## SEPARATE OPINION OF PRESIDENT J. L. BUSTAMANTE Y RIVERO

*[Translation]*

1. I share the opinions expressed in the text of the Judgment and the conclusions in its operative provisions, except so far as concerns paragraph 59, with regard to which I must express the reservation that will be found below. Nevertheless, I believe it to be possible to state some further considerations in support of certain principles and rules of law upon which the Parties might also base themselves for the purpose of carrying out the delimitation, the effecting of which they have reserved to themselves by Article 1, paragraph 2, of the Special Agreements whereby the Court was seised.

2. The reasoning I have followed in drawing up the present opinion was the following: although the institution of the continental shelf is a new institution, it is the fact that its application has now become very widespread. Numerous States, in all continents, have adopted its fundamental principles into their legislation and constantly apply them. In this sense, it is not going too far to say that the régime of the continental shelf has today a concrete existence and a growing vitality.

Since the governmental proclamations which lay at its origin (about 25 in number) have but rarely been challenged, but have, on the contrary, set a trend in motion, they have thereby acquired the character of relevant factors from the point of view of international law. While it is true that some proclamations formed the subject of reservations on the part of certain other States, those reservations arose from the fact that the rights proclaimed over the continental shelf gave to this concept an ambit which the objecting States considered excessive; it must consequently be concluded therefrom that the expression of such reservations merely constitutes further evidence of the effective nature of the institution from that time on. The writings of publicists have firmly supported the concept of the continental shelf and have recognized as legitimate its legal foundation, namely: the utilization of the natural resources of the seabed and subsoil for the benefit of the neighbouring peoples and of mankind in general. In several bilateral agreements, States have subsequently confirmed the system by adopting it for their mutual relations. Finally, the Geneva Conference tried to systematize the principles of the new institution in the 1958 Convention on the Continental Shelf and sought to define the methods by which they can be applied.

Having regard to the recent appearance of this new branch of maritime law and to the still limited and not always happy experience that has been had of its methods of application, it is understandable that some hesitation might have been felt with regard to the formal incorporation of all its principles and norms into general international law. It seems to me, however, that certain basic concepts, at any rate, the acceptance of which corresponds to a well-nigh universally held opinion, or the sense of which necessarily flows from the very concept of the continental shelf, are already sufficiently deeply anchored for such incorporation to be possible. This is, moreover, what the Judgment states so far as concerns, for example, the two principles set forth in paragraph 85, sub-paragraphs *(a)* and *(b)*, the former referring to the obligation to negotiate incumbent upon the States concerned for the purposes of delimiting their continental shelves and the latter referring to the application of equitable principles for determining the rights of the participating parties. These two principles, expressly stated in the Truman Proclamation, respectively reflect the exclusive right of the State, as sovereign, itself to decide on the boundaries set to the national territory, and the need to introduce into the negotiations on the continental shelf, complex in themselves and frequently full of unforeseen factors, that factor of good faith and flexibility which equity constitutes and which reconciles the needs of peaceful neighbourly relations with the rigidity of the law. A third principle is laid down in the Judgment (paragraph 85, sub-paragraph *(c)*), when it considers as established the notion that the continental shelf of every maritime State is *the natural prolongation of its land territory* and must not encroach upon that which constitutes the natural prolongation of the land territory of another State. This concept of "prolongation" is also implicit in the expression "adjacent to the coast", which is employed in the description of the continental shelf in Article 1 of the Geneva Convention of 1958. I shall demonstrate later that the concept of "prolongation", which takes on the aspect of "convergence" in the particular geographical circumstances of closed seas, involves certain limitations regarding the drawing of the boundary line of the shelves situated in such seas.

3. I am nevertheless of the opinion that besides the essential principles which I have just mentioned, it is possible to deduce others from the accepted concept of the continental shelf, whether they be sought in the Truman Proclamation or in Articles 1 and 2 of the Geneva Convention, or whether they be the logical and necessary consequence of adapting the basic principles to certain unavoidable geographical facts of which examples are to be found throughout the world. I have listed such possible supplementary principles below.

4. The concept, already examined, of "natural prolongation" of the land territory of the coastal State implies, as an obvious logical necessity, a relationship of *proportionality* between the length of the coastline of the land territory of a State and the extent of the continental shelf

appertaining to such land territory. Parallel with this, so far as concerns inter-State relations, the conclusion is inescapable that the State which has a longer coastline will have a more extensive shelf. This kind of proportionality is consequently, in my view, another of the principles embraced by the law of the continental shelf. The Judgment, in paragraphs 94 and 98, mentions this element as one of the factors to be taken into consideration for the delimitation of a shelf; the Court nevertheless did not confer upon it the character of an obligatory principle.

The preceding question leads quite naturally to that of the method to be applied for measuring the length of the coastline of the land territory of a State and, so far as concerns the continental shelf, I do not share the idea that that length must be measured as in the case of the territorial sea, from the low-water line. That criterion, laid down in the 1958 Convention, probably originates from the fact that the institution of the continental shelf is historically subsequent to that of the territorial sea and it was perhaps thought that an apparent similarity between the two cases rendered the adaptation thereof possible. In reality, the cases are different. The continental shelf, being but a natural prolongation of the land territory, forms an integral part thereof and is physically identified with it, so as to constitute a single land mass. A dividing line between the land territory and the shelf consisting of the low-water mark would be a boundary that would be variable, capricious and, furthermore, foreign to the concept of the continental shelf. After all, the low-water mark relates only to a changeable and irregular surface element, viz., the relief or topography of the coast. This uncertain element, subject to numerous physical and geographical circumstances, does not seem to be the most appropriate for defining the starting-point for a land mass such as the continental shelf, the close link between which and the land territory is beyond discussion. A more stable baseline must be found and it might be obtained by measuring the length of the coastline according to its general direction, by means of a straight line drawn between the two extreme points of the marine frontier of the State concerned. In paragraph 98, the Judgment mentions this solution as one of the possible solutions in the present case. I must add that the principle of equity, which would apply at the same time as one of the elements which must govern the delimitation to be effected, would enable any difficulty which might arise in practice to be surmounted.

I must deal here with another, very closely related, subject. Neither do I share the viewpoint of the Geneva Convention of 1958, according to which the continental shelf commences only beyond the outer limit of the territorial sea. Such a viewpoint seems to me artificial and even highly debatable, not only because it contradicts the idea of adjacency to the coast referred to in Article 1 of the Convention, but, above all, because it upsets the geological concept of the land territory of which the continental shelf is but a physical prolongation under the territorial sea and even beyond it. Geology admits neither a break nor an inter-

mediate space between the coast of the land territory and the line where the continental shelf would be deemed to commence at the outer limit of the territorial sea. It seems to me that the truth is otherwise: that the territorial sea is superjacent to that part of the shelf which is closest to the coast. But there is no geological difference between the bed of the territorial sea and that part which extends beyond the outer limit of that sea. These two beds constitute in fact but a single geological formation: the continental shelf, the characteristic of which is to constitute an area of shallow depth in relation to the level of the superjacent sea, gradually prolongs the continent until the continental platform is reached, from which there is a sudden sharp drop to the great depths of the high seas.

5. If, on the basis of the criterion adopted in the Convention, the possibility of utilizing the natural resources of the seabed and of its subsoil close to the coast was the determinant reason in the creation of the continental shelf, it goes without saying that certain fundamental principles must be stated which furnish a basis for the legal system governing the exploration and exploitation of those resources.

In my opinion, the fact of taking into consideration the existence or the location of natural resources in the area of a continental shelf, far from constituting *in principle* an essential factor for judging where to draw the boundary with a neighbouring shelf, rather entails the risk of constituting a disturbing factor to the detriment of equity. But a court cannot ignore reality, which latter shows that at the origin of the concept of the continental shelf, opening to coastal States the possibility of exploiting the riches which it contains, is to be found a criterion of social and economic import. That is why it is indispensable to consider whether, on the basis of the elements furnished by the accepted concept of the continental shelf and contained in the initial proclamations, in the writings of qualified publicists, in the proceedings at Geneva and in the practice of States, it is possible to formulate certain postulates aimed at co-ordinating the basic concepts of the institution and the factors represented by geographical circumstances, technical requirements or economic needs. This notion of co-ordination is summarized in the principles and rules stated hereunder:

*(a)* The coastal State exercises sovereign rights over the continental shelf appertaining to its territory for the purposes of the exploration and exploitation of the natural resources to be found therein.

*(b)* The sovereign rights of a State over its continental shelf are exercised independently of the existence or non-existence of natural resources in the said shelf.

*(c)* The delimitation of any given continental shelf is not in principle subject to the location or direction of fields or deposits of such natural resources as may exist in the region in which the shelf is to be found, unless decisive circumstances so require, or an agreement to the contrary is reached between the States concerned, without prejudice to the rights of third parties.

*(d)* The exploitation of a deposit extending across the boundary line of a continental shelf shall be settled by the adjacent States in accordance with the principles of equity and, preferably, by means of the system of joint exploitation or some other system which does not reduce the efficiency of working or the quantities obtained. (The Court, in paragraph 97, touched upon the question of deposits as one of the factors which must reasonably be taken into consideration by the Parties.)

6. The special geographic situation of the continental shelves concerned requires, in my opinion, that rules of law, themselves also special, must be sought so as to enable the Parties to arrive at a just and equitable delimitation. The problems with which the Court has to deal must be placed within their particular geographical context. The continental shelves of Denmark, the Federal Republic of Germany, and the Netherlands, whose delimitation has to be carried out, appertain respectively to the territories of those three States, which are situated on the eastern coastline of the North Sea, while several other States border the rest of the approximately oval perimeter of this quasi-closed sea on the north, south and west. The area thus circumscribed is taken up by the various national continental shelves lying no deeper than 200 metres below sea-level (with the exception of the Norwegian Trough). The Parties agree as to this fact.

This special geographical configuration of the North Sea confers on the continental shelves included within it certain characteristic aspects so far as their location, form and mutual delimitation are concerned, and these aspects have an influence upon the legal régime. The aspects in question are as follows:

*(a)* In this kind of configuration, the natural prolongation of the territory of each State, starting from the shore, moves in a seaward direction towards the central area of the sea under consideration; while the lateral boundary lines of each shelf naturally and necessarily converge towards that same central area. The principle of convergence is therefore normal for the delimitation of the shelves in this kind of sea unless the Parties agree upon another solution.

*(b)* The natural convergence of the lateral delimitation lines of adjacent shelves belonging to such seas in fact precludes the possibility of giving to those lines parallel directions and, in consequence, of obtaining shelves of a rectangular shape. This convergence therefore introduces a new factor, one which the necessity of avoiding all overlapping or encroachment renders practically inevitable, i.e., the progressive narrowing of the shelf as it approaches the central apex; the shelf then takes on approximately the form of a trapezium or triangle, according to whether the central maritime area is more or less elongated or, on the contrary, more nearly circular.

In the light of these facts, which demand that the concept of "prolongation" be adapted to the exigencies of geography, and referring for the

time being solely to the problem of *lateral* delimitation, I believe that there is justification for laying down in the present instance, as a rule to be followed by the Parties, the adoption of the system of converging delimitation lines for the purpose of drawing the lateral boundaries of the continental shelf of the Federal Republic of Germany, both as concerns the German-Danish boundary to the north and as concerns the German-Dutch boundary to the south; of course the following two essential elements must also be borne in mind:

(i) the delimitation will be made only beyond the partial boundary lines determined by the treaties of 1 December 1964 and 9 June 1965 already cited (points D and B on the map shown as Annex 16 in the Counter-Memorial);

(ii) the extremities of the two lateral boundary lines to be drawn will meet the line or, as the case may be, the point indicating the western side or apex of the German shelf, the special legal situation of which is described in sub-paragraph *(f)* of the present paragraph. It is for the Parties to choose the method or methods for carrying out this lateral delimitation, in conformity with the terms of the Special Agreements now in force, as well as to combine those methods with the principle of equity, as contemplated in paragraph 85 of the Judgment.

*(c)* The convergence of the lateral boundaries of this type of shelf necessitates the consideration of a new and different delimitation, that of the apex or end boundary of the shelf in question, in the area where as a result of contact with the extremity or apex of the shelf of the opposite State there is a danger of a conflict of rights. This delimitation is customarily effected by the drawing of a median line, except in the case of agreement of the Parties to the contrary, or of the existence of special circumstances. So far as the North Sea is concerned, the use of the median line by the majority of the coastal States in the agreements for delimitation of their shelves of which mention will be made below shows that a regional customary law has come into existence on this point.

*(d)* The characteristics considered in the three preceding paragraphs are not, in my opinion, new expressions or concepts of the law of the continental shelf, but are simply logical adaptations of other principles, which have already been described, under the inescapable influence of the geographical facts. For example, convergence is nothing but an aspect of the principle of the natural prolongation of the land territory, this prolongation being to a certain extent restricted as a result of the pressures resulting from local geography. The determination of the apex, as one of the boundaries of the continental shelf, is implicit in the definition thereof, since it must not be undefined and must not be prolonged beyond the neighbouring domain, that is to say beyond the apex of the shelf of the opposite State, nor yet beyond the points where the depth of the sea exceeds the 200-metre depth line, if the Convention

of 1958 is adopted. The principle of what is *reasonable* applies, in my view, in all cases, for the recognition as legally proper of these occasional variants of the principles and rules which are the basis of the legal régime of the continental shelf, as contained in its generally accepted definition, which principles have been backed by sufficiently repeated support of the *opinio juris* among States, and by the writings of publicists.

It is as well to add that the expression of these ideas does not imply that the present writer would wish to propose the application, in the present case, of the sector system (a concept which, from the strictly technical point of view, does not correspond to the situation in the North Sea), and less still to distribute between the Parties shares of such sectors taken from the shelf as a whole. The present writer's argument is particularly directed to the fact that, in the North Sea, taking into account its peculiar configuration, particularly on the eastern coast, the lateral demarcation lines of the national shelves necessarily converge toward the central area, and the fact that it is necessary to demarcate not merely the lateral boundaries of each shelf but also the apex or end boundary in order to fix in law the neighbour-relationship with the shelf of the opposite State.

*(e)* It remains to be added—and this observation seems to me not merely important, but possibly decisive—that in practice a substantial number of the continental shelves of the North Sea have already been delimited, wholly or in part, according to the very principles which I have just expressed. In other words, a body of treaty-law which is fairly widespread and generally accepted exists on this question among the coastal States of the North Sea. An examination of the Anglo-Norwegian Agreement of 10 March 1965, the Anglo-Dutch Agreement of 6 October 1965, the Danish-Norwegian Agreement of 8 December 1965, and the Anglo-Danish Agreement of 3 March 1966, is sufficient to show that the system of convergence lines towards the central space, and the use of the median line, have invariably been adopted for the delimitation of the shelves between opposite States, with reference to their apices. The German-Dutch Agreement of 1 December 1964 and the German-Danish Agreement of 9 June 1965 on the lateral delimitation of the shelves near the coast also show that the two partial lines which were drawn up by these Agreements, although their course was interrupted, are clearly lateral lines converging towards the central region of the sea. Consequently, when in this opinion I draw the Parties' attention to the obligation to refer, for the delimitation of the German continental shelf, to the rule set out in paragraph 6, I do no more than observe the existence of a customary law of a regional nature, which in the form of treaty law has generally prevailed for some years in the practice of coastal States of the North Sea.

*(f)* It still remains to determine the principles and rules according to which the delimitation of the apex (west side) of the shelf of the Federal Republic of Germany should be effected by the Parties. This demands

first that the legal situation be examined which results in this connection from the Agreement of 31 March 1966 between the Netherlands and Denmark on the delimitation of the continental shelves which these two countries have allotted to themselves on the basis of the equidistance principle; this also requires that the situation be studied which derives from the Agreements of 6 October 1965 and 3 March 1966, determining by an unbroken median line (points G-F-H on the map, Annex 16 to the Counter-Memorial) the boundaries between the apices of the Anglo-Dutch and Anglo-Danish shelves respectively.

As to the first of these three agreements, the Court has considered that it was not opposable to the Federal Republic of Germany which, not having been a party thereto, informed the contracting parties of its reservations (Annex 15 to the Memorial). The Court has also indicated that, Denmark and the Netherlands not being adjacent States, their application of the equidistance system was not in conformity with the text of Article 6, paragraph 2, of the 1958 Geneva Convention.

So far as concerns the two other agreements mentioned (Netherlands/United Kingdom and Denmark/United Kingdom), in regard to which the Federal Republic of Germany has also made observations (Annexes 10 and 13 to the Memorial), it is not for the Court to make any finding as to their content or validity, since there is among the contracting parties thereto a State which is not a party to the present cases; according to the terms of the Special Agreements, the Court lacks jurisdiction. Since this is how matters stand, there would be no possibility of the Court laying down any rule concerning the drawing of a median line as between the United Kingdom and the Federal Republic. From the hypothetical point of view, various possibilities could be envisaged for the future: one might contemplate an Anglo-German settlement, in which the Netherlands and Denmark would acquiesce, which would enable the Anglo-Dutch-Danish median line to be redrawn so as to introduce therein, probably with a slight eastward inflection, a small section of Anglo-German median line, or simply a point, if it is the apex of a triangle which is envisaged; one might also imagine a tripartite agreement between Federal Germany, Denmark and the Netherlands in which the theoretical or mathematical position of a German-British median line would be fixed for the sole purpose of situating upon it the line (or point) where it would meet the two Danish-German and Dutch-German lateral boundary lines of the continental shelf of the Federal Republic, which lines would be drawn in conformity with the indications of paragraph 6 *(b)* above—the purpose thereof being the final completion of the delimitation of the German shelf. In the latter hypothesis, a narrow passage would probably preserve the junction of the extremities of the Dutch and Danish shelves behind the German shelf and, that being so, it would not be necessary for the United Kingdom to participate contractually for the purpose of adjusting the present median line. These hypotheses or perhaps others, more acceptable or more practical, might be

envisaged outside the ambit of the proceedings before the Court; but they all give rise to the profound conviction that in order to settle this situation in a satisfactory manner the Court has, in my view no other rule to prescribe to the Parties than observance of the principle of equity, always inspired by the two legal factors already defined; the concept of lateral convergence starting from points B and D of the map referred to above, and the concept of access to what would at least in theory be the Anglo-German median line or a point thereon, whether it be that the negotiations provide for the apex of a trapezium, or whether they provide for that of a triangle. At this point I must revert to the text of paragraph 85 *(a)* and *(b)* of the Judgment:

> "the parties are under an obligation to enter into negotiations [which] ... are meaningful, ... [and] are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied".

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Having thus expressed my separate opinion, I must go on to add the following declaration:

The comparison given in paragraph 59 of the Judgment by way of example is quite correct when it shows the quite different effects on the equidistance line of certain irregular configurations of the coastline according to whether the line is used for drawing the lateral boundaries of territorial waters, whose seaward extent is not considerable, or for defining the lateral boundaries of more extensive continental shelves. But from the fact that no uniform agreement, still less unanimity, exists between States as to the breadth of the territorial sea of each of them, and that it is not always certain that in every case the breadth of the continental shelf of a given State will extend beyond that of its territorial sea, it is impossible to conclude with certainty that the deviation-effects affecting the equidistance line will occur in practice in the way and to the extent indicated in that text. I have therefore thought it preferable to express some reservations so far as concerns my adherence to the content of the said paragraph 59, the more so in that if the problems of the territorial sea are connected problems, they do not directly constitute the principal object of the dispute, which concerns the continental shelf *in concreto*.

*(Signed)* J. L. BUSTAMANTE Y RIVERO.