SEPARATE OPINION OF JUDGE MBAYE

[Translation]

I have voted in favour of the operative part of the Judgment because I endorse the Court's findings and, in general, the grounds advanced in support of them. I firmly believe indeed that the indications which the Court has given to the Parties in application of the principles and rules of international law, viz. the drawing of the median line between Malta and Libya and its transposition northwards over 18′ of latitude, to take account of the circumstance of "the great disparity in the lengths of the relevant coasts", enable an equitable delimitation to be achieved.

Nevertheless, there is one point over which, to my regret, I part company with the Court. It relates to "the considerable distance between the coasts" of the Parties.

Before dealing with this point of disagreement, I have some comments to make on the Court's finding as to the two meanings attributed by customary law at the present time to the concept of natural prolongation.

I. The Two Meanings of the Concept of Natural Prolongation

The Court has stated the following finding :

> "the area of continental shelf to be found to appertain to either Party not extending more than 200 miles from the coast of the Party concerned, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation in the physical sense" (Judgment, para. 79 A. (2)).

I do not dispute this finding ; quite the contrary. I merely believe I should explain my own understanding of it. I also think that there is such a firm link between it and the present-day definition of the continental shelf that this link should have been emphasized, bearing in mind the significance of the idea which underlies it and which, in my view, marks a crucial stage in the development of international law.

The significance of the finding in question becomes fully conspicuous if we examine it in the context of what has been the nub of the debate in the present case. For, in final analysis, the essence of the disagreement between the Parties is reducible to the fact that Libya maintains that delimitation must rest on the principle of the natural prolongation of the land territory, whereas Malta considers that the "distance principle" should be upheld.

If we look carefully at these positions, as the Court has done, we see that

Malta, in arguing in favour of the "distance principle", has sought to justify the use of equidistance as the delimitation method which must necessarily be employed in this case ; and that Libya, for its part, in arguing for the principle of natural prolongation, has attempted to prove that any delimitation line between itself and Malta should pass through what the Parties have agreed to call the "Rift Zone", which extends roughly from 10° 30′ E to 16° E, and which is formed by the troughs or grabens of Pantelleria, Malta and Linosa and the Malta-Medina Channel ; and that it should take account of the escarpment-fault zone to the east (particularly the Sicily-Malta and Medina Escarpments) : the rift zone would accordingly form a break between two continental shelves.

Both Parties concede that the delimitation of their respective continental shelves must be based on equitable principles in order to achieve an equitable result. But they have taken different positions regarding the interpretation of the law applicable to the case. And since the Court had a duty to indicate which principles and rules of international law were to form the basis of the delimitation, it has had to try and bring these to light from out the penumbra into which they had been cast by the learned, ingenious but contradictory arguments of the Parties.

The development of the law of the sea, especially since 1958, has shown a tendency to extend the concept of the continental shelf and to attach it increasingly to legal principles, and to detach it ever more surely from its physical origins, whether geological or geomorphological. Moreover, the indisputable connection between the continental shelf and the exclusive economic zone argues in favour of a purely legal approach to the former, which is henceforward to be primarily defined in terms of a certain distance rather than by the physiography of the sea-bed and its subsoil. This does not mean that the concept of natural prolongation has no longer any role to play. The development in question is to be interpreted simply as meaning that, in contemporary customary law, natural prolongation is no longer what Truman referred to as such in his 1945 Proclamation. Every coastal State is entitled to a continental shelf, which is the natural prolongation of its territory. This title may be limited in four different ways :

(1) by 200 nautical miles, when the outer edge of the continental margin is at a lesser distance than this ;

(2) by the outer edge of the continental margin, when this lies beyond 200 miles ;

(3) by a distance of 350 miles, when the outer edge of the continental margin is situated at a limit in excess of that distance ;

(4) by the rights and titles of other States.

The respective Parties, in their pleadings and oral arguments, have attempted to achieve supremacy for "natural prolongation" over the "distance principle" or vice-versa. But are these two concepts incompatible ?

The Court states that the "concepts of natural prolongation and distance are . . . not opposed, but complementary" (Judgment, para. 34). In its eyes, "both remain essential elements in the juridical concept of the continental shelf" *(ibid.)*. Yet a study of what the Court indicates in this paragraph discloses that it is using the term "natural prolongation" in two different senses, as will be seen from the following quotation :

> "where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore . . .".

I fully endorse this view. But I should have preferred the Court to place more emphasis on this point.

Such findings place accurately on record the development of the customary law of the continental shelf.

This development reached its most recent stage in the United Nations Convention on the Law of the Sea of 10 December 1982. Title to continental shelf derives from the *continuum* formed by the territory of a State with the submarine areas extending in front of its coasts. A fundamental legal principle is involved here. The extent of the sovereign rights which it confers is henceforward to be measured in two ways : by reference to the continental margin, or by invoking a certain distance. In other words, this fundamental principle now encompasses two rules which serve to implement it, particularly in determining the expanse of continental shelf covered by the sovereign rights of the coastal State.

Just as under the 1958 Geneva Convention there is an "equidistance/special-circumstances" rule for determining the extent of continental shelf title in a given situation, so it may be said that under the 1982 Convention there is the rule of "natural prolongation/outer edge of the continental margin or distance".

The principle of natural prolongation, in the physical sense, is indivorcible from continental shelf law. But surely distance, on the other hand, has never been truly absent from the concept of natural prolongation. Has it not accompanied that concept from the outset ? It used to be latent in such notions as "exploitability" or "bathymetry". However, when these concepts proved far too relative, resort to an exact distance became necessary in order to define the factors which determine rights to areas in or under the sea.

It may of course be argued that Article 76 of the 1982 Convention does not deal with delimitation, and that the latter is covered rather by Article 83, which makes no reference to any distance principle.

Indeed, this argument is reinforced by the conclusions reached by the Court in 1969, when it stated that :

> "Articles 1 and 2 of the Geneva Convention do not appear to have

> any direct connection with inter-State delimitation as such. Article 1 is concerned only with the outer, seaward, limit of the shelf generally, not with boundaries between the shelf areas of opposite or adjacent States. Article 2 is equally not concerned with such boundaries. The suggestion seems to be that the notion of equidistance is implicit in the reference in paragraph 2 of Article 2 to the rights of the coastal State over its continental shelf being 'exclusive'. So far as actual language is concerned this interpretation is clearly incorrect. The true sense of the passage is that in whatever areas of the continental shelf a coastal State has rights, those rights are exclusive rights, not exercisable by any other State. But this says nothing as to what in fact are the precise areas in respect of which each coastal State possesses these exclusive rights. This question, which can arise only as regards the fringes of a coastal State's shelf area is, as explained at the end of paragraph 20 above, exactly what falls to be settled through the process of delimitation, and this is the sphere of Article 6, not Article 2." (*North Sea Continental Shelf, I.C.J. Reports 1969,* p. 40, para. 67.)

At first sight, it appears that this conclusion could be applied *mutatis mutandis* to Articles 76 and 83 of the 1982 Convention.

In fact, however, the situation is no longer the same. Article 6 of the 1958 Convention establishes a method of delimitation by the "equidistance/special-circumstances" rule. The clause covering delimitation is therefore sufficient in itself to supply the solution in the event of negotiations or judicial proceedings. This is no longer the case with the 1982 Convention, since Article 83 confines itself to indicating that the delimitation must produce an "equitable solution". A delimitation problem arises when the rights derived from Article 76 conflict with one another, and the solution is not given in the Convention. Thus it is through a comparison of the titles which underlie the conflicting rights, and of the methods of evaluating them, that the solution to this conflict may be found. The course indicated by the new provisions is such that this comparison will almost always lead to a "solution" attributing rights. Article 83 of the 1982 Convention, unlike Article 6 of the 1958 Convention, has no self-sufficient existence. In cases of overlapping or mutually interfering continental shelf rights, it must be read with Article 76 of the same Convention in order to produce a resolution of the conflicting claims generated by such situations.

Delimitation, after all, is merely the means of resolving situations of overlap or interference arising from the titles of the Parties to an area of continental shelf. Thus it is not feasible artificially to separate the right to an area of continental shelf from the rules for delimiting this shelf, as honed by State practice and the decisions of courts. An assessment has to be made of the bounds within which the competing rights can be exercised. Whether this assessment is made by reference to a distance, or by reference to the edge of the continental margin, in all cases the starting-point will be

existing titles based on the principle of natural prolongation ; to these we have then to apply the legal rules (viz., distance, the outer edge of the continental margin, the rights of third States).

Paragraph 1 of Article 76 of the 1982 Convention founds a State's title to continental shelf on the principle of the natural prolongation of its land territory. This is no mere inference, but – the rules for the interpretation of treaties set out in Article 31 of the Vienna Convention – clearly emerges the "ordinary meaning" of the words used in that paragraph, which provides :

> "The *continental shelf* of a coastal State *comprises* the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea *throughout the natural prolongation of its land territory* . . ." (Emphasis added.)

This principle of natural prolongation, according to Article 76, can be applied in two ways : either by means of the rule of the "outer edge of the continental margin", or by means of the "200-mile" rule. This is what is meant by the rest of the sentence :

> "to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".

Thus the 200-mile rule (or the "distance principle"), far from contradicting the principle of natural prolongation, in fact completes it, as it is also completed by the rule of the "outer edge of the continental margin". To express the same idea in another way, we can say that a coastal State has a right to the continental shelf because it is the natural prolongation of its land territory, and that this right is measured by reference to a geophysical fact (the outer edge of the continental shelf) or an arithmetical fact (the 200-mile distance).

In the hypothetical case of two States with opposite coasts whose continental shelves cannot extend as far as their minimum legal limits, the rule of the outer edge of the continental margin evidently has no part to play. This is what the Court means by saying that "no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation in the physical sense" (cf. the aforementioned finding) or that :

> "at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial" (Judgment, para. 39).

In the case of the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* the Court stated in no uncertain terms that :

> "The conclusion that the physical structure of the sea-bed of the Pelagian Block as the natural prolongation common to both Parties does not contain any element which interrupts the continuity of the continental shelf does not necessarily exclude the possibility that certain geomorphological configurations of the sea-bed, which do not amount to such an interruption of the natural prolongation of one Party with regard to that of the other, may be taken into account for the delimitation, as relevant circumstances characterizing the area, as indicated in this case in Article 1, paragraph 1, of the Special Agreement. In such a situation, however, the physical factor constituting the natural prolongation is not taken as a legal title, but as one of several circumstances considered to be the elements of an equitable solution." (*I.C.J. Reports 1982,* p. 58, para. 68.)

In stating that "the physical factor constituting the natural prolongation is not taken as a legal title", the Court had already taken a stand on the question of natural submarine boundaries, and, well in advance of the present case, had settled the question of the basis of title, which in spite of its name (natural prolongation) is entirely legal.

As for the distance rule, it is reinforced by the fact that the exclusive economic zone confers rights over not only the water column, but also over the sea-bed and its subsoil, and thus over the continental shelf. As far as the limits which it shares with the continental shelf, the exclusive economic zone confers upon coastal States the same rights, and these are exercised in the same conditions (Art. 56, para. 3, of the 1982 Convention).

Now, "theorists consider that the exclusive economic zone is part of general international law [1]", and the Court has itself held that the exclusive economic zone "may be regarded as part of modern international law" (*I.C.J. Reports 1982,* p. 74, para. 100) or that the institution of this zone has "become a part of customary law" (this Judgment, para. 34).

The question is whether this customary law is binding on all parties to a

[1] Raymond Goy, "Les sources du droit et la convention : droit conventionnel et coutumier", *Rapport général du colloque de Rome sur "Perspectives du droit de la mer à l'issue de la troisième conférence des Nations Unies",* 2, 3 and 4 June 1983, Pedone, Paris 1984, p. 53. On the same page, the author adds : "Thus the powers enjoyed within the exclusive economic zone are derived from customary law." Indeed, the Court holds the same view (see para. 34 of the Judgment). The customary law now being fashioned on the basis of the 1982 Convention has hastened the transformation of the concept of natural prolongation by detaching it from its physical connotations. Raymond Goy comments in his report :

> "Thus, contemporary lawmaking finds it possible for customary law to grow out of a draft convention in such a way as to enable all to take part in the formation of law. It features a custom which rapidly crystallizes through having a text to serve as model and is put into application ahead of the convention itself." *[Translations by the Registry.]*

case or whether each is free to pick only those rules which it finds convenient, contrary to President Koh's admonition, at the Conference on the Law of the Sea, that States could not take what they pleased from the Convention and leave whatever they did not want. Even disregarding this note of warning, the choice does not lie between natural prolongation and the distance "criterion", for in reality these are two rules, paired though on different levels, which are applied simultaneously, just as the rules of "natural prolongation" and "natural prolongation in the physical sense" (or outer edge of the continental margin), are paired. No option can be presented in the context of these rules, which form a single whole. It has simply to be decided in each case which pair applies. This involves considering the arguments for "distance" on the one hand and "continental margin", or "natural prolongation in the physical sense", on the other. Let no one be misled if the Judgment appears to use the same term for "natural prolongation" (the legal principle) and "natural prolongation" (in the physical sense). The Court itself is not so misled. This becomes plain if we compare its statement that "no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation in the physical sense" with the provisions of Article 76 of the 1982 Convention, whereby the continental shelf of a coastal State is "the natural prolongation of its land territory", or again, if we refer to the sentence contained in paragraph 41 of the Judgment, where the Court says :

> "The endeavour . . . in the terms of the Libyan argument, was to convince the Court of a discontinuity so scientifically 'fundamental', that it must also be a discontinuity of a natural prolongation in the legal sense"

and follows with the words "the Court, therefore, rejects the . . . argument of Libya".

That is my understanding of the Court's finding cited above. The principle of natural prolongation in Article 76 of the 1982 Convention is a purely legal concept. As for natural prolongation in the physical sense, it now finds concrete expression in the outer edge of the continental margin.

II. The Considerable Distance between the Coasts

The Court has found that the considerable distance between the coasts of the two States is a relevant circumstance which must be taken into consideration in order to arrive at an equitable delimitation, for, having considered a number of circumstances and rejected each of them as lacking in relevance, it states :

> "there remains however the very marked difference in the lengths of the relevant coasts of the Parties, and the element of the considerable distance between those coasts" (Judgment, para. 66).

Admittedly, in determining "the extent of the required northward shift of the boundary line", the Court no longer considers "the considerable distance between the coasts" as a relevant circumstance, but rather as a "parameter" which is

> "an obviously important consideration when deciding whether, and by how much, a median line boundary can be shifted without ceasing to have an approximately median location, or approaching so near to one coast as to bring into play other factors such as security" (Judgment, para. 73).

Nevertheless, it concludes that :

> "The circumstances and factors to be taken into account in achieving an equitable delimitation in the present case are the following :
>
> . . . . . .
>
> (2) the disparity in the lengths of the relevant coasts of the Parties and the distance between them" (Judgment, para. 79 B).

It must be recognized that no clear explanation emerges from the Judgment of the reasons for taking into consideration as a relevant circumstance the considerable distance between the coasts of the Parties.

For my part, I confess, I cannot understand by what process the distance between the coasts of the two States can instigate or justify the correction of the median line initially drawn by the Court as a provisional step in the delimitation.

Certainly, the fact that the continental shelf abutting on the coasts of the two States has a breadth of less than 400 nautical miles has undeniable importance. It could not be otherwise, since it is this fact which brings about the need for delimitation, leaving aside the case of the edge of the continental margin of one or both of the shelves being located where it would have to be taken into account. If the shelf separating the two States had been more than 400 nautical miles wide, the solution to the problem put to the Court would have been simple. But it is for the very reason that the two States involved are unable fully to exercise the rights imputed to them by customary law, and to extend their continental shelves as far as their "legal" limits, that a delimitation problem arises for them. The total extent of the continental shelf between Malta and Libya is approximately 183 nautical miles. It is this shelf which was to be divided so as to achieve an equitable result.

It must also be pointed out that if the distance between the coasts of the two States were less than 24 nautical miles, what would be at issue would be the territorial waters, and I do not think it likely that any question would arise of adjusting the territorial limit of the two States.

But this is not the question. The question is why the fact that a con-

siderable distance separates the coasts of two opposite States should have led the Court to adjust the preliminary median line which it had drawn between their coasts. If Malta, instead of lying at 183 miles from the Libyan coast, were separated from it by a distance of only 50 miles, would that make any difference ? I do not think so. At all events, there is nothing in the Judgment to point to the opposite conclusion. The problem which arises is related to proportionality. It would arise in the same way in a hypothetical situation of that kind. The difference in the lengths of the coasts of two opposite States neither increases nor decreases with the distance between them. This is an obvious fact which cannot be altered by the attempt to find an equitable result, even if, in some degree, the room for manœuvre available for this purpose may vary with the distance between the coasts of the States concerned, though to what extent or in what direction it is impossible to determine. And it is this difference which is decisive in the present instance, where we are dealing with an adjustment in the light of the "general configuration of the coasts" which lie "opposite" and the "general geographical context" in which the delimitation is being carried out.

A few examples will illustrate even better the fact that the distance between the coasts of the Parties, in the present instance, plays no role at all. The Court's manner of taking the distance into consideration fails to emerge clearly from the pronouncements in the Judgment, for two reasons. In the first place, there is no indication whether the Court views the distance between the coasts of the two States as a relevant circumstance because it is considerable, or merely because it is what it happens to be in the present case. Paragraph 78 of the Judgment states that :

> "Having drawn the initial median line, the Court has found that that line requires to be adjusted in view of the relevant circumstances of the area, namely the considerable disparity between the lengths of the coasts of the Parties here under consideration, the distance between those coasts . . ."

In the operative part of the Judgment, the Court employs virtually identical language, quoting among the

> "circumstances and factors to be taken into account in achieving an equitable delimitation in the present case . . ." "the disparity in the lengths of the relevant coasts of the Parties and the distance between them" (para. 79 B. (2)).

It will be seen that the Court does not qualify the distance. It does not state that it is considerable. But apparently, no particular significance is to be attached to this omission, since where the disparity in the length of the coasts is concerned the word "considerable" does not recur in the operative part of the Judgment. Moreover, in the reasoning, paragraph 66 refers to : "the very marked difference in the lengths of the relevant coasts of the Parties, and the element of the considerable distance between those

coasts". It must therefore be concluded from the foregoing that the distance between the coasts of the Parties is a relevant circumstance because it is considerable. Besides, the Court can surely not have found that transposition of the median line was called for simply because the coasts of the Parties were separated by the actual distance found to lie between them.

In the second place, it is not very clear if the Court has used the distance between the coasts as an independent "element" which contributes to the adjustment of the initial median line, or as a "circumstance", a "parameter" or a "factor" which is inseparable from the disparity in the lengths of the coasts and must play an integral role with it.

In my opinion, the former hypothesis should be rejected, because it would lead to absurd conclusions. To accept that the considerable distance between the coast lengths of two States is in itself sufficient to justify an adjustment of the median line would mean that, whenever such a distance is considerable, the median line must be adjusted, even in cases where the disparity in the lengths of the coast is negligible or non-existent. That would be an unacceptable position.

As for the second hypothesis, it is incompatible with the terms of the Judgment, despite the two provisions quoted above which mention both these circumstances at the same time. But let us suppose that this hypothesis is valid. Would that mean either that the two circumstances can only have an effect when they are found in conjunction, or that the disparity in the lengths of the coasts is only taken into account to any significant degree because the distance between the coasts is considerable ? I do not believe that the Court can have intended the first proposition. This may confidently be asserted in the light of the significance which it has always ascribed, and which it continues to ascribe in the present case, to differences in the lengths of coastline.

Where the second proposition is concerned, it would be a simple matter to demonstrate that the considerable distance between the coasts of States cannot influence, or at any rate increase, the effect to be attributed to disparity in lengths of coast. Let us suppose that two States' coasts are 399 miles apart, such that they are only one mile short of escaping any delimitation problems. Let us also suppose that the same disparity in the lengths of the coasts is present. It is obvious that the role played by this disparity would dwindle precisely because of the considerable distance between the coasts, so it would be rash to state, as the Court does in paragraph 73 of the Judgment, that :

> "the considerable distance between the coasts . . . is an obviously important consideration when deciding whether, and by how much, a median line boundary can be shifted . . .".

This is because the margin of transposition in such a hypothetical case would be reduced to half a mile, since beyond that margin the State which benefited from the transposition would otherwise be allotted a continental shelf of more than 200 miles' breadth. Considering that in the present case

equity calls for a margin of 24 miles, it should immediately be apparent that there is no direct relationship between the distance separating the coasts of the two States and the amount by which the median line dividing the continental shelves appertaining to those States is to be shifted in order to achieve an equitable result.

(Signed) Kéba MBAYE.