations on 23 and 24 April 1973 the Libyan Government proposed a line of division which was the product not of a method of delimitation but of a system of apportionment based upon a concept of proportionality in terms of the ratio of the lengths of the Maltese and Libyan coasts.[4] The resulting division is depicted by Map (5) 9 in the Libyan Memorial and is also reproduced in this Counter-Memorial.[5] The "line" indicated represents an arbitrary process of division and bears no relation to any known method of delimitation.

(*c*) *A Boundary within the "Rift Zone".* In the Libyan Memorial, and in the Submissions of the Libyan Government, the position is adopted according to which the "Rift Zone", as identified by Libya, constitutes a discontinuity which separates the natural prolongations of

[1] Malta's Memorial, p. 23, para. 65.
[2] *Ibid.*, pp. 17–18, para. 37.
[3] See Libyan Memorial, paras. 4.24–4.57; 6.70–6.73; and 9.25–9.43.
[4] See Libyan Memorial, para. 4.33; Ann. 39.
[5] Map 4.

Malta and Libya.[1] The boundary lies within this Zone, according to the Libyan thesis, but Libya does not indicate a precise line.[2]

268. It may be noted that these three positions are not variants of the same principle but are radically different in provenance. In particular, the proposal based on the ratio of coastal lengths purports to reflect the *test* of proportionality – though *as applied* it becomes a *substitute* for a method of delimitation. The "Rift Zone" boundary is supposed to be based upon natural prolongation and thus has a totally *different technical provenance. The result is that the "proportionality"* line of division (Map 9 of the Libyan Memorial) contrasts with the vague concept of a boundary to be discovered within the extensive area of the "Rift Zone" (Map 17 of the Libyan Memorial). Map 4 of this Counter-Memorial reproduces both boundaries.

269. The proposal based upon the ratio of coastal lengths and the "Rift Zone" boundary represent two distinct conceptions which cannot in legal terms be complementary since they lack a common basis. The one common feature is the fact that neither position involves a method of delimitation. The proportionality position constitutes a claim to a just and equitable share as has been explained above in Chapter IV. The "Rift Zone" thesis bears no relation to the proposal of 1973 based upon the ratio of coastal lengths and is not a reasonable indication of a method or principle of *delimitation*. The identification of a *zone*, as shown on Map 17 of the Libyan Memorial, or Map 4 of this Counter-Memorial does not even approximate to a method of delimitation. Delimitation involves the identification of a *limit*, or *line*. In the present case the Court is asked to identify the "principles and rules" applicable to the "delimitation" of the area. The Court is not asked to identify the "principles and rules" applicable to the identification of a "zone".[3]

[1] Libyan Memorial, paras. 6.54, 7.15, 8.17, 9.64 and 10.18.
[2] *Ibid.* paras. 7.15 and 10.18; and see Map 17 (following p. 160 of Libyan Memorial).
[3] See Part II of this Counter-Memorial on the Task of the Court, paras. 68–74.

CHAPTER VII

THE GEOGRAPHICAL FRAMEWORK OF THE PRESENT CASE

1. Introduction: The Key Elements

270. A major principle of international law concerning delimitation of the continental shelf is that it is the geographical framework which determines the approach to delimitation. In the present case the key elements in that framework – and they are clear to see and not the result of sophisticated constructions – are as follows:

(*a*) The seabed between Malta and Libya is a geological continuum consisting of the Pelagian Block and thus the shelf in the relevant area is characterised by its essential geological and geomorphological continuity.

(*b*) The coasts of Malta and Libya are opposite and are set at a considerable distance from each other.

(*c*) 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.

(*d*) The primary elements in 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.

2. The Essential Geological Continuity of the Shelf in the Relevant Area

271. The weaknesses in the Libyan thesis relating to natural prolongation and the "*Rift Zone*" have been explored earlier in this Counter-Memorial.[1] In terms of legal principle and the language used by the Court of Arbitration in the *Anglo-French* case, the Pelagian Block "is characterised by its essential geological continuity".[2] It is helpful to recall the analysis by that Court in respect of a clearly comparable situation:[3]

> "The Court shares the view repeatedly expressed by both Parties that the continental shelf throughout the arbitration area is characterised by its essential geological continuity. The geological

[1] *Chapter I, Part III.*

[2] *Anglo–French Continental Shelf* case, Decision of 30 June 1977, *International Law Reports*, Vol. 54, p. 6, para. 107.

[3] *Ibid.*; and see also paras. 108 and 109.

faults which constitute the Hurd Deep and the so-called Hurd Deep-Fault Zone, even if they be considered as distinct features in the geomorphology of the shelf, are still discontinuities in the seabed and subsoil which do not disrupt the essential unity of the continental shelf either in the Channel or the Atlantic region. Indeed, in comparison with the deep Norwegian Trough in the North Sea, they can only be regarded as minor faults in the geological structure of the shelf; and yet the United Kingdom agreed that the trough should not constitute an obstacle to the extension of Norway's continental shelf boundary beyond that major fault zone. Moreover, to attach critical significance to a physical feature like the 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".

The Libyan argument ignores "the whole tendency of State practice... in recent years". It is indeed extremely rare for topographical features such as troughs to be taken into account for purposes of delimitation.[1]

272. In any case, the inclination or axis of a fault zone is, as the Court pointed out in the *Anglo–French* case,[2] "placed where it is simply as a fact of nature", and such a fact has no relation to considerations of equity. Consequently such a fault zone does not mark a separation of distinct natural prolongations and does not count as a relevant circumstance when the key elements in the geographical and legal framework militate in favour of some other basis of delimitation.

273. In conclusion Malta would respectfully remind the Court of the findings concerning the Pelagian Block in the *Tunisia–Libya Continental Shelf* case, findings which resulted from a considerable volume of geomorphological evidence presented by the parties. The Court's firm view on the absence of distinct natural prolongations in the Pelagian Block is evident from the following passages from the Judgment:[3]

> "66. Since the Court is here dealing only with the question of geomorphological features from the viewpoint of their relevance to determine the division between the natural prolongations of the two States, and not with regard to their more general significance as potentially relevant circumstances affecting for other reasons the course of the delimitation, its conclusion can be briefly expressed. The Court has carefully examined the evidence and arguments put forward concerning the existence and importance of the submarine features invoked as relevant for delimitation purposes. Those relied on by Libya in support of its principal contention as to the geologically determined 'northward thrust' do not seem to the

[1] See above, paras 144–151, for the State practice.

[2] Para. 108.

[3] *I.C.J. Reports*, 1982, pp. 57–58.

Court to add sufficient weight to that contention to cause it to prevail over the rival geological contentions of Tunisia; nor do they amount independently to a means of identifying distinct natural prolongations, which would in fact be contrary to Libya's assertion of the unity of the Pelagian Block. 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 suggest, 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. As was noted in argument, so substantial a feature as the Hurd Deep was not attributed such a significance in the Franco–British Arbitration of 1977 concerning the Delimitation of the Continental Shelf. 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 (see further paragraph 75 below). Nor does any geographical evidence as to the direction of any 'natural prolongation' assist in determining the boundaries thereof, however relevant it may be as a circumstance to be taken into account from the viewpoint of equity."

"67. The submarine area of the Pelagian Block which constitutes the natural prolongation of Libya substantially coincides with an area which constitutes the natural submarine extension of Tunisia. Which parts of the submarine area appertain to Libya and which to Tunisia can therefore not be determined by criteria provided by a determination of how far the natural prolongation of one of the Parties extends in relation to the natural prolongation of the other. In the present case, in which Libya and Tunisia both derive continental shelf title from a natural prolongation common to both territories, the ascertainment of the extent of the areas of shelf appertaining to each State must be governed by criteria of international law other than those taken from physical features."

3. The Rôle of Coastlines

274. The Libyan Memorial shows a certain obsession with the length of the Libyan coastline which bears little or no relation to questions of legal principle. In assessing the geographical and legal framework within which delimitation is to be seen, the *relationships* of coasts are of first importance. Thus the location and relation of coastlines are the over-riding factors and the dominant geographical features in consequence is the position of Malta at a distance from the Libyan coast and the absence of any intervening islands or other unusual features.

275. In the circumstances of Malta–Libya coastal relationships, a

relatively short sector of abutting coast may generate a number of influential controlling points *vis-à-vis* an opposite and distant coast. This well known feature of maritime delimitation can be illustrated by reference to a sample of existing delimitations based upon agreement. Thus reference may be made to the following delimitations in which significant sectors of the line are generated by one or two controlling points. The maps reproduced in the pages that follow show the actual line of delimitation and indicate the controlling points which generate all or part of those lines.[1] The cases given as examples relate to the following agreements:

(*a*) Norway–United Kingdom, 10 March 1965
(*b*) Bahrain–Iran, 17 June 1971
(*c*) Denmark–United Kingdom, 25 November 1971
(*d*) Italy–Spain, 19 February 1974
(*e*) India–Indonesia, 8 August 1974 and 14 January 1977.

The texts of these Agreements are reproduced respectively as Annexes 50, and 22 of the Maltese Memorial, Annex 8 of the present Counter-Memorial, and Annexes 63 and 51 of the Maltese Memorial.

276. The extensive longitudinal reach of the Libyan coast produces a generous appurtenant area of shelf for Libya in spite of the fact that by reason of its length and regularity a number of basepoints are superfluous. This is the natural consequence of the distance principle and the employment of basepoints. On the basis of the criterion of distance, and the treatment of all normal coastal relationships on the basis of the equality of significance for purposes of delimitation, the equitable result must be an equidistance line.

277. The whole question of the length of coastlines is seen in a proper legal perspective when it is related to the trapezium figure used in the Memorial of Malta,[2] to illustrate the product of the coastal relationships. This product reflects both the reality of those relationships and the equitable result of the equidistance line.[3]

278. The attention of the Court is respectfully drawn to an essential aspect of the present case. The distance principle, of which the equidistance line is but a particular application, gives full value to coasts in the absence of any relevant circumstances requiring any adjustment on equitable grounds. The distance principle gives effect to the concept of shelf rights as a natural prolongation of land territory in the legal sense which this phrase has in contemporary law of the sea and also reflects the actual coastal configurations, the importance of which was emphasised by the Court in the *Tunisia–Libya* case.[4] In face of the importance of the rôle of coastlines in contemporary international law, the attitude of Libya is strange indeed. Neither the Libyan thesis of 1973 on the basis of the *ratio* of the lengths of certain coastlines nor the

[1] See Reduced Maps No 11, 12, 13, 14 and 15.
[2] P. 120.
[3] See also above para. 245 and Figure 5 (Diagrams A and B).
[4] *I.C.J. Reports*, 1982, p. 53, para. 61; p. 61, paras. 73 and 74.

new "Rift Zone" thesis of the Libyan Memorial reflect coastal geography at all. The ratio of the lengths is simply a formula, a prescription for an apportionment, and produces an enclaving effect which involves a brutal and eccentric disregard of coasts and actual coastal relationships. The "Rift Zone" thesis has no connection whatsoever with the coasts of Malta and Libya.

4. The Equidistance Method Normally Effects an Equitable Delimitation of Areas Dividing Opposite States

279. Given the nature of Malta–Libya coastal relationships the equidistance method of delimitation produces an equitable result. Malta would recall once more the formulation of this Court in the *North Sea Continental Shelf* cases: [1]

> "57. Before going further it will be convenient to deal briefly with two subsidiary matters. Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. *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.*"

This statement of principle has not been modified or contradicted either by subsequent jurisprudence or by trends in the practice of States.

280. In the area dividing Malta and Libya there are no islets or other features creating disproportionately distorting effects which need to be eliminated or abated. The equidistance method is justified by the geographical framework and produces an equitable result which involves no refashioning of geography. Moreover, a median line is in accordance with the principle of non-encroachment.

[1] *I.C.J. Reports*, 1969, p. 36, para. 57. Emphasis supplied. See also the *Dispositif* at p. 53, para. 101.

CHAPTER VIII

THE EQUALITY OF ISLAND STATES IN SHELF DELIMITATION

1. The Significance of Islands in Delimitation

281. As a matter of legal principle islands, whether island States or otherwise, have a normal significance in matters of shelf delimitation. As a sample of State practice only three States becoming parties to the Continental Shelf Convention of 1958 made reservations which concerned islands in any form.[1] In general, and if at all, islands are discounted only if they are dependent and then only for such reasons as the following:

(*a*) that they are insignificant rocks or islets (but this is not invariably the case);
(*b*) that they are wholly detached geographically from the mainland and thus lie on the "wrong side" of the delimitation indicated by the major geographical facts;[2]
(*c*) that the islands, though to be given weight as an extension of a mainland, have a location which deflects the equidistance line further than would a baseline of the mainland.[3]

282. In general, the overall geographical and other circumstances of the particular case determine the equitable solution and, in that respect, the rôle of islands. There are numerous examples in the practice of States of groups of islands being given full weight, especially when they are, in geographical and political terms, extensions of the mainland. The following delimitations are relevant in this connection:[4]

Norway – United Kingdom (Shetland Islands)
India (Nicobar Islands) – Indonesia
United States (Puerto Rico) – Venezuela
India (Nicobar Islands) – Thailand
Denmark (Faroes) – Norway
Australia – France (New Caledonia)
Italy – Spain (Balearic Islands).

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[1] See Malta's Memorial, paras. 164–165.
[2] *Anglo–French Continental Shelf* case, Decision of 30 June 1977, paras. 196–201 (and see para. 199 in particular).
[3] *Ibid.*, paras. 243–254.
[4] See Malta's Memorial, Annexes 50–53, 20, 54 and 63, respectively.

2. The Generally Recognised Significance of Island States in Shelf Delimitation

283. Out of a total of 154 independent States, 38 are island States, a proportion of 25 per cent. The sources of international law relating to the continental shelf and its delimitation give no indication *that island States are disadvantaged.*[1] The relevant multilateral conventions, including the Convention on the Law of the Sea of 1982, make no reference to island States as constituting a special case. The point is underlined by the fact that Part VIII of the 1982 Convention ("Régime of Islands") attaches a certain disability only to "rocks which cannot sustain human habitation or economic life of their own".[2] It is to be recalled that, of the reservations made by Parties to the 1958 Convention on the Continental Shelf, none related to island States.

284. The fact is that the Libyan Memorial does not seek to question the principle that island States are under no legal disability in matters of entitlement to and delimitation of continental shelf areas. The Libyan argument is related to particular circumstances as alleged to be relevant in the present case. The Libyan position is based on theses which do not in terms stipulate for a legal disability for island States as such. But the undoubted and direct effect of the Libyan contention is to deprive Malta of her legal entitlement as a coastal State.

3. The Link between Entitlement and Delimitation

285. In theory the issue of entitlement to continental shelf rights and the issue of delimitation of appurtenant shelf areas are distinct. In reality the two questions are closely related,[3] and this will be especially the case when the geographical situation attracts a well-recognised method of delimitation. Thus in the case of opposite States abutting on the same continental shelf, and in the absence of incidental special features creating distorting effects, the equitable solution takes the form of an equidistance line. This is recognised both in the jurisprudence of international tribunals and in the practice of States. In such situations the standard of equity embodied in general international law is represented by the equidistance method of delimitation, and this is so whether or not one or both of the States concerned are island States.

4. The Coastal State's Interest in Exercising Political Authority in respect of Appurtenant Shelf Areas

286. The basis of the law concerning the continental shelf is often stated in terms of "the principle that the land dominates the sea".[4] The

[1] See Malta's Memorial, pp. 48–57, paras. 154–175.

[2] Article 121(3) of the Convention.

[3] See above para. 101.

[4] *North Sea* cases, *I.C.J. Reports*, 1969, p. 51, para. 96, quoted in the *Aegean Sea Continental Shelf* case, *ibid.*, 1978, p. 36, para. 86, and the *Tunisia–Libya Continental Shelf* case, *ibid.*, 1982, p. 61, para. 73.

Truman Proclamation[1] contains notions of the practical control exercisable by the coastal State by reason of its contiguity. The following preambular parts of the Proclamation deserve special mention:

> "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 utilise or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the landmass 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 utilisation of these resources;"[2]

287. It can hardly be doubted that a coastal State such as Malta has the ability, and the right, to offer the necessary "co-operation and protection from the shore" in respect of the utilisation of the mineral resources of the appurtenant shelf areas southward to the equidistance line. Nor can it be doubted that an island State has the same need as other States to exercise effective supervision over adjacent areas of seabed.

288. In addition it is clear that control over the seabed has a significant security aspect. When the entire homeland of a State consists of an island or group of islands the interest of the coastal State in the maintenance of political authority for the purposes of such control is enhanced.

289. It is not surprising that in the *Aegean Sea Continental Shelf* case[3] the Court held that a dispute regarding rights of exploration and exploitation over the continental shelf to which a State is entitled is "one which may be said to relate to the territorial status of the coastal State".

290. The question of political authority is one of substantial importance. The selection of an equitable solution is one to be made in the light of the geographical framework *and the other relevant circumstances*.[4] In other words the question of what is equitable is not to be approached in terms of "geography in the abstract" but in terms of the broad context of legal policy. In this same context equitable considerations include elements of the interest of the coastal State which are not purely "economic" or "functional".

291. It then follows that the equitable solution cannot be seen in terms of sharing resources by reference, for example, to the length of the respective coastlines, or "relevant" coastlines. The political and security aspects of the interest of the coastal State are not a subject-matter for

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[1] Annex 3.
[2] Emphasis supplied.
[3] *I.C.J. Reports*, 1978, p. 36, para. 86.
[4] *Anglo-French Continental Shelf* case, paras. 97, 194.

apportionment and the distance principle, applied in the form of a median line, is the best expression of the equitable result which, on the one hand, gives credit to the geography of the case and, on the other, gives recognition to the "territorial" and "protective" aspects of maritime jurisdiction.

292. The issue of political authority is one of great significance for island States generally, but in the case of Malta this factor is combined with the need for access to oil resources of the seabed and the absence of land-based energy resources. Malta would, respectfully and by way of necessary emphasis, repeat the formulation of principle which appears in its Memorial:[1]

> "In this litigation Malta is seeking the legal affirmation and protection of important aspects of her national patrimony and in particular the sovereign rights to govern, manage, exploit and conserve the resources of appurtenant shelf areas. The method of equidistance provides a delimitation which gives appropriate recognition of the need for an adequate political control, both as to the quality and extent of such control, by the island State of Malta in respect of adjacent submarine areas. The coast of any State generates appurtenant zones of maritime jurisdiction. The distance criterion, which is prominent in recent sources of the law of maritime delimitation, is a reflection of the rule that all coastal States have a lateral reach of jurisdiction. Such an apron of jurisdiction is a necessary attribute of national security. The equidistance method thus gives effect to the logic that Malta's need for security is no less than that of Libya."

[1] p. 47, para. 149.

CHAPTER IX

EQUIDISTANCE AS THE EQUITABLE SOLUTION SANCTIONED BY STATE PRACTICE AND ANALOGOUS CONSIDERATIONS

1. The Provenance of the Equidistance Method in Customary Law

293. The State practice concerning delimitation of shelf areas dividing island States and opposite mainlands has been surveyed in the Memorial of Malta.[1] Twelve bilateral agreements were there set forth, all of which either involved express reliance upon the equidistance method or substantial application of a median line solution in practice. These agreements involved seventeen different coastal States of various regions.

294. In addition other bilateral agreements have effected an equal division of shelf areas dividing mainlands and major island dependencies opposite such mainlands, as, for example, the Agreement establishing an alignment between the mainland of Norway and the Faroes.[2]

295. These two sets of delimitation agreements constitute a significant proportion of the practice of States in situations which are geographically comparable. They provide compelling evidence of the standard of equity in customary law, more particularly in view of the fact that the development of the customary law of the continental shelf encompasses several decades and has a reasonable degree of maturity.

296. In recent years the national legislation of States, including island States and States which have island dependencies, has been characterised by a marked tendency to assimilate the continental shelf to the exclusive economic zone for many purposes. Such legislation commonly specifies the method of delimitation on the basis of a median line in relation either to the shelf, or to the exclusive economic zone, or to an exclusive fishery zone.[3] This development contributes in a significant way to the consolidation of the customary law standard.

297. The absence of any consideration of the relevant State practice in the Libyan Memorial is odd in view of the setting of the case, which is that of customary international law. The omission creates an air of pure hypothesis and unreality, since the State practice is substantial and

[1] Chapter VII.
[2] Malta's Memorial, pp. 80–86.
[3] *Ibid.*, pp. 78–9.

militates strongly against the view that the Libyan position coincides with an alignment which is equitable in terms of the applicable principles and rules of international law.

2. The General Toleration of the International Community

298. To the practice of States in respect of the entitlement of island States, and the use of the equidistance method of dividing continental shelf areas on which they abut, there must be added "the general toleration of the international community". This toleration was a significant element in the reasoning of the Court in the *Anglo-Norwegian Fisheries* case,[1] on the basis of which the Norwegian system of baselines was accepted as valid in customary international law.

3. The Importance of Finality and Stability in Matters of Delimitation

299. The use of the equidistance method between opposite States is widely recognised as the normal method and the use of the method in dividing shelf areas between island States and mainlands opposite is more widely recognised than was the system of straight baselines at the time when the legality of that system was accepted by the Court in the *Anglo-Norwegian Fisheries* case.[2] In view of the number of island States in the international community and the prevalence of the use of the method of equidistance in situations comparable to that of Malta and Libya, the giving of legitimacy to a position at variance with the method of equidistance would, to say the least, create an atmosphere of uncertainty.

300. As Malta has shown in its Memorial, the principles governing the issues of both entitlement and delimitation have a reasonable degree of maturity and the present case is not in that sense one of first impression. The principles of finality and stability, the importance of which the Court has recognised in relation to matters of frontier delimitation,[3] are no less important in the context of the division of appurtenant shelf areas. It may be recalled that in the *Aegean Sea Continental Shelf* case[4] the Court recognised the affinity of rights in respect of shelf areas and the territorial status of the coastal State, and made the following important affirmation:

> "Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence . . .".[5]

[1] *I.C.J. Reports*, 1951, p. 138.
[2] *Ibid.*, p. 116 at pp. 138, 139.
[3] *Temple* case (Merits), *ibid.*, 1962, p. 6 at p. 34.
[4] *I.C.J. Reports* 1978, p. 36, para. 86.
[5] *Ibid.*, pp. 35–36, para. 85.

4. The Practice of States in the Mediterranean Region

301. The pattern of the practice of States in the Mediterranean basin is sufficiently evident from the delimitations on the basis of agreement between Italy and Yugoslavia, Italy and Tunisia, Italy and Spain, and Greece and Italy.[1] To these delimitations must be added the provisional demarcation between Italy and Malta on the basis of a median line,[2] and Malta's Continental Shelf Act of 1966. These materials constitute cogent evidence of the positions of coastal States in the semi-enclosed seas of which the Mediterranean basin is composed.[3]

302. The practice firmly indicates the normality of the equidistance method, and this particularly in the use of a median line as between coasts, including islands, set at considerable distances from each other. It is to be noted that in the division between Italy and Spain, full and equal weight is given both to Sardinia and to Minorca. This practice of the coastal States of the region constitutes an important indication of the element of an equitable solution in the present proceedings. On the contrary, the practice of the region, and indeed, State practice generally, provides no support whatsoever for the contentions of the Libyan Memorial. None of the delimitations – and the practice includes the Agreement between Italy and Tunisia of 1971 – involves reference to criteria either of proportionality or of submarine topography.

[1] Malta's Memorial, Annexes 61–64. See also Map 4 of this Counter-Memorial.
[2] *Ibid.*, p. 102.
[3] See above, para. 272.

CHAPTER X

EQUITABLE CONSIDERATIONS RELEVANT TO THE PRESENT CASE

1. The Rôle of Non-Geographical Considerations

303. There can be no doubt that the concept of natural prolongation reflects the significance of the coast of the territory of the State as the decisive factor for title to submarine areas adjacent to it. This significance is enhanced when the geological continuity of the relevant sea-bed areas excludes reference to topographical criteria of title. In such a case as the present, distance from the coast provides the legal basis of the title to continental shelf rights.

304. The importance of coasts, in conjunction with the distance principle or criterion, in relation both to title and to delimitation – since the method of delimitation should be in harmony with the legal basis of title – is not a question of giving significance to geography in the abstract. The customary law of the continental shelf has always reflected the legal and political factors of adjacency and non-encroachment, factors which are common to all forms of coastal State jurisdiction.

305. The political consequences of coastal geography are mirrored by the equitable principle of non-encroachment and the acceptance by international tribunals that non-geographical considerations may have a rôle in finding an equitable solution.[1]

306. The relationships of the coasts of the parties create the legal framework and indicate the "primary delimitation" which is equitable. This primary delimitation must then be tested and weighed in the light of other relevant considerations and factors. In this chapter certain non-geographical considerations are set forth which in the view of Malta confirm that the primary delimitation resulting from the equidistance method is the equitable solution in the present case.

2. Malta's Special Dependence upon Sea-bed Energy Resources.

307. Malta has already mentioned the importance to it of the petroleum resources of the sea-bed in the region delimited by her

[1] *Anglo–French Continental Shelf* case, Decision of 30 June 1977, para. 194.

equidistance line. The absence of land-based energy resources controlled by Malta is a fact, a question of status in the sense that it represents a permanent state of deprivation. Thus the absence of resources on the mainland of Malta cannot be described as a "variable" in which "unpredictable national fortune ... might cause to tilt the scale one way or the other".[1]

308. This permanent lack of land-based energy resources constitutes a relevant equitable consideration or factor which confirms and reinforces the appropriateness of the equidistance method in this case. The significance of this element in the context of maritime jurisdiction and access to resources is underlined by the reasoning of the Court in the *Fisheries Jurisdiction* case (United Kingdom v. Iceland).[2] In that case the Court recognised "the concept of preferential rights of fishing in adjacent waters in favour of the coastal State *in a situation of special dependence on its coastal fisheries*".[3] By virtue of her inherent and sovereign rights over adjacent shelf areas, Malta has access to a vital resource, which is contested by Libya. The Libyan views on sea-bed division in the area could not be less equitable, given Libya's massive land-based oil resources and given her attempts to control virtually all the sea-bed between itself and Malta.

3. The Requirements of Malta as a Developing Island Country

309. The text of the Law of the Sea Convention of 1982 is but one of a number of instruments which evidence the concern of the international community with the requirements of developing countries. This constantly reiterated concern constitutes a relevant equitable consideration to be given its proper significance in achieving an equitable solution in the circumstances of the present case.

310. The relevance and weight of Malta's development needs are enhanced considerably by the recognition on the part of the organs of the United Nations, as well as UNCTAD, of the particular needs of *island developing countries*.[4] This classification signals the recognition of such countries as having a special degree of vulnerability among the broad category of developing countries.

311. Malta has been classified as an "island developing country" in the relevant United Nations documents[5] and this classification involves a formal and universal certification of the status of the requirements of Malta as an island developing country. Malta has already expressed its confidence that the Court, as the principal judicial organ of the United

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[1] *Tunisia–Libya Continental Shelf* case, *I.C.J. Reports*, 1982, p. 77, paras. 106–107.

[2] *I.C.J. Reports*, 1974, p. 3 at p. 23, para. 52; and see also paras. 55–68. See also *Fisheries Jurisdiction* case (Federal Republic of Germany v. Iceland), *ibid.*, p. 175 at pp. 191–192, para. 44; and see also paras. 45–60.

[3] Emphasis supplied.

[4] For the documentation see Malta's Memorial, pp. 110–114, paras. 226–230 and Annex 68.

[5] See the 1976 Report of the UNCTAD Secretariat, M. M. Ann. 68, p. 253.

Nations, will readily recognise the significance of the practice of organs of the United Nations, and of the Member States, in relation to island developing countries. Moreover, *such practice forms a complement* to the reasoning of the Court in the *Fisheries Jurisdiction* cases, which refers to the "special dependence" of the coastal State upon resources in adjacent maritime areas.[1]

4. The Consideration of National Security and Necessary Control of Adjacent Submarine Areas

312. Malta, as a coastal State, has an interest in national security which is no less than that of other States in the region, and her status of neutrality[2] must increase the importance of that interest. It has already been pointed out[3] that the interest of the coastal State in appurtenant shelf areas involves a need for a certain political authority. As in the case of the territorial sea, the protection of the coastal State connotes a lateral reach from the coast.

313. The rôle of "navigational, defence and security interests" of the Parties as equitable considerations was recognised by the Court in the *Anglo–French Continental Shelf* case.[4] Indeed, there is good reason to believe that such considerations militated strongly in favour of the riparian State as against the United Kingdom in respect of the Channel Islands. The Court clearly preferred to avoid any major encroachment upon what it perceived to be the predominant French interest in the southern areas of the English Channel.[5]

314. In the circumstances of the present case, the equitable consideration of security and defence interests confirms the method of equidistance, which gives each Party a comparable lateral control from its coasts. This equality of reach is justified also by the principles of distance[6] and of non-encroachement. The interests of Maltese security cannot be reconciled with the Libyan claim. As the Libyan Memorial itself recognises:

> "It is undeniable that one of the motivations of the Truman Proclamation in 1945 related to security; the idea that it was not tolerable to have a foreign State or its licensees exploiting resources off one's own coasts."[7]

The position was expressed even more emphatically by Libya in its Reply in the *Tunisia–Libya* case, and the passage is worth quoting again:

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[1] *Fisheries Jurisdiction* case (United Kingdom v. Iceland), *I.C.J. Reports*, 1974, p. 3 at p. 23, para. 52; *Fisheries Jurisdiction* case (Federal Republic of Germany v. Iceland), *ibid.*, p. 175 at pp. 191–192, para. 44.

[2] For the background the Court is referred to the *Memorial*, p. 22.

[3] Above.

[4] Decision of 30 June 1977, *International Law Reports*, Vol. 54, p. 6, para. 188.

[5] *Ibid.*

[6] *Cross-ref.*

[7] p. 110, para. 6.77.

"The rationale for the prohibition against encroachment is self-evident. It lies in the fact that coastal States will not tolerate a sea-bed area immediately in front of their coasts being used by a foreign power. Considerations of security and of practicality, in the sense of the need to have direct and easy liaison between the onshore and offshore activities which are essential to sea-bed exploration and exploitation, make it imperative that a State should have jurisdiction over activities directly in front of its coast. It was for this very reason that, at Geneva in 1958, the proposal by the Federal Republic of Germany to promote "le laissez-faire" beyond the limits of the territorial sea was totally unacceptable to the Conference. And it was for this same reason that the coastal State's rights were regarded as attaching to the State *ipso facto* and *ab initio*, and not made dependent upon physical occupation or even proclamation." [1]

5. The Geographical Range of Fishing Activity

315. In its Memorial Malta has described the established patterns of fishing activity by Maltese boats reaching to the equidistance line and further.[2] The existence of such an economic interest in the biological resources of the area must be given weight as an equitable consideration.

6. The Conduct of the Parties

316. The conduct of the Parties in the present case and, in particular, the consistency of Malta's conduct, is a relevant consideration in determining the equitable solution. The consistency of Malta's conduct is to be compared with the appearance of no less than three Libyan positions:[3]

(*a*) Silence in face of Malta's equidistance line of 1965;
(*b*) A division based on the ratio of the lengths of Maltese and Libyan coasts (1973); and
(*c*) A boundary "within the Rift Zone" (1983).

7. The Effects of Other Delimitations between States of the Region

317. Malta has already set out in detail the reasons for treating as irrelevant Libya's reference to the manner in which the application of Malta's equidistance method would affect the prospect of any delimitation between Malta, Libya and third States.[4] The Court's 1982

[1] Page 59, para. 130.
[2] Malta's Memorial, pp. 18–19, paras. 41–45.
[3] See further above.
[4] See Part IV, Chapter III, paras. 195–208.

Judgment has been carefully scrutinized and it has been shown that passages touching on the subject of third States were directed exclusively at establishing that the decision of the Court could not formally affect the position of States not parties to the litigation. The Court's views, and Malta's analysis of them, are entirely in line with the views expressed by the Court of Arbitration in the *Anglo–French Continental Shelf* case in 1977:

> "... the Court does not consider that the course of the boundary between the United Kingdom and the French Republic in that region depends on any nice calculations of proportionality based on conjectures as to the course of a prospective boundary between the United Kingdom and the Republic of Ireland". [1]

318. To the extent that there is any function in a reference to relations with third States, it is, in Malta's submission, to point out (a) the relatively constricted position in which Malta finds itself in the north, west and southwest vis-à-vis Italy (by reference to Sicily to the North and the group of islands, Lampione, Lampedusa and Linosa to the west) and Tunisia (to the southwest) and (b) the enormous actual and potential continental shelf which would remain to Libya on the basis of an equidistance delimitation with Malta.

8. Conclusion

319. The equitable considerations of particular relevance to the present case may be summarised as follows:-

(*a*) Malta's permanent lack of land-based energy resources, coupled with the existence of petroleum resources in the shelf areas delimited by her equidistance line.

(*b*) The particular requirements of Malta as an island developing country, recognised as such in the practice of UNCTAD and the organs of the United Nations.

(*c*) The consideration of Malta's national security in maintaining control of adjacent submarine areas, an interest of Malta the significance of which is increased as a consequence of its status of neutrality.

(*d*) The established patterns of Maltese fishing activity by Maltese boats in the region southward to the equidistance line and further.

(*e*) The conduct of the Parties and, in particular, the consistency of the conduct of Malta since the Continental Shelf Act of 1966, and Libya's acquiescence from 1965 to 1973.

(*f*) The existence and interests of other States in the area and their constricting effects on Malta's entitlement.

320. These equitable considerations or relevant circumstances confirm and reinforce the appropriateness of Malta's equidistance line as the equitable solution in the present case.

[1] *Op. cit.*, para. 28.

CHAPTER XI

THE EQUIDISTANCE METHOD SATISFIES THE TEST OF PROPORTIONALITY IN THE PRESENT CASE

1. The Rôle of Proportionality in the Present Case

321. The Libyan Memorial uses a proportionality argument which is impossible to reconcile with legal principle. The Libyan thesis in effect employs proportionality as an independent source of rights over shelf areas and the result is a crude apportionment of the pertinent submarine areas. Moreover, the version of the concept of proportionality used by the Libyan Government is completely inapposite in the geographical circumstances of Malta and Libya. The particular version of proportionality based upon the ratio of the lengths of the respective coastlines is applicable (and then only as a *test* of the equitable result) in the situation of three adjoining States located on a concave coast. This form of proportionality is not of general application.

322. Libya's approach to the test of proportionality misunderstands the importance of the *relationship* of the coastlines of the Parties, and fails to recognise the significance of *distance* between the coastlines of Malta and Libya and the *location* of the Malta group of islands opposite the Libyan coastline. This relationship of the two coastlines is, generally speaking, trapezoidal and is illustrated in the Memorial of Malta.[1] The figure of a trapezium illustrates the generous proportion of the pertinent shelf areas which fall to Libya when the equidistance method is applied and how that method reflects the extensive west-east reach of the Libyan coastline.

2. The Significance of the Legal Framework of the Particular Delimitation

323. In the context of continental shelf delimitation the effect to be given to any particular principle "is always dependent not only on the particular geographical and other circumstances but also on any relevant considerations of law and equity".[2] The Libyan version of proportionality treats the concept as a substitute for a method of delimitation and, in so doing, proposes a solution which utterly disregards "the legal framework within which the Court must decide the course of the boundary".[3]

(13)

[1] Figure B at page 120.
[2] See the Decision in the *Anglo–French Continental Shelf* case, *op. cit.*, para. 194.
[3] *Ibid.*, para. 187.

324. The legal framework of the delimitation in this case includes the following significant principles:

(a) The Principle of Non-encroachment

325. This principle is a fundamental aspect of the law relating to continental shelf delimitation, and in the circumstances of the present case a departure from the equidistance line would involve a major encroachment upon the shelf areas adjacent to Malta. Indeed, the Libyan claim is an attempt to reserve virtually the entire Pelagian Block to Libya, and constitutes a taking in of continental shelf not related to Libyan coasts. It is absurd to think that Libyan coasts could play the rôle of land which "dominates the sea" in respect of sea-bed areas a few miles off Malta.

(b) Equitable Considerations applicable to the present case.

326. The equitable considerations set forth in Chapter X above bear no relation to an abstract conception of spatial proportionality of the kind utilised in the Libyan Memorial. These considerations, which include the status of Malta as an island developing country and considerations of national security and necessary control over adjacent submarine areas, militate strongly in favour of the equidistance line. The Libyan claim in these proceedings is totally incompatible with such equitable considerations.

(c) The criterion of distance.

327. The criterion of distance has a decisive rôle in the law of continental shelf delimitation whether regarded independently or as a facet of the law relating to the Exclusive Economic Zone, and, in the case of opposite States abutting upon the same continental shelf, the criterion confirms the equidistance method as the appropriate route to an equitable solution.

(d) The principle of equality of States.

328. The principle of the equality of States, a general principle of international law, forms an obvious but nonetheless significant part of the legal framework of the delimitation. The division of the submarine areas between Malta and Libya as envisaged in the Libyan Memorial would involve a refashioning of geography and a violation of the principle of the equality of States. Malta is not invoking the principle as a basis for the reordering of geography, but to confirm the validity of the equidistance line as an equitable reflection of "the particular equality of the two States in their geographical relation to the continental shelf"[1] of the Pelagian Block.

[1] *Anglo-French Continental Shelf* case, Decision of 30 June 1977, *op. cit.*, para. 195.

329. In Malta's submission the method of equidistance produces an equitable result, which meets the test of proportionality to the extent applicable in the circumstances of this case, and is compatible with the other relevant circumstances of law and equity which form the legal framework of the delimitation.

CHAPTER XII

THE PRINCIPAL ELEMENTS JUSTIFYING THE EQUITABLE SOLUTION BASED UPON THE METHOD OF EQUIDISTANCE

330. The principal elements which justify the conclusion that the equitable delimitation in the present case is that based upon the equidistance method are now presented for the convenience of the Court. The elements are identified in the following propositions:

(*a*) The key elements are to be derived from the geographical circumstances, which are characterised by an absence of unusual features. The coasts of Malta and Libya are opposite one another and set at a distance, and they abut upon a continental shelf which is a geological continuum.

(*b*) In such geographical circumstances, the delimitation which offers itself, as the equitable delimitation, is an equidistance line. Both principle and State practice substantiate the view that in the case of opposite States the equidistance line constitutes the equitable solution.

(*c*) The appropriateness of the equidistance method is confirmed by the criterion of distance, of which it is but another form. The criterion of distance in the law of continental shelf delimitation lends weight to the right of a coastal State to a lateral reach of shelf jurisdiction, and this on a basis of equality with other coastal States.

(*d*) There is no evidence in State practice to suggest that island States are placed at a disadvantage either in the matter of continental shelf delimitation or in the analogous sphere of delimitation of exclusive economic zones as between opposite or adjacent States abutting upon the same submarine areas.

(*e*) The legal validity of the equidistance method in the circumstances of the present case is confirmed by the principle of the equality of States. This principle is not invoked by Malta in order to seek a refashioning of geography but in order to contradict a Libyan thesis on delimitation which would result in a manifestly inequitable solution, leaving Libya with a monopoly of the sea-bed resources of those parts of the Pelagian Block dividing the two States. In short, the principle of equality is called upon to *prevent* a refashioning of geography.

(*f*) The equidistance line provides an adequate reflection of the coastal State's major interest in exercising political authority in respect of adjacent submarine areas, in order to protect its security and to maintain a stable régime for the management of the natural resources of the sea-bed. An island State has at least the same need and the same capacity as other States to exercise supervision over adjacent areas of sea-bed.

(*g*) The distance criterion, as an element in the law of maritime delimitation, is a reflection of the major interest of coastal States in a lateral reach of jurisdiction. This attribution of jurisdiction is based on the political and geographical significance of possessing coasts abutting

upon the relevant shelf areas. The distance criterion provides an apron of jurisdiction which indicates and assumes the equality of the security needs of coastal States, and in the present case such equality can only be maintained by resort to the method of equidistance.

(*h*) The appropriateness of the equidistance line as the equitable delimitation of the shelf areas dividing Malta and Libya is evidenced by a substantial State practice involving island States. This practice provides cogent evidence of the pertinent standard of equity in the matter of delimitation embodied in customary international law.

(*i*) In view of the number of delimitations based upon equidistance in comparable situations, and the political and security aspects of the boundary line in the continental shelf, a departure from the method of equidistance in these proceedings would produce a certain discordance with those principles of finality and stability in matters of delimitation which have received the approbation of the Court.

(*j*) The equitable considerations relevant to the present case confirm that the delimitation resulting from the equidistance method constitutes the appropriate equitable solution. The pertinent equitable considerations include the following:

(i) Malta's special dependence upon sea-bed energy resources.
(ii) The requirements of Malta as a developing island country.
(iii) The consideration of national security and the need for control of adjacent submarine areas.
(iv) The geographical range of Maltese fishing activity.
(v) The conduct of the Parties and, in particular, the consistency of Malta's conduct since the Note Verbale of 1965 and the legislation of 1966.

(*k*) In the present case the test of proportionality is satisfied by the equitable solution based upon the equidistance method. The Libyan view of delimitation is clearly incompatible with an equitable solution, constitutes an attempt to reserve virtually the entire Pelagian Block to Libya, and would involve a major encroachment upon shelf areas adjacent to Malta and unrelated to Libyan coasts.

(*l*) The Libyan version of proportionality based upon the ratio of lengths of coastlines is not only essentially inequitable in result but shows a marked disregard for the legal framework within which the delimitation must be considered. The legal framework of the present case includes the principle of non-encroachment, the criterion of distance, and the principle of the equality of States.

(*m*) The types of division of the sea-bed proposed by Libya, in the forms illustrated by Maps 9 and 17 of the Libyan Memorial,[1] are essentially based on the principle of the just and equitable share and they thus rest upon an extra-legal conception.

(*n*) Malta's equidistance line is equitable and is in conformity with the relevant considerations of law and equity which constitute the overall framework within which the delimitation must be effected.

[1] Reproduced also in Map 4 of this Counter-Memorial.

CHAPTER XIII

THE IMPLICATIONS OF THE LIBYAN ARGUMENTS IN THE PRESENT CASE

331. The Libyan arguments in the present case have serious implications for the development of the principles of law and equity relating to the continental shelf. Indeed, given the particular form of the Libyan case, the present proceedings have a critical relation to the law relating to maritime jurisdictions in general.

332. The essence of the Libyan arguments can be stated in the form of the following propositions:

(*a*) Physical features of the sea-bed, such as depressions or faults, may present natural frontiers.

(*b*) In the case of a small island State opposite a mainland coastal State, the jurisdictional needs of the latter are much more significant than those of the former.

(*c*) The large *territorial extent* of a coastal State opposite another smaller coastal State is relevant in determining an equitable solution.

(*d*) Proportionality in the form of the ratio of coastal lengths, and also topographical factors, provide not merely factors which may be employed as *the basis for abatement or adjustment of the primary boundary indicated by equitable principles*: these two elements, proportionality and topography, are to provide the *actual bases* for such a primary delimitation.

333. Malta cannot be indifferent to the implications of the Libyan arguments for many other coastal States in the vicinity of extensive "mainland" or "continental" coastal States. *In effect* the Libyan case calls for radical change in the existing structure of the law of maritime jurisdictions in spite of the fact that the Libyan Memorial *appears to accept the existing* body of principles.

334. The existing law has a strong basis in good policy and shares the assumptions of traditional thinking about maritime jurisdictions. The development of the territorial sea and the concept of contiguous zones was based upon the political implications of coastal geography. It has long been accepted that coastal States have a political and security interest in controlling activity in the sea areas contiguous to their coasts.

335. The language used by the draftsmen of the Truman Proclamation on the continental shelf is faithful to this traditional thinking. Thus the preambular part states that "self-protection compels the coastal nation to keep close watch over activities off its shores

which are of the nature necessary for utilisation"[1] of the natural resources of the subsoil and sea-bed of the continental shelf. As Malta has already had occasion to point out, the Libyan Memorial recognises that "one of the motivations of the Truman Proclamation of 1945 related to security".[2]

336. Between the Truman Proclamation of 1945 and the Law of the Sea Convention of 1982 certain elements in the law relating both to entitlement and to delimitation in respect of maritime jurisdictions have evolved and received recognition by international tribunals. These elements are all related to the basic idea that a coastal State has a lateral reach represented by the criterion of distance, which is related to the traditional conception of maritime jurisdiction as involving a zone *of uniform breadth.*

337. The elements referred to in the previous paragraph are as follows:

(*a*) The concept of natural prolongation as the legal expression of the extension of the coastal front of every coastal State and as the basis of an inherent right existing *ipso jure* and *ab initio*;

(*b*) The equitable principle of non-encroachment which recognises the element of self-protection and requires that proximity of a coastal front should predominate over any geomorphological argument which would allow cutting across the coastal front of one coastal State in favour of another;[3]

(*c*) The distance criterion in the delimitation of maritime jurisdictions, which reinforces the principle of non-encroachment and which provides both a legal basis of title and a principle of delimitation.

338. These three elements can be restated in the form of a synthesis. The coasts of the States concerned, that is to say, the major geographical facts, produce certain primary legal consequences. Coasts and coastal relationships generate a *primary delimitation* which is equitable in terms of the geographical and legal framework. Especially in the case of opposite States the primary boundary is an equidistance line, which implements, in the appropriate manner, the legal concept of natural prolongation and the principles of distance and non-encroachment.

339. In the relationship of Malta and Libya the equidistance line gives the necessary significance to coasts in terms of the interests of coastal States in the exercise of political authority over adjacent areas of sea-bed. The security needs of small States and especially small island States are no less, to say the least, than those of other States. Consequently, the equality of lateral reach from the coasts which results from equidistance is in harmony with the traditional thinking behind the legal principles governing maritime delimitation.

340. In principle coastal States which are opposite and abut upon the same area of continental shelf should be accorded an equal lateral

[1] See Annex 3.

[2] Libyan Memorial, p. 110, para. 6.77.

[3] See the Separate Opinion of Judge Jiménez de Aréchaga in the *Tunisia–Libya* case, *I.C.J. Reports*, 1982, pp. 116–117, paras. 58–59, pp. 118–122, paras. 65–76.

reach of jurisdiction. Equidistance is the method by which the primary equitable delimitation is achieved. The equitable nature of the primary boundary is then, so to speak, tested and, if necessary, refined by reference to other relevant considerations. Such adjustment or abatement does not involve major re-ordering of the primary delimitation, still less a reapportionment – since no apportionment took place originally.

341. The second stage of delimitation necessarily involves a limited operation, since it can only apply to the marginal aspects of the equal relationships of the two coastal States. In the present case the relevant considerations confirm the equitable nature of equidistance. In the same connection the test of proportionality is no more than a verification of equity and, in any case, cannot be used to set aside the primary delimitation. Even when proportionality justifies some change in the primary boundary such adjustment or abatement can only have a limited scope.

342. The two stages involved in the process of equitable delimitation constitute a practical expression of a legal policy of major significance. In accordance with the concept of the inherent rights of coastal States, the criterion of distance, and the political interest represented by the principle of non-encroachment, the coastal configurations of the States and their geographical relationships must be given full faith and credit. The criterion of distance and the method of equidistance provide the instruments by which such full faith and credit are accorded. The significance of coasts, the equality of lateral reach, and the needs of self-protection in respect of adjacent areas, recognised in the Truman Proclamation and in the criterion of distance, militate against any policy of substantial revision of the primary delimitation which embodies such values.

343. The matter can be expressed more succinctly. The basic entitlement and political and security interests of coastal States in offlying sea-bed areas cannot be apportioned. Moreover, even when adjustment is justified in principle on equitable grounds, certain interests can only be ordered equitably on the basis of equality.

344. This legal policy is evidenced by the extensive pattern of State practice which constitutes clear evidence of the types of delimitation which are compatible with equitable principles as recognised in customary international law. The State practice indicates very clearly that island States are not disadvantaged. It may be noted also that the practice of States, including States of the Mediterranean region, with almost no exceptions, ignores faults and depressions as criteria of delimitation and gives no support to the Libyan version either of natural prolongation or of proportionality.

345. Were an international tribunal to show favour to arguments of the type advanced by Libya in this case, the law would be thrown into confusion. The implications, the invitation to forms of aggrandisement and revisionism which such a change of direction in the law would presage, would be serious indeed. In many regions of the world small

States, some island States some not, face larger States or States with "mainland" coasts. Examples may be found in the Baltic Sea, the Gulf, the Bay of Bengal, the Indian Ocean, South East Asia and the Caribbean. Moreover, apart from small States which are *opposite* mainland States, there are examples of small or smaller States more or less *adjacent* to large States in several continents.

346. The "large State" and "long coast" arguments embodied in the Libyan case are fundamentally opposed at once to good legal policy, to traditional thinking in matters of maritime jurisdiction, and to existing patterns of customary international law as evidence of equitableness in the context of continental shelf delimitation.

SUBMISSIONS

SUBMISSIONS

347. Having regard to the considerations set out above, *May it please the Court*, rejecting all submissions to the contrary, to adjudge and declare 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 solution.

(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.

VOLUME II

ANNEXES TO THE COUNTER-MEMORIAL OF MALTA

Annex I

THE IMPORTANCE TO MALTA OF THE SEA AROUND IT

From time immemorial, life in Malta has evolved and has been fashioned and conditioned by two basic and indisputable facts, both closely linked to the sea: Malta's strategic position as a group of *islands*, in the very centre of the Mediterranean Sea – a sea which has for so long been the scene of many of the world's most important historical events – and Malta's fine, deep and well sheltered harbours both in the north and in the south-east of the main island.[1]

These main characteristics have had a fundamental influence on the course of history, both for Malta and its people and for those nations and peoples, whether from the Mediterranean or not, for whom that sea was, or was to become, of vital concern.

For Malta these fundamental features have been both an asset and a liability. They have meant long periods of settlement or domination by the peoples or empires that from time to time colonized or dominated the region: Phoenicians, Carthaginians, Greeks, Romans, Byzantines, Arabs, Normans, Spanish, the Order of St. John, the British. They have brought to Malta a mixture of cultures; prosperity and well-being, and even freedom, alternating with periods of servitude and want; years of peace and years in which the inhabitants were decimated by marauders and other pirates from the Barbary coast of North Africa and from the east; they have also meant decades of sustained emigration to keep the population to the numbers which the limited resources of the islands could support. In brief, Malta has had, because of its characteristics as an island in the Middle Sea and its strategic and geographical advantages, a long and chequered history, intimately related to the sea and highlighted by feats of heroism and even glory which have few parallels in the annals of the region's history.

For the main trading or military powers of the past, Malta has meant a safe haven after a long and perilous voyage by sea, and a centre from which to undertake further voyages and more trade; a safe base for sea-faring activities – whether of a military or of a peaceful nature; a major outpost on the main sea-routes, particularly on the way to India and the Far East; a major entrepôt for trade and an important bunkering station.

[1] *Diodorus Siculus*, the 1st Century B.C. historian, attributes the prosperity of Malta at the time to the island's "Geographical position, excellent harbours and sea-merchants" (V. 12. 1–4).

In the two world wars of this century Malta was vital to the Allies, and in the 1939–45 war was significantly instrumental in the final victory against Nazism and Fascism. To honour the bravery and heroism of its people during the last World War, Malta was awarded the George Cross by King George VI of Great Britain and a Scroll of Honour by President Roosevelt.[1]

The population of Malta has lived and thrived, as is natural for an island people, on both agriculture and fishing, to which other activities were added from time to time. In the days when it was not very safe to live too near the coast except behind well-defended and properly fortified settlements,[2] the Maltese lived either in the security of fortifications within the harbours or somewhat more inland, but, of course, always within walking distance from the sea. After the Great Siege of 1565 the whole of the Grand Harbour and Marsamxett area were so well fortified that Malta has since experienced no other attack from the sea; and the population has grown mostly by the sea around those harbours, to the extent that this area has become one large settlement in which about two-thirds of the population now live.

The arable land in Malta is, however, very restricted, and fresh water has always been very scarce. A good part of the population had therefore to turn to the sea, and to other activities in one way or another connected with the sea, for a living. To the sea the inhabitants of Malta turned mainly either as sailors or fishermen and, in later years, in the service or repair of the merchant or naval fleets that operated from or through Malta.[3]

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[1] The motivation for the award of the George Cross reads as follows: "To honour her brave people I award the George Cross to the Island Fortress of Malta to bear witness to a heroism and devotion that will long be famous in history."
President Roosevelt wrote: "In the name of the people of the United States of America I salute the Island of Malta, its people and defenders, who, in the cause of freedom and justice and decency throughout the world, have rendered valorous service far above and beyond the call of duty.
"Under repeated fire from the skies, Malta stood alone but unafraid in the centre of the sea, one tiny bright flame in the darkness – a beacon of hope for the clearer days which have come
"Malta's bright story of human fortitude and courage will be read by posterity with wonder and with gratitude through all the ages.
"What was done in this island maintains the highest traditions of gallant men and women who from the beginning of time have lived and died to preserve civilization for all mankind.
Franklin D. Roosevelt
December 7th 1943"

[2] Some 25 villages most of them close to the sea, disappeared between the fifteenth and the later eighteenth centuries; and about 30 villages mostly concentrated on the Southeast of Malta, disappeared before 1419. The depopulation of these villages was largely due to the operations of the Barbary corsairs. See G. Wettinger "The Lost Villages and Hamlets of Malta" (1975 pp. 181–204); and Brian Blouet "The Story of Malta" (1962, pp. 93–99).

[3] A. Lutrell, in his study "Eighteenth Century Malta: Prosperity and Problems" (published in *Hyphen* Vol. III No. 2 1982) writes "... in 1721/3 the merchant fleet was probably employing some 3000 men and the *corso* about 700 aboard ship. For much of the century the *corso* was in serious decline, but after 1776 it enjoyed a comparative

[*Footnote 3 continued on next page*]

Several settlements have for many years thrived exclusively on fishing: Marsaxlokk, Wied il-Ghajn, Wied iż-Żurrieq, Marsalforn, San Pawl il-Bahar, Mġarr, Xlendi, are all names intimately connected with fishing activities, and three of these face southwards. A good number of Maltese migrants to North Africa, particularly those that settled in Tripolitania, were fishermen who went there to settle as such; and to this day there are families that owe their ancestry to those Maltese fishermen.

Tens of thousands of Maltese sailors have over the years served in the merchant fleet and on the galleys of the Order of St. John,[1] on British merchant vessels and on ships of the Royal Navy. Today Malta has its own merchant fleet and its own shipping company. This fleet carries most of the goods exported by Malta and a substantial part of Malta's imports. The Maltese national shipping company – Sea Malta – is a thriving one and has been so successful that it has provided managerial services not only to its own ships but also to those of other countries, including Libya.

One of Malta's main attractions to the military powers whose interests, or greed, brought them to the Mediterranean were its fine "*arsenali*" or dockyards. To this day Malta's main industry is ship-repairing. The Malta Drydocks provide direct work to more than 5,000 highly skilled workers, and an annual turnover of more than US $ 50 million to the Maltese economy. A new ship-building yard is in the course of construction capable of building ships up to 120,000 dwt.

The existing shipyards, besides being capable of building ships up to 10,000 dwt and other maritime equipment, can repair almost any ship afloat. There are eight dry docks, of varying sizes, of which the last to be constructed is capable of accomodating tankers up to 300,000 dwt. It is the largest in the Mediterranean and one of only a handful in the entire world. Ships of all nationalities have been repaired there; and several Libyan ships, both military and commercial, and other maritime equipment including a floating dock, were constructed or repaired in the Maltese shipyards and for a while even operated by Maltese workers.

The oil industry, particularly offshore oil production, in the Central

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revival ... Between 1792 and 1798 Malta's naval strength was about 25 fighting ships. In 1788 the Order's fleet still employed around 1900 men, and an average of 529 were at sea in the *corso* between 1792 and 1797; these were mainly Maltese."

J. Mizzi, in the Introduction to Vol. XII of the *Catalogue of the Records of the Order of St. John of Jerusalem in the Royal Malta Library* (1968, p. 12) states, in relation to the French occupation of Malta that "... the annals of the Maltese seamen who manned the Order's warships do not end there. Over 1000 Maltese sailors and 900 Maltese soldiers, forming a body 2000 strong and called the Maltese Legion, followed Napoleon to Egypt, where they were crowned by a heroic death a brilliant tradition of courage and daring".

[1] The 1829 census figures quoted by Miege (*Histoire de Malte* Vol. I, Paris, 1840, p. 159) give a global figure of 16,440 persons as belonging to the class of merchant seamen and 9,240 to that of boatmen and fishermen – Out of a total population of 114,236 in 1829, 25,680 persons were therefore directly dependent on the sea for a living. The figure given for agriculture for that year is 32,428.

Mediterranean, is serviced in good part by Maltese companies set up for the purpose during the last decade or so. The Mediterranean Oil Services Ltd – or Medserv as it is more commonly known – is the largest and best equipped of these servicing companies. These companies provide, maintain and repair equipment and other material required by the international oil companies operating in the area mainly offshore but also onshore in Africa. There are over 1000 Maltese technicians and other workers engaged in these operations.

In recent years Malta has become an important yachting centre providing berth and service to hundreds of yachts. Each year an international yachting race is held and organized by the Malta Yachting Club. The race, which starts from and ends in Malta, is known in the yachting world as the Middle Sea Race and is patronized by yachtsmen from all over Europe and beyond.

Another activity which is very important to the economy of Malta is tourism. Here too, apart from her long history and her monuments dating from prehistoric times, and apart from her fine warm climate, blue skies and long sunny periods, the main attraction for tourists is the clear blue and unpolluted sea around the islands of the Maltese archipelago.

Pollution is clearly of vital concern to Malta. The international initiatives which Malta has taken in this field have led to the establishment of a Regional Anti-Pollution Centre set up under the auspices of IMCO (now IMO) following an international conference held in Barcelona.

Equally of vital concern to Malta are all matters relating to the sea. It was for this reason that in 1967 Malta took another initiative in the United Nations, an initiative which was significantly responsible for the 1982 Convention on the Law of the Sea.

An island people cannot but be seaward looking. This statement is even more axiomatic with respect to a people living on a small island where the sea is at no point more than four or five kilometres away, constantly visible and vitally affecting the every day life of every single inhabitant.

With regard to energy resources Malta is not only seaward but also southward looking. As has already been pointed out in the Memorial, Malta must turn to the sea for such resources, and "the most promising areas for discovery and production of oil lie in or near the regions of Malta's southern equidistance line".[1]

[1] See Malta's Memorial, Page 3 Para. 4.

Annex 2

TECHNICAL ANNEX: THE SCIENTIFIC FACTS

INTRODUCTION

This annex, which describes and analyses the scientific facts concerning the Pelagian Basin and which is also referred to as the Technical Annex, has been prepared by independent scientists who have wide knowledge and experience in their field of specialization and a very special knowledge and experience in the region relevant to the present dispute.

The two parts of the Annex have been prepared respectively by:

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and

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GLOSSARY

Pelagian Sea: A geographic term derived from the name of the islands situated at its centre, extending between Tunisia to the west and southwest, Sicily to the north, and Libya to the southeast.[1] The Pelagian Sea is a part of the Pelagian Block.

Pelagian Block: A geological term created to define the structural prolongation of Tunisia. To the north it is limited by the North Sicily mountain chain; to the east, by the Sicily–Malta–Medina Escarpment; to the south, by the Jeffara Flexure. It is hence a structural entity, sometimes submerged, sometimes emerged, as it includes the Sahel of Eastern Tunisia, the Gulf of Hammamet, the Jeffara plains of Southern Tunisia and of Northern Libya and Southern Sicily.

Strait of Sicily (or Siculo–Tunisian straits): This is the arm of the sea between Cap Bon (Tunisia) and Capo Feto (Sicily). See the hydrographic chart, especially that of the U.S. Naval Oceanographic Office (N.B.C. 3920).

Sicily Channel: A maritime passage which extends between Tunisia and Sicily. In the narrow sense: it is equivalent to the Straits of Sicily; in a broad sense it is an arm of the sea having a trapezoidal shape, limited to the South by a line drawn from Malta to the Kerkennah Islands. Approximate area: 250,000 km^2.[2]

Some authors wrongly interpret the Sicily Channel as the collection of depressed and irregular seabeds situated South of Sicily.

Ionian Sea: Part of the Eastern Mediterranean, between the East Sicilian coast, the southeast Italian coast and the western coast of Greece. It is sometimes somewhat wrongly interpreted as the whole Ionian Basin reaching to the coast of Africa, including what was formerly defined as the Gulf of Big and Small Sirte.

[1] P. F. Burrolet, 1979.
[2] Stanley *et al*, 1975.

THE SCIENTIFIC FACTS

PART I

THE RELEVANT GEOMORPHOLOGICAL AND GEOLOGICAL FACTS CONCERNING THE PELAGIAN SEA

by

Professor Jean-René Vanney

1. Introduction

1. This Part of the Technical Annex describes and explains the submarine topography of the maritime zone of the Pelagian Sea[1] to the east of the Tunisian Plateau,[2] that is approximately east of the 150 m isobath.[3] The study also describes and examines the escarpments which form the eastern limits of the Pelagian Block and their extensions into the Ionian Basin. The study is the result of an objective utilization of almost all the available data on the subject. These include:

— bathymetric data, the quantity and quality of which have increased as a result of oil exploration. They have served for the (11) compilation of the bathymetric chart IBCM published in 1981 under the direction of the International Oceanographic Commission. However, due to the coarse spacing of the isobaths (200 m) used for the final form of this map, recourse to the original sources have been necessary: sonde readings at a scale of 1:250000, taken by multibeam sonde surveys carried out and published by Groupe ESCARMED;[4]

— the seismic reflection profiles collected and published by the geophysicists of the Osservatorio Geofisico Sperimentale (O.G.S.) of Trieste (C. Morelli, I. Finetti): some of the profiles are commented upon in this study.

— the observations made by the Groupe ESCARMED[5] after diving by submarine SP 3000 Cyana on the Malta Escarpment;

[1] The term is defined in the Glossary.

[2] The toponymy used is that adopted for the International Bathymetric Chart of the Mediterranean, or IBCM (Sheet 8), 1981.

(23) [3] See Figure 1.

[4] See B. Biju-Duval *et al.* 1981, 1982; A. Baudrimont *et al*, 1982.

[5] *Op. cit.*

— the publications, especially those rearranged under the direction of P.F. Burrolet *et al.* (1979) and in particular the works of E. Winnock, (1979, 1981),[1]

— the morphosedimentary studies by C. Blanpied and G. Bellaiche in the south, and of D. J. Stanley and A. Maldonado in the north.[2]

2. This study expresses the author's interpretation of the relevant data and the results of his own personal experience on the subject of geomorphology of continental margins. Within reasonable limits, the analysis of the relief attempts to show the relationship between the shape of the sea-bed and the structure of the underlying terrain.

2. General Description

(a) *Main Geomorphic Characters*

3. Numerous authors are of the view that the Pelagian Sea is a *key region* for understanding the Mediterranean. This is due to:

(i) Its *strategic position* standing as it does between the two great basins (West and East) of the Mediterranean. The Pelagian Sea forms a sort of a "continental bridge" with Africa on one side, Malta in the middle, and Sicily on the other side. It is the most extensive and the shallowest sill of the Mediterranean. Because of its geographic position and bathymetry, the Pelagian Sea has:

— a multiplicity of continental and marine erosional phases, which have been particularly important during the last five million years;

— currents, both channelled and accelerated, causing hydrological changes. On the surface, the currents are oriented from northwest to southeast from the Sicilian–Tunisian straits (or Sicilian straits) to the Ionian Sea. This surface water, relatively less dense, covers a movement in the opposite direction: between 300 and 600 m it runs in the opposite direction to that of intermediate waters which connect the deepest depressions situated between one side and the other of the Medina and Melita Banks. Finally, in the eastern waters of the escarpments described in section 7 of this Annex, there is a hydrologically mobile and sinuous front: the Maltese Front.

(ii) Its *configuration:* the morphology of the Pelagian Sea can be summarized as a vast continental shelf bordered on the east by a long escarpment varyingly abrupt and excavated by internal basins ("the intermediate basins" of Italian geophysicists Finetti and Morelli). A comparison with the neighbouring continental margins shows its distinctiveness which is based on three dominant characteristics:

[1] See list of references at the end of this Annex.
[2] *Ibid.*

— Its remarkable extent: it is the most elongated margin in the Mediterranean, apart from the Adriatic.

— Its edge which dips on the east to depths in the Ionian Basin which are exceptional for the Mediterranean. The rupture of the slope bordering the eastern side of the Pelagian continental shelf descends from the southeastern point of Sicily to the Libyan coast increasing in depth until it reaches depths of the order of 600 to 800 m. South of the 34th parallel, the rupture of the slope decreases and becomes more difficult to trace. However, the 200 m isobath, which circles the Tunisian Plateau on the one hand and the Adventure Bank–Malta Plateau on the other, cannot in any way be used to define the border of the continental shelf.

— An association of tabular topographies and irregular depressions as shown by the north-south bathymetric profile.[1] The ordinary morphology of the continental shelf is represented by the Tunisian Plateau, the Adventure Bank–Malta Plateau and the Melita–Medina Banks. These are uniform surfaces washed by the currents and covered by residual coarse sedimentary formations. In the lower part, very diverse reliefs stagger down to depths varying between 1500 to 1700 m; erect slopes (often cut by a network of ravines or by several small valleys), crests (sometimes subtabular), peaks (in many cases volcanic) and finally deep basins where the finest sedimentary fractions are deposited by decantation. Although they are diverse in depth and nature these forms present a consistent overall northwest-southeast direction.

(b) Morpho-structural Framework

4. The same sedimentary series lying on the same subfoundation are found across the entire Pelagian Block. The elements which constitute the structural unity of this block are the following:

(i) Identical sub-basement of a continental nature, prolonging the African crust and reaching as far as southeast Sicily and Apulia (Italian Peninsula). The crust of the Pelagian Block is different from that of the Ionian Basin to the east which is either oceanic or intermediate.

(ii) Identical cover; from Triassic times the bedrock has subsided and has been covered by a sedimentary series stratigraphically and lithologically comparable from one shore to the other of the Pelagian Sea. On seismic reflection profiles there is a striking continuity of the same horizons from the south of Sicily to the coasts of Africa.

(iii) Identity of earth movements; the submarine relief is the result of a long and tortuous tectonic history due to the proximity of the Alpine orogenic belt. The northern border of the African Plate and in particular the Pelagian Sea has been affected by spasmodic movements producing fractures and basins oriented in general northwest to

[1] See Figure 2.

southeast. This dominant northwest-southeast structural trend is cut by faults oriented approximately north-south. A major discordance clearly visible on seismic reflection profiles has been dated from rock samples obtained from drill holes to the late Miocene. It was during the late Miocene that the major morphological features started to be formed. The major tectonic phase seems now to have ended, but the submarine escarpments are still actively moving and volcanic activity still occurs.

5. Briefly, the medium depth parts (more than 150 m) of the Pelagian Sea owe their appearance of alternating basins and blocks to a system of continued extension to which the Pelagian Block has been subjected since late Miocene times, as shown by G. Mascle in Part II of this Annex. These earth movements have produced sections clearly characterized by their shape, structure and origin. The purpose of the following regional study is to underline the morphological variety of the different parts of this tectonic marquetry.[1]

3. The Northern Deeps and Plateaux

6. In the northern part of the Pelagian Sea are a series of shallow plateaux separated by deep basins elongated parallel to the southern coast of Sicily. Topographically this assemblage resembles the overall structure of the Pelagian Sea. The plateaux are similar to the Medina–Melita Banks, and the deeps are identical in form and in origin to the central Trough and Ridge system described in Section 4 of this Annex. The Adventure Bank and the Malta Plateau form two basically quadrangular apophyses which extend to the south of the extremities of Sicily. On the bathymetric charts they are delimited by the 150–200 m isobaths. The two plateaux are relatively stable calcareous platforms levelled in the Miocene limestones. The original topography, deeply cut by channels and fissures caused by fracturing or erosion (Karst), has been filled and levelled by the relatively thin Plio-Quaternary sedimentary cover.

7. To the west, the *Adventure Bank* (with an area of about 4000 km^2) features peaks formed out of rolling hills submerged in less than 50 m of water (the shallowest point is 8.8 m on Talbot Bank). Towards the east the plateau is bordered by the Graham Bank (58.7 m), the Terrible Bank (20 m) and the Pinne–Marine Bank (53 m). The highest relief is formed by volcanic cones which have been detected at the surface by the flames and fumaroles which are emitted from the sea. Navigators have frequently described volcanic activity and this has been recorded in notices to mariners (1632, 1701, 1801, 1831, 1863, 1923, etc). These texts also record the seisms and the sudden changes affecting the seabed on the border of Adventure Bank. For example, Graham Bank is the remnant of the volcanic island Julia which rose to 60 m above sea level during the summer of 1831, but which presently exists only as a sill of lava beneath the sea surface.

[1] See Figure 3.

8. To the east, the *Malta Plateau* is formed from the same Miocene limestone as Adventure Bank. It has a pronounced tilt towards the north near the islands of Gozo and Malta, rising in the south to more than 200 m above sea level. The shoals (Hurd Bank, seabed composed of sand and coral under less than about 35 m of water) which extend the archipelago to the east, are joined to Sicily by an isthmus over 60 km long, very probably eroded and shaped by the sea at the time of its last rise and fall a few thousand years ago.

9. The slopes limiting these limestone plateaux towards the south are differently inclined. The slope which marks the edge of Adventure Bank has a very pronounced gradient reaching a 100:1000 to the east of the island of Pantelleria. On the other hand, the slope bordering the Malta Plateau descends gradually to the south and southeast of the island. It reaches a gradient of 90:1000 to the southwest of Malta, but to the southeast the slope is no more than a gently inclined ramp which does not exceed a gradient of 15:1000.

10. Between these two bastion-like plateaux lies a quadrilateral of subsided seafloor with undulating relief. Running northwest-southeast across the region is an underwater ridge with peaks submerged at about 250 metres (264 m for the Madrepore Bank) composed of uplifted or tilted Miocene limestone blocks.[1] Between the ridge and the Sicilian mainland is a long (150 km) and narrow (30 km) submarine depression known as the South-Sicilian Basin or Gela Basin (at an average depth of 882 m). Although there has been considerable subsidence of the Gela Basin, it has been infilled by the deposition of a very thick sedimentary series and by the slow progression (during the late Miocene and the Pliocene) of a gigantic submarine slide proceeding from Sicily. The Gela Basin and adjacent ridges are the result of major tectonic movements interpreted as a consequence of the bending and subduction of the northern border of the Pelagian Block under the adjacent European plate.

4. The Central Trough and Ridge System

11. Another depressed region, with still more uneven relief is situated immediately to the south of the Northern Deeps and Plateaux of the preceeding region. It contains the major Malta, Pantelleria and Linosa Troughs with intervening ridges and the smaller Malta and Medina Channels. On the Tunisian side it is limited by the edge of the Tunisian Plateau. It is quite well defined by the 500 metre isobath and forms the deepest and most uneven part of the Pelagian Sea. Its size (80 km by 100 km between the meridians of Pantelleria and Malta) as well as its abrupt changes in depth and inclination make it a distinct region although difficult to describe.[2] This region will be described under the following aspects:

[1] See Figure 4.
[2] See Figures 5 and 6.

(a) The Limits of the Depressed Region

12. The margins of the depressed region are very irregular and have deep spurs caused by erosion by tributary valleys. The edge of the Tunisian Plateau in the vicinity of the islands of Lampione and Lampedusa is step faulted and greatly dissected by erosion. There are a series of levelled "terraces" (depths averaging from 200 to 300 metres), having an undulating topography and topped by low crests, subcircular or oval peaks, and banks (Alfil, Birsa, Fonkal, Bouri Banks) covered with coarse detrital sediments. Towards the north, the "terraces" are cut by discontinuous indentations, which are deep (up to more than 400 metres) and sinuous. The seismic reflection profile in Figure 5 shows that it is recent faulting that is mainly responsible for the topographic individuality of the "terraces" and banks which top them.

(b) The Depression Proper

13. The depression proper presents a very complex morphology. It is however possible to distinguish several interrelated elements, all lineated parallel to the dominant northwest-southeast trend:

— crests which are often tabular and several kilometres wide, more rarely tapering and narrow; their peaks vary between 400 and 700 metres.

— closed depressions (between 600 and 700 metres deep) joined by slightly sinuous valleys. One of these depressions extends for about 50 km to the east-southeast of Bouri Bank; it is 10 km wide, and 796 m at its deepest. A gap in its northern crest brings it into contact with another, narrow, closed depression.

— the most striking morphological elements are the three subparallel basins of the Pantelleria (1314 metres), Linosa (1615 metres) and Malta (1715 metres) Troughs.

14. In spite of their size (Malta Trough: 150 by 18 km; Pantelleria Trough: 90 by 30 km; Linosa Trough: 75 by 17 km) the floor of these shallow basins does not cover an area exceeding one fifth of the depressed zone. Each shallow basin forms a small cell, enclosed on all its sides by walls several hundred metres high. Their flat, or slightly cradle-shaped bottoms are filled with thick Plio–Quaternary sediments, several hundred metres thick (more than 2000 m for the Linosa Troughs). These are pelagic sediments, turbidites or slumped masses with intercalations of volcanic-sedimentary material (and maybe laval flows). The evenness of the basin floors makes them look like small submarine plains except at the extremities of the basins. The steepness and height of the sides are due to a system of very close normal faults, hardly covered by the Plio–Quaternary deposits which are normally thinner than the throws (which may reach 1 km) of the original escarpments. This is especially evident in the southern edges of the

Linosa and Malta Troughs which are strongly asymmetric basins.[1] A precision survey of the southern slope of the Linosa Trough by the Multibeam sonde, Seabeam,[2] indicates:

— its regularly aligned trend in a direction of about 120°;

— its dissection into spurs and deep ravines, the amplitude of which reaches the hectometre level. These have a trend of about 060° reflecting the effects of transverse faulting;[3]

— its elevation (about 500 m) and its overall straightness with an average slope of 500:1000.

15. Normally, on the bottom of these shallow basins there are adjoining hanging basins, some of which are isolated by raised sea-bottoms which look like "bolts". The Malta Trough provides the most typical example of such a situation. To the east of 13° 30'E, the trough undergoes a triple morphological change:

(i) a pronounced change in trend towards a southeasterly direction;

(ii) a remarkable narrowing, forming a gullet giving access to an adventicious basin;

(iii) an elevation of its floor: the adjoining basin is raised to more than 500 m above the deepest part of the Malta Trough (1500 m–1700 m).

16. At their extremities each basin is terminated by either (i) a steep *cul-de-sac*, as in the case of the Pantelleria Trough which is obstructed by the imposing volcanic cone of the island, whose crater reaches 836 m above sea level; or (ii) by counter-slopes, as in the case of the Malta Trough, the bottom of which rises rapidly to the southwest of the Maltese archipelago.

(c) *The Extremities of the Depressed Zone*

17. The extremities of the depressed zone are not easy to define. To the west the Pantelleria Trough extends to the Straits of Sicily through a sort of hanging valley, which is first straight (to the south), then sinuous, where it forms the Pantelleria Valley. To the north, the depressed zone narrows rapidly to a straight gorge blocked at its western end by the Adventure Bank. At the other, eastern, end of the depressed zone[4] the counter-slope closing the basin of the Malta Trough to the southeast passes progressively into a ramp with a marked inclination to the south. It is surmounted by low crests and high peaks (summits at 113 and 169 m) of an unknown geological nature. From the morphological point of view, the Malta Channel does not really appear except considerably further to the east, i.e. around

[1] e.g. see Figure 5.
[2] See Figure 7.
[3] See para. 40(e) of this Annex.
[4] See Figure 8.

15° 10'E. The situation is similarly complex to the south, where the Linosa Trough is separated from the Medina Channel by a number of crests, channels and closed depressions, oriented west-east and some 500–700 m deep. It is important to note this quite pronounced angular swerve to west-east from the dominant northwest-southeast orientation in the zone of the troughs. The Medina Channel, similarly oriented west-east, is a shallow valley, the course of which is tightly constrained between a peak at 169 m and the border north of the Medina Bank. Because of their shallow depth (compared to the adjacent regions) and their wide cradle-shaped profiles, the Medina and Malta Channels do not possess the characteristic features of tectonic troughs caused by rift-faulting. They have the appearance of ancient fluvial valleys (probably excavated during the strong sea level lowering during the Messinian) partly filled by sediment during the subsequent sea level oscillations. They are more erosional features than structural features.

18. In brief, the central Trough and Ridge system does not comprise a single long trough with a flat bottom which would unite to a large extent the two great Mediterranean basins. It is not comparable to other troughs of the continental shelf such as the Hurd Deep (of the English Channel) or the Norwegian Trough (in the North Sea). Strictly speaking, it would be preferable to define it as a "Morphological Complex" i.e. a collection of crests, submarine channels of different depths and deep closed basins. All this complex morphology is the most remarkable expression of the distensive forces acting since Miocene times (10 million years ago). It appears that the relief has been produced by two distinct phases: first a phase of dislocation characterized in the depressed zone by faulting of the pre-Pliocene series, creating crests, channels and hanging basins; subsequently, during Quaternary times a localized deepening phase forming the basins. This last phase is contemporaneous with the formation of the volcanic islands of Pantelleria and Linosa.

5. The Eastern Tabular Units (Melita and Medina Banks)

19. To the south of the Medina Channel and half-way between the Malta Plateau and the Libyan coast lies a second tabular region sometimes called the Melita–Medina Plateau. This region is clearly distinguished by the following characteristics:

(a) an altitude of several hundred metres above the nearby sea-floor: the major part of the banks is limited by the 300 m isobath;

(b) quadrangular forms (Melita Banks 100 by 40 km; Medina Bank: 120 by 100 km) positioned to east of the Tunisian Plateau;

(c) the isobaths defining the Medina Bank are approximately perpendicular to those of the Melita Banks. The Medina Bank trends northeast-southwest, closely similar to the trend of the adjacent Medina Escarpment.[1] The Melita Banks are oriented approximately

[1] See Section 7 of this Annex.

northwest-southeast and comprise three plateaux, the westernmost of which is covered by less than 86 m of water.

20. Little is known about the detailed morphology of the summital regions of the Melita and Medina Banks, although they appear on the sonde data to be more irregular than expected. Near 34° 48′N, the Medina Bank is cut by a discontinuous network of fissures, oriented from west to east, one of which reaches a depth of more than 400 m. The three large buttes (peaks at 86, 144 and 207 m) of the Melita Banks have sloping rectilinear borders which may in places have heights in excess of 100 m. Geologically, these high tabular blocks have been cut by a network of faults in thick sub-horizontal sedimentary series and have been elevated above the surrounding region. The small thickness of the Plio–Quaternary cover demonstrates the role erosion has played in the fashioning of the top part of the Banks.[1] Beneath this cover the Tertiary sediments rarely exceed a thickness of several hundred metres, considerably less than in the regions described below. It is probable that these plateaux, detached into banks on the external part of the Pelagian shelf, have existed as regional highs since the Cretaceous.

6. The Southern Valleys

21. This section describes the morphology of the second depressed region which is entrenched between the Tunisian Plateau, the Melita–Malta Blocks and the Tripolitanian coast. The topography is more (11) complex and more uneven than the IBCM chart makes one believe.[2] The general appearance of the depression is that of a deep and vast basin (300 km by 150 km), cut by a network of sub-parallel valleys, all oriented from northwest to southeast like the African coast.

22. This region contains three major depressions called the Jarrafa Trough, the Misurata Valley and the Tripolitanian Valley. Their presence in this southern region of the Pelagian Sea merits special attention because they are very significant for an understanding of its geomorphologic evolution. The upper courses of these valleys are cut out in a series of "terraces" (between 200 and 300 m) built on the Quaternary by sedimentary progradation towards the eastern border of the Tunisian Plateau. The valleys present strongly dissimilar morphologies.

(a) The Jarrafa Trough

23. This Trough lies to the northwest, and has the shape of a large rectangular basin, limited by the 300 m isobath. Its upper section (between 300 and 400 m) is surrounded by steep slopes, particularly to

[1] See Figure 9.

[2] In this respect the chart drawn up by SOGREA (1975) reproduced in Annex II to the Libyan Memorial in the Tunisia–Libya case (30 May 1980, Annex II, Ch. II, Section 3, (11) Fig. 13, p. 18) is more expressive than the IBCM chart because of the use of a smaller isobath interval (100 m).

the south, which are interpreted as recent fault scarps surrounded by reefal structures. The sea bottom irregularities could be due to salt diapirs. The central and deepest part (between 400 and 500 m) is a basin rendered irregular by escarpments (average heights between 50 and 200 m) locally bordered by linear, straight, closed depressions the bottom of which goes down to more than 500 m (e.g. 522 m at 13° 50′ E and 34° 23′ N). Slopes, escarpments and depressions are all oriented from northwest to southeast. The closed depressions are as yet unexplained, but are perhaps halokinetic reliefs, which have been created by the rising and subsequent dissolution of diapiric salt. The smooth counter-slope which closes the Jarrafa Trough is cut by a straight, narrow fissure, irregularly sunk between 400 and 470 m, limited on the side of the Melita Banks by steep talus (level: 167 m; gradient: 39:1000).

(*b*) *The Misurata Valley*

24. Through this link, the Jarrafa Trough opens into the second depression, the Misurata Valley at the southern foot of Isis Terrace. Lying between the Melita Banks and along a subtabular water shelf (between 400 and 500 m), the Misurata Valley is more precisely a large depression having the shape of an armchair, hollowed down to more than 600 m (635 m on the 14° 30′ E meridian),[1] and closed towards the northwest by a much dissected sill between 500 and 550 m.

(*c*) *The Tripolitanian Valley*

25. This valley is undoubtedly the most distinctive depression of the three.[1] It owes this to:–

(i) its length, which is about 300 km;

(ii) its sinuous shape, especially east of the 14° 30′ meridian where its bed makes a double curvature similar to a river meander;

(iii) its entrenchment, which becomes much pronounced to the east of the 13° 30′ meridian: the gradient of the slopes may surpass 40 and even 50:100. The maximum depths of 632 m and 795 m have been measured towards the 14° 30′ and 14° 40′ E, respectively;

(iv) the important gulleying of the slopes, sometimes cut into fern leaves like the border of the meander mentioned above;

(v) and finally, the presence of closed depressions excavated in the bed; the most remarkable of these umbilici is excavated in the concave part of the meander near 14° 40′ (795 m).

26. Since it curves towards the south the Tripolitanian Valley causes the gradient of the Libyan continental slope to reach as high as 17 to 20:1000 on the meridian which passes through Ras Zarrouq.

27. All three valleys have been formed by extension in a basin which has been subsiding since the Cretaceous. The underlying Permo–Triassic sedimentary section reaches 8 to 10 km thick. Like the north-

[1] See Figure 2.

ern troughs of the Pelagian Sea, the valleys are intra-continental fault grabens lying in relays parallel to the African coast. Although they are established on old fractures, the troughs have been reactivated during the Plio–Quaternary. The Jarrafa Trough, and probably also the other southern valleys, have undergone a succession of deepenings, erosion and back-filling during the three major tectonic phases which have affected the region since Miocene times.[1]

28. The structural mechanisms causing these valleys are the same as in the north of the Pelagian Block although the amount of extension is even *higher*. The high sedimentation rates in this region have partially infilled the troughs, to a greater extent than in the northern troughs.

7. The Eastern Slope

29. The Pelagian Block is limited on the eastern side by a scarp which is one of the most remarkable in the Mediterranean because of its length (more than 700 km) and its height (difference in level between 1 to 3 km). From Sicily to the northeast of Ras Zarrouq (Libya) the scarp forms an abrupt transition between the epicontinental Pelagian Sea and the deep parts of the Ionian Basin. In the last four years information on this uneven terrain has made considerable progress as a result of campaigns carried out by Italian (dredging) and French scientists (the three precision bathymetry diving and dredging Escarmed campaigns). The entire scarp zone is cut out of the same sedimentary series extending from the Triassic to Neogene times. However, from the north to the south, the shape and origin of the relief changes very considerably. Setting aside the Sicilian escarpment, three very different segments can be distinguished:

(a) The Malta Escarpment

30. Its orientation is almost linear for more than 150 km. The Malta Escarpment consists of three levels:[2]

(i) the higher cliff, sheer, almost rectilinear with its edge descending from 200 to 645 m in the south. Its base lies at about 700–1000 metres. The cliff is cut in Neogene age deposits (chalk of a pelagic nature) and is covered with coral and mud;

(ii) half-way down the scarp, the slope descends gently to form a large glacis (some dozen kilometres wide) broken by basins and parallel or slightly converging valleys. The gashes act as a trench which traps heavy material coming down from the high cliff;

(iii) the lower cliff, between 2200 and 3200 metres, which rises almost vertically from the Ionian abyssal plain. It is a fault scarp cutting through a thick limestone series mainly of Jurassic age. It is dug into by semi-circular features (for example the scarp excavated between 36° 26′ and 36° 28′).[3] The most prominent is the Maltese

[1] C. Blanpied and G. Bellaiche, 1983.
[2] See Figures 10 and 11.
[3] See Figure 10.

Valley which has the shape of a deep amphitheatre at the level of the 36th parallel. The circular aspect of all these crevices is emphasized by the oval depressions at the base, which are enclosed by arched elevations. The manner in which these basins have been formed has not yet been established.

31. The age and the shape of the Malta Escarpment differ according to the level that is being considered. The lower cliff has been formed in two periods: it was first an accumulation of limestone on a gradually subsiding platform, then a fault escarpment. The intermediate glacis and the top cliff were formed by the accumulation of pelagic sediments deposited subsequent to the subsidence of the lower cliff.

(b) The Central Escarpment

32. To the east of the 16th Meridian, the escarpment changes orientation, and moves eastwards to form a large promontory dissected by canyons. The main one among them is an asymmetrical meandering valley called Heron Valley (*a little to the north of the 35th parallel*). To the east of the outlet of this canyon there is a series of tabular mountains which form the Medina (Malta) Ridge. The depths of the main hills vary from 1200 to 2000 m, giving local relief from 1500 to 2000 m.[1]

33. In spite of the presence of magnetic anomalies, the Medina Ridge is not formed from a chain of levelled volcanoes. Dredging and a dive (by the submarine Cyana) on the westernmost ridge has shown that Early and Middle Cretaceous age sediments are present. The sediments are neritic, originally deposited in shallow water at depths less than 200 m. The Medina Ridge, therefore, formed an integral part of the Pelagian Shelf before the sinking of the Ionian Basin which occurred first in Late Cretaceous times and then since the Miocene. The Medina Ridge seems rather like a succession of *avant-buttes* cut by normal faults.[2]

(c) The Medina Escarpment

34. The southernmost segment presents a totally different morphology. The most striking features are the width, the levelling and the modification of the talus which curves sharply towards southwest. The higher cliff, forming the limit of the Medina Bank, descends and becomes gentler, finally disappearing at the 34th parallel. Further to the south, the escarpment changes into terraces of tabular, elongated shape. Below depths of 1000 m, the talus descends gradually to the slope and glacis of the Gulf of Sirte. The slope is formed of flat hill-tops, strongly intersected by a network of canyons (Melita Valley and the deep prolongation of the Misurata Valley).

35. The morphological modifications and the intensities of the fur-

[1] See Figure 12.
[2] See B. Biju-Duval *et al.* 1982.

rows reveal an abrupt change in the origin of the talus. It no longer originates from a fault scarp but instead from the erosion and degradation by gravitational processes of a sedimentary series.

8. Limits of the Continental Margin

36. If the heights of the Malta–Medina Escarpment were the effective natural limit of the continental shelf of the Pelagian Sea, then one could conclude that its base forms the outer limit of the continental margin. On the basis of present knowledge, however, such an interpretation is incorrect to the south of the 35th parallel, and problematic to the north. To the south it is wrong because the Sirte Rise and the Sirte abyssal plain, which extend the Medina Escarpment northeastwards, have been built on a continental sub-basement which swings towards the centre of the Ionian Sea. North of the 35th parallel, despite the large amount of research in this region, it is still uncertain where the continental crust terminates. This uncertainty is due to two reasons: (i) from the morphological point of view, between the foot of the Malta Escarpment and the Ionian (or Messina) abyssal plain there is a great deal of relief which is difficult to understand; (ii) from the geological point of view, the contact between the continental crust and the oceanic crust which marks the structural edge of the margin is still controversial.

37. Indeed, even the presence of oceanic crust under the deepest part of the Ionian Sea is still hypothetical. I. Finetti, the Geophysicist, in one of his most recent publications,[1] has written that "successively, various authors favoured the hypothesis that the Ionian Basin (abyssal plain) is an old oceanic crust covered by a thick sedimentary sequence. But still continental crust is supported by some authors". Consequently, it would be imprudent to conceive and fix a physiographic frontier on such divergent interpretations.

9. Conclusion

38. The Pelagian Sea is an extended epicontinental sea, formed by a thick deformed sedimentary series. The eastern part, north of the 34th parallel, formed by the Malta Plateau and the Medina–Melita Banks, has maintained its relatively elevated position since the end of the Cretaceous. The tabular relief occupies the major part of the topography which is only cut by erosional canals, like the Medina Channel, having no structural significance.

39. Between the eastern plateaux on one side and the Tunisian Plateau on the other, there is an important chain of impressive grabens. They are arranged in an echelon from the Sicilian coast to the African coast. They are the result of extensional forces undergone by the Pelagian Block since Late Miocene times. The crustal stretching has

[1] See I. Finetti, 1982, p. 270.

resulted in: (1) the anticlockwise rotation of Sicily; (2) opening of all the troughs from the Gela Basin to the Tripolitanian Valley. The troughs so formed are presently partially filled by a thick Plio-Quaternary sedimentary series which in certain places surpasses one kilometre in thickness.

PART II

STRUCTURE AND RIFTING OF THE SEA-BED BETWEEN MALTA AND LIBYA

by
Professor Georges H. Mascle

1. Structural Data as per Bathymetric Chart (IBCM)

40. A study of the International Bathymetric Chart of the (11) Mediterranean (IBCM)[1] shows:

(a) A general direction of the Pantelleria, Linosa and Malta troughs of approximately 120°; this direction is the same as that of other features, both negative features (depression northeast of Lampedusa, trough between Medina and Melita Banks, Jarrafa Trough and Misurata Valley, Tripolitanian Valley) and positive features (Madrepore Bank, Melita Banks Fonkal Bank).

(b) A change in the lateral extensions of the troughs from west to east:

— west of Pantelleria (west of the 12th Meridian) there is a unique trough which is relatively straight (a little more than 100 km wide at the 600 m isobath): the Pantelleria Trough;

— east of Pantelleria (east of the 12th Meridian), this trough is even wider (about 32 km at the same isobath);

— east of the 13th Meridian (near Linosa) one finds two troughs (the Malta and Linosa Troughs) which together are over 92 km wide.

(c) Relatively abrupt terminations of the troughs, in particular the Malta and Linosa Troughs at their western extremities and that of *Pantelleria at its eastern extremity.*

(d) Sudden changes in the axis of symmetry of the troughs; even the Malta Trough shows, at the 36th parallel, a dextral displacement of nearly 7 km of the axis of symmetry. This displacement takes place along a bearing of approximately 060°.

(e) The frequency of transverse structures with an approximate bearing of 060° (to within 10°) in particular the Medina Bank, the Medina Escarpment, Alfil Bank west of Linosa, Birsa Bank, southwest

[1] See Figures 1 and 3.

of Pantelleria, the 200m isobath north of Tripoli (north of the 34th parallel). It is to be noted that this type of fracture is well known onshore both in Malta (the Victoria Lines fracture system in particular) and in Sicily (Comiso fracture zone, the Ispica fault). Detailed survey by SEABEAM of the Linosa Trough shows freqeunt structures with an approximate bearing of 060°.[1]

41. All this is in harmony with a distensional tectonic model in which the troughs have a bearing of 120° and are "transformed" by faults or transforming zones[2] having a bearing of 060°. The amount of extension caused by rifting increases in a southeast direction from Pantelleria to the 14th Meridian, showing that the pole of rotation for motion between the Sicilian–Maltese zone and the Pelagian plateau off Tunisia, must be situated to the northwest.[3]

2. The Problem of Continuity Towards the East of a Rifting System

42. A priori, such a system, if it continues towards the east, must retain its characteristics: (1) direction of the troughs about 120°, transforming directions towards the east at about 060°; (2) increase in the total amount of rift extension towards the east, whether it be due to the widening of the troughs or to the appearance of new troughs.

43. One notes from the start that the structural model indicated by (11) the bathymetric chart (IBCM)[4] is in agreement with the forcasts of a distentional tectonic model with a pole of rotation to the northwest. To the east of the 14th Meridian, the troughs with a bearing of 120° increase to four in number: extrapolation of the Malta Trough to the Malta Channel, exaggerated extrapolation of the Linosa Trough to the Melita Banks, Jarrafa Trough, and Tripolitanian Valley. The transforming directions at about 060° appear clearly in the Medina Escarpment, the Medina Bank, and in the shape of the 200 m isobath north of the 34th parallel (north of Tripoli).

44. In the Libyan Memorial, to the east of 14° E only the Malta and Medina Channels are considered to form part of the tectonic model and the rifting further south, apparent for example in the Jarraffa Trough and the Tripolitanian Valley, is totally ignored. There is then a problem in making a tectonic model which explains both the extensive rifting in the Linosa and Pantelleria Troughs to the west of the 14th Meridian and the considerably smaller rifting across the Malta and Medina Channels to the east of the 14th Meridian. A solution is proposed by Libya in its Memorial[5] reproduced here in Figure 14. The suggestion

[1] See Figure 7.

[2] Le Pichon *et al.*

[3] See Figure 13. A theorem by Euler says that any motion on a sphere can be represented by rotation about an axis through the centre of the sphere. The pole of rotation is the axis about which two rigid blocks on the surface of the earth move relative to each other.

[4] See Figure 1.

[5] Libyan Memorial, Volume 1, Figure 2, facing page 32.

is that the opening of the troughs is not the result of a simple rifting,[1] but of a complex movement, oblique to the 120° direction of the troughs.[2] Under these conditions the troughs can terminate and the movements die out along the Medina Channel which can thus compensate for the movement, even though distinctly more straight than the troughs, contrary to what is suggested by the seismic profile MS14.[3] This profile is in fact extremely oblique (oriented northwest-southeast) in comparison with the trough. In such a system, the pole of rotation would necessarily be situated at some distance from the north of Sicily. This model would also amongst other things require[4] an east-west symmetric branch, at the other extremity (northwest) of the troughs.

3. Criticism of the Rifting with Shearing Model Oblique to the Direction of the Troughs

45. In a model such as that postulated in the Libyan Memorial, the transforming direction is necessarily east-west (090°) which is in contradiction with the observed facts both in the Malta Trough (36th parallel)[5] and in the Linosa Trough,[6] even if one were to purposely limit oneself to these two examples.

46. The Western terminations of the troughs system is effected by means of a straight corridor with an almost north-south direction[7] situated west of Adventure Bank between Adventure Bank and Tunisia, followed by a rotation in a northeast direction towards the Tyrrhenian Sea, west of the Egadi Islands.[8] This termination is, therefore, exactly the opposite of what one would expect to find if the model in the Libyan Memorial were correct.[9]

4. Recent Paleomagnetic Data in the Ibleo-Maltese (Ragusa–Maltese) Region

47. Paleomagnetic research has been carried out on the outcropping series of the Iblean region (the Ragusa Plateau). The samples were collected from: Late Cretaceous, Eocene, Middle-Upper Miocene, Messinian, Pliocene and Quaternary formations.[10] The magnetic north direction at the time of its formation was measured for each terrain.[11]

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[1] See Figure 13, No. 1.
[2] See Figure 13, No. 2.
[3] See Figure 2 in Part II of the Technical Annex of the Libyan Memorial.
[4] See Figure 14, No. 2.
[5] See Figure 1.
[6] See Figure 7.
[7] See Map I, Vol I.
[8] Ibid.
[9] See figure 14 no 2.
[10] See Figure 15.
[11] See Figure 15 and J. Besse, 1981; J. Besse *et al.* 1981, 1983.

Thus, it was possible to construct the curve for "the migration of the Magnetic North Pole" for the Iblean region.[1]

48. This curve was compared with the curve for the "migration of the Magnetic North Pole" for Africa, drawn on the basis of data about the African series published by various authors.[2] It can be seen that the two curves have the same shape and can be superposed up to the beginning of the Pliocene but from then onwards they are different. This means that after the beginning of the Pliocene, Africa and the Ibleo–Maltese complex ceased to form one solid block and that the latter has rotated with respect to Africa. This rotation, although quite small, is over 10° and is anticlockwise. Such a rotation *imposes* the formation of troughs between the two domains.

5. Comparison of the Geotectonic Models and the Paleomagnetic Data

49. Figure 17 has been drawn starting from a model depicting rifting–fault termination[3] and affecting one of the compartments (that which corresponds to the Ibleo–Maltese domain in this case) by an anticlockwise rotation of 10°, purposely less than the real angle of rotation. According to whether the pole of rotation is near or remote one may obtain a 17–2 result (pole in the vicinity), or a 17–3 result (pole further away). In the first case (17–2) one should find the appearance of a zone of compression (closure of the trough at the western end). In the second case (17–3) the trough should open noticeably larger towards the east and cannot be transformed into a straight channel. In both cases the directions change, to the west in particular. The feature to the north has a tendency to reorient itself to a direction east-north-east. It is enough to compare these schemes with (11) the bathymetric chart (IBCM) to observe the contradiction.

50. In Figure 18, two possible configurations of a rifting zone have been drawn, limiting two domains separated by an anticlockwise rotation of the northern block through an angle of the order of 10°. Case 18–1 is the most simple theoretical model, showing that the extension increases from west to east (arrows 18–1 a-b-c-d).

51. Case 18–2 shows a more complex system, where the rifting, increasing towards the east, changes as a result of the appearance of new troughs which are themselves shifted by transforming zones. This system shows the same order of extension for each compartment as the previous one and has been constructed so that the sum of the vectors 18–2 d1 + 18–2 d2 + 18–2 d3 + 18–2 d4 is equal to the vector 18–1 d and so forth.

52. A comparison with the bathymetric chart (IBCM)[4] shows that

[1] See Figure 16.
[2] See Figure 15 and J. Besse, 1981; J. Besse *et. al.*, 1981, 1983.
[3] See Figure 14, and also Figure 2 in Part II of the Technical Annex of the Libyan Memorial.
[4] See Figure 1.

the actual structures correspond to the theoretical model of Figure 18–2.

53. Case 18–2a is represented by the Pantelleria Trough, west of the 13th Meridain; case 18–2b is typical of the situation between the 13° 00′ and 13° 30′ Meridians (Malta and Linosa Troughs); case 18–2c is represented by the situation between the Meridians 13° 30′ and 14°; and case 18–2d is found east of the 14th Meridian where there are in succession the Malta Channel, the widened extension of the Linosa (24) Trough, the Jarrafa Trough and the Tripolitanian Valley. Figure 19 shows the main fault network as deduced from the bathymetric chart. This system is in harmony with that shown in Figure 18–2.

6. Extension in the Pelagian Sea

54. It appears from what has been said that the Pelagian Block has *witnessed deformation by rifting. The rifting fractures generally* have a well expressed topography (or bathymetry). However the amount of extension undergone by a domain is not only a result of the throw, i.e. the depth reached by the troughs, but is also a result of the number of fractures in a trough or the number of troughs in a domain.

55. Figure 20 is a theoretical scheme showing that one could obtain the same amount of extension with:

1. a complex trough with several stepped fractures; or
2. a simple trough limited by one fracture on each border.

56. Figure 21 is equally theoretical and shows how four shallow troughs can together produce more extensional rifting than one very deep trough.

57. The two figures show how illusive it is to consider the displacement (throw) of faults as a discriminating characteristic.[1]

58. Moreover, in the case of a number of faults with small relative displacements, it is difficult to place a precise structural limit within the faulted zone. This is the case of the Pelagian Sea east of a line joining Gozo to Ras Ajdir, near the seismic line MS19.[2]

59. *An analysis of the extension following the method* of cancellation of the displacement of the faults described[3] along line MS19 shows[4] that, when compared with the axis of the Malta Trough, the total rifting is more important to the southwest than to the northeast. Therefore, the southwest part of the Pelagian Sea is more stretched, or else more distended, than the northeast part.

60. Line MS19, of which the southwest section is reproduced in this Annex,[5] clearly shows that, contrary to what is indicated in the Technical Annex of the Libyan Memorial,[6] the fractures found to

[1] cf. Figures 5 and 6 in Part II of Technical Annex of the Libyan Memorial.
[2] See Figure 7 in Part III of Technical Annex of Libyan Memorial.
[3] See Figure 22.
[4] See Figure 23.
[5] See Figure 24.
[6] See Part II, paragraph 3.06 and Part III, paragraph 3A *Second.*

the south of the Pelagian Sea have had recent activation, as proved by the throw of recent horizons near to the faults of the Jarrafa Trough.

61. To conclude, 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.*

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Annex 3

THE TRUMAN PROCLAMATION ON THE CONTINENTAL SHELF

PROCLAMATION 2667

[Not reproduced]

Annex 4

THE REAGAN PROCLAMATION ON THE EXCLUSIVE ECONOMIC ZONE

[Not reproduced]

Annex 5

LIBYAN CONCESSION NC 53

(7) 1. Map 11 of the Libyan Memorial[1] shows in red a Libyan concession described as NC 53.

2. This concession is referred to in the Libyan Memorial at page 61, paragraph 4.44. The reference states: "Concession NC 53 was covered by a framework agreement between NOC (the National Oil Corporation of Libya) and Total Libya of 14 April 1974, and the necessary exploration and production sharing agreement was signed on 13 October 1974".

3. It is not disputed that a concession now called NC 53 was granted to a French company, at times called CFP and at other times Total Libya. What is in doubt is the shape and extent of the concession northwards.

4. Petroconsultants – who are quoted by Libya itself as the main source of its information about Maltese concessions, and are perhaps the best source of petroleum information – reported this concession almost from the very date the "framework agreement" was signed on 14 April 1974, and they have been very accurate in their reporting.

5. Petroconsultants reported in April 1974 "the initiation of negotiations for exploration rights under the production sharing system" with CFP of France. In May 1974, they reported that three companies, of which one was France's CFP, had signed preliminary agreements with Libya; and in November 1974 they reported that "CFP recently signed production sharing agreements for areas believed to be in the Murzug basin and off the western shelf in waters beyond the 200 metre isobath". The agreement concerning NC 53 had, according to Libya, just been signed: the date given by Libya is 13 October 1974.

6. The relevant area was first shown on a map by Petroconsultants in May 1975, i.e. on their map containing a synopsis of Libya's offshore and onshore activities in 1974. The concession is shown on this map as CFP – PS.

7. The same area re-appears consistently, and in very much the same shape and extent, in all subsequent Petroconsultants' synopsis of Libya's activities, which they publish every year, and recently even twice a year. The area is indicated as CFPTL – PS – A in the synopsis map for 1975, as CFP – PS – A in the 1976 and 1977 synopsis maps, as CFP – PS – NC 53 in those for 1978, for the first half of 1979 and for the full year for 1979, and finally as TOT – NC 53 in the synopsis maps published since the one covering the first half of 1980.

[1] Opposite p. 62 of Libyan Memorial.

8. In all these maps, however, the area is shown not as reproduced in the Libyan Memorial[1] but as reproduced by Malta in Map 3 of Vol. III of the Maltese Memorial. In Map 3 this concession is shown as part of the Libyan concessions and marked TOT – NC 53. It will be noted that *in this Map the line facing Tunisia is not defined; the reason being that,* according to Petroconsultants, this line has never been defined, and is in fact so shown also on the synopsis maps published by them after 1976.[2]

9. The same concession is shown in very much the same shape as that given by Petroconsultants also in other publications including a Report published in December 1977 by the Petroleum Economist of London entitled "Opec Oil Report". The map shown in this Annex as Reduced Map No. 17 is a reproduction of the relevant part of a map contained between pages 208 and 209 of the said Report.

10. Compared with the area as given by Petroconsultants — who have been otherwise very accurate both with respect to this area and to other concessions whether by Libya, Malta or other States, and whose information is also confirmed by other sources – the area as given in the Libyan Memorial tallies with that given by Petroconsultants only in its southern border viz where it borders with Libyan concessions NC 41, NC 35A and NC 47; but it is hugely inflated northwards to such an extent that in encroaches not only on Italian continental shelf but also on Italian waters around Linosa and Lampedusa.

11. Several facts and considerations appear to cast serious doubts on the Libyan version of Concession NC 53 and to confirm the version given by Petroconsultants:

(1) As already pointed out the area as given in the Libyan Memorial encroaches on Italy's Continental Shelf, even on the limited area surrounding Linosa and Lampedusa allotted to Italy under the Italo–Tunisian Agreement. Indeed it extends so near to the shores of these islands that it encroaches even on Italy's entitlement to territorial waters around those Islands. As far as can be made out there was no Italian protest directed at this Libyan Concession.

(2) The Concession as described in the Libyan Memorial encroaches on Tunisian Continental Shelf – not only as claimed but also as has been declared by the Court to appertain to it. Again here, as far as can be made out, there was no Tunisian protest directed at NC 53.

(3) A concession extending to the north and west as is claimed by Libya for NC 53 would also encroach on earlier Tunisian concessions. According to Petroconsultants, Tunisian concessions shown as Concessions 8 and 9 in their Map for 1972 were "granted

[1] See Map 11, opposite Page 62 of Libyan Memorial.
[2] See Reduced Map No. 16 of the present Counter-Memorial.

respectively to CFP – AGIP AMOCO and SEPEG". This fact is accepted by Libya in Map 4 of its Counter Memorial in the *Tunisia–Libya* case,[1] in paragraph 34 of the same Counter Memorial[2] as well as in the Maps included in Annex 9 of Vol. III of that Counter Memorial.[3]

The map showing Tunisian concessions as on 31 December 1974 is reproduced in this Annex as Reduced Map No. 18. It is identical to that included in Annex 9 of Vol. III of the Libyan Counter Memorial in the Tunisia–Libya case just referred to.

These maps show that –

(i) At the time NC 53 was granted by Libya to CFP there were still in force two concessions given by Tunisia which, if NC 53 had in fact been as shown in the Libyan Memorial, would have overlapped NC 53 almost completely *except* part of what in Petroconsultants' synopsis maps for Libya is shown as NC 53.

(ii) The southern border of Tunisian concession No. 9 is in the same direction as the northwestern border of NC 53 as shown by Petroconsultants.

(iii) Had NC 53 been in fact as shown in the Libyan Memorial, CFP – a major oil company – would have in 1974 accepted a concession from Libya which encroached on practically the whole of an earlier concession given to it jointly with other oil companies (CFP – AGIP – AMOCO) by Tunisia in 1972.

(4.) There is also another inconsistency in the Libyan versions of NC 53. In its case with Tunisia the date for this concession is given by Libya as 28 September 1974;[4] whereas in the present case the date is given by Libya as 13 October 1974.[5]

12. The purpose of the Libyan version of NC 53 is of course obvious. In the Tunisia–Libya case it was meant to show that "The western boundary of both these concessions (i.e. NC 41 to NOC/AGIP and NC 53 to NOC/Total) allowed the 26° line".[6]

13. The Libyan version may have also anticipated the present case. It hides the fact that the northeastern boundary of NC 53 followed very closely the direction and shape of the Malta–Libya equidistance line in that area, and in part even the co-ordinates of that line. In fact it looks like a line intended to correspond to the median line between Malta and Libya but slightly out of its proper co-ordinates.

[1] Facing page 18 of Libyan Counter Memorial in Tunisia–Libya case.
[2] *Ibid.* page 19.
[3] These concessions appear to be the ones against which Malta protested in a Note Verbale to Tunisia of 8 April 1974. Para. 34 of the Libyan Memorial in the present case.
[4] Tunisia–Libya case, Libyan Counter Memorial p. 20 para. 36.
[5] Libyan Memorial pp. 61–62 para. 4.44.
[6] Tunisia–Libya case, Libyan Counter Memorial p. 20 para. 36.

Annex 6

(1) DENMARK-NORWAY MARITIME DELIMITATION AGREEMENT, 8 DECEMBER 1965

(2) EXCHANGE OF NOTES CONSTITUTING AN AGREEMENT BETWEEN DENMARK AND NORWAY AMENDING THE AGREEMENT OF 8 DECEMBER 1965 CONCERNING THE DELIMITATION OF THE CONTINENTAL SHELF, 24 APRIL 1968

[Not reproduced]

Annex 7

IRAN-QATAR MARITIME DELIMITATION AGREEMENT, 20 SEPTEMBER 1969

[Not reproduced]

Annex 8

DENMARK-UNITED KINGDOM MARITIME DELIMITATION AGREEMENTS

(1) AGREEMENT OF 3 MARCH 1966

(2) AGREEMENT OF 25 NOVEMBER 1971

[Not reproduced]

Annex 9

IRAN-OMAN MARITIME DELIMITATION AGREEMENT OF 25 JULY 1974

[Not reproduced]

Annex 10

AUSTRALIA-PAPUA NEW GUINEA MARITIME BOUNDARY AGREEMENT, 18 DECEMBER 1978

[Not reproduced]

CERTIFICATION

I, the undersigned, Edgar Mizzi, Agent of the Republic of Malta, hereby certify that the copies of the documents attached as Annexes 3, 4, 6, 7, 8, 9 and 10 of the Counter-Memorial submitted by the Republic of Malta are accurate copies or accurate translations of the documents or translations they purport to reproduce.

This 26th day of October, 1983.

(Signed) Edgar MIZZI,
Agent of the Republic
of Malta.