NORTH SEA CONTINENTAL SHELF

(Federal Republic of Germany / Denmark; Federal Republic of Germany /Netherlands)

International Court of Justice

February 20, 1969

General List: Nos. 51 & 52

JUDGMENT OF 20 FEBRUARY 1969

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1. By the two Special Agreements respectively concluded between the Kingdom of Denmark and the Federal Republic of Germany, and between the Federal Republic and the Kingdom of the Netherlands, the Parties have submitted to the Court certain differences concerning 'the delimitation ***13** as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them'-with the exception of those areas, situated in the immediate vicinity of the coast, which have already been the subject of delimitation by two agreements dated 1 December 1964, and 9 June 1965, concluded in the one case between the Federal Republic and the Kingdom of the Netherlands, and in the other between the Federal Republic and the Kingdom of Denmark.

2. It is in respect of the delimitation of the continental shelf areas lying beyond and to seaward of those affected by the partial boundaries thus established, that the Court is requested by each of the two Special Agreements to decide what are the applicable 'principles and rules of international law'. The Court is not asked actually to delimit the further boundaries which will be involved, this task being reserved by the Special Agreements to the Parties, which undertake to effect such a delimitation 'by agreement in pursuance of the decision requested from the ... Court'-that is to say on the basis of, and in accordance with, the principles and rules of international law found by the Court to be applicable.

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7. The further negotiations between the Parties for the prolongation of the partial boundaries broke down mainly because Denmark and the Netherlands respectively wished this prolongation also to be effected on the basis of the equidistance principle,-and this would have resulted in the the dotted lines B- E and D-E, shown on Map 3; whereas the Federal Republic considered that such an outcome would be inequitable because it would unduly curtail what the Republic believed should be its proper share of continental shelf area, on the basis of proportionality to the length of its North Sea coastline. It will be observed that neither of the lines in question, taken by itself, would produce this effect, but only both of them together-an element regarded by Denmark and the Netherlands as irrelevant to what they viewed as being two separate and self-contained delimitations, each of which should be carried out without reference to the other.

8. The reason for the result that would be produced by the two lines B-E and D-E, taken conjointly, is that in the case of a concave or recessing coast such as that of the Federal Republic on the North Sea, the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity. Consequently, where two such lines are drawn at different points on a concave coast, they will, if the curvature is pronounced, inevitably meet at a relatively short distance from the coast, thus causing the continental shelf area they enclose, to take the form approximately of a triangle with its apex to seaward and, as it was put on behalf of the Federal Republic, 'cutting off' the coastal State from the further areas of the continental shelf outside of and beyond this triangle. The effect of concavity could of course equally be produced for a country with a straight coastline if the coasts of adjacent countries protruded immediately on either side of it. In contrast to this, the effect of coastal projections, or of convex or outwardly curving coasts such as are, to a moderate extent, those of Denmark and the Netherlands, is to cause boundary lines drawn on an equidistance basis to leave the ***18** coast on divergent courses, thus having a widening tendency on the area of continental shelf off that coast. These two distinct effects, which are shown in sketches I-III to be found on page 16, are directly attributable to the use of the equidistance method of delimiting continental shelf boundaries off recessing or projecting coasts. It goes without saying that on these types of coasts the equidistance method produces exactly similar effects in the delimitation of the lateral boundaries of the territorial sea of the States concerned. However, owing to the very close proximity of such waters to the coasts concerned, these effects are much less marked and may be very slight,-and there are other aspects involved, which will be considered in their place. It will suffice to mention here that, for instance, a deviation from a line drawn perpendicular to the general direction of the coast, of only 5 kilometres, at a distance of about 5 kilometres from that coast, will grow into one of over 30 at a distance of over 100 kilometres.. .

25. The Court now turns to the legal position regarding the equidistance method. The first question to be considered is whether the 1958 Geneva Convention on the Continental Shelf is binding for all the Parties in this case-that is to say whether, as contended by Denmark and the Netherlands, the use of this method is rendered obligatory for the present delimitations by virtue of the delimitations provision (Article 6) of that instrument, according to the conditions laid down in it. Clearly, if this is so, then the provisions of the Convention will prevail in the relations between the Parties, and would take precedence of any rules having a more general character, or derived from another source. On that basis the Court's reply to the question put to it in the Special Agreements would necessarily be to the effect that as between the Parties the relevant provisions of the Convention represented the applicable rules of law-that is to say constituted the law for the Parties-and its sole remaining task would be to interpret those provisions, in so far as their meaning was disputed or appeared to be uncertain, and to apply them to the particular circumstances involved.

26. The relevant provisions of Article 6 of the Geneva Convention, paragraph 2 of which Denmark and the Netherlands contend not only to be applicable as a conventional rule, but also to represent the accepted rule of general international law on the subject of continental shelf delimitation, as it exists independently of the Convention, read as follows:

'1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States

shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.'

***25** The Convention received 46 signatures and, up-to-date, there have been 39 ratifications or accessions. It came into force on 10 June 1964, having received the 22 ratifications or accessions required for that purpose (Article 11), and was therefore in force at the time when the various delimitations of continental shelf boundaries described earlier (paragraphs 1 and 5) took place between the Parties. But, under the formal provisions of the Convention, it is in force for any individual State only in so far as, having signed it within the time-limit provided for that purpose, that State has also subsequently ratified it; or, not having signed within that time-limit, has subsequently acceded to the Convention. Denmark and the Netherlands have both signed and ratified the Convention, and are parties to it, the former since 10 June 1964, the latter since 20 March 1966. The Federal Republic was one of the signatories of the Convention, but has never ratified it, and is consequently not a party.

27. It is admitted on behalf of Denmark and the Netherlands that in these circumstances the Convention cannot, as such, be binding on the Federal Republic, in the sense of the Republic being contractually bound by it. But it is contended that the Convention, or the regime of the Convention, and in particular of Article 6, has become binding on the Federal Republic in another way,-namely because, by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional regime; or has recognized it as being generally applicable to the delimitation of continental shelf areas. It has also been suggested that the Federal Republic had held itself out as so assuming, accepting or recognizing, in such a manner as to cause other States, and in particular Denmark and the Netherlands, to rely on the attitude thus taken up.

28. As regards these contentions, it is clear that only a very definite, very consistent course of conduct on the part of a state in the situation of the Federal Republic could justify the Court in upholding them; and, if this had existed-that is to say if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional regime-then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested-namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless

somehow become bound in another way. Indeed if it were a question not of obligation but of rights,-if, that is to say, a State which, though entitled ***26** to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.

29. A further point, not in itself conclusive, but to be noted, is that if the Federal Republic had ratified the Geneva Convention, it could have entered-and could, if it ratified now, enter-a reservation to Article 6, by reason of the faculty to do so conferred by Article 12 of the Convention. This faculty would remain, whatever the previous conduct of the Federal Republic might have been-a fact which at least adds to the difficulties involved by the Danish-Netherlands contention.

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37. It is maintained by Denmark and the Netherlands that the Federal Republic, whatever its position may be in relation to the Geneva Convention, considered as such, is in any event bound to accept delimitation on an equidistance- special circumstances basis, because the use of this method is not in the nature of a merely conventional obligation, but is, or must now be regarded as involving, a rule that is part of the corpus of general international law;-and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter. This contention has both a positive law and a more fundamentalist aspect. As a matter of positive law, it is based on the work done in this field by international legal bodies, on State practice and on the influence attributed to the Geneva Convention itself,-the claim being that these various factors have cumulatively evidenced or been creative of the opinion juris sive necessitatis, requisite for the formation of new rules of customary international law. In its fundamentalist aspect, the view put forward derives from what might be called the natural law of the continental ***29** shelf, in the sense that the equidistance principle is seen as a necessary expression in the field of delimitation of the accepted doctrine of the exclusive appurtenance of the continental shelf to the nearby coastal State, and therefore as having an a priori character of so to speak juristic inevitability.

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62. Whatever validity this contention may have in respect of at least certain parts of the Convention, the Court cannot accept it as regards the delimitation provision (Article 6), the relevant parts of which were adopted almost unchanged from the draft of the International Law Commission that formed the basis of discussion at the Conference. The status of the rule in the Convention therefore depends mainly on the processes that led the Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an a priori necessity for equidistance, and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation,

somewhat on an experimental basis, at most de lege ferenda, and not at all de lege lata or a an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule.

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63. The foregoing conclusion receives significant confirmation from the fact that Article 6 is one of those in respect of which, under the reservations article of the Convention (Article 12) reservations may be made by any State on signing, ratifying or acceding,-for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;-whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own ***39** favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention 'other than to Articles 1 to 3 inclusive'-these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the jurisdical character of the coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which there relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space.

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69. In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre- existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: qua conventional rule however, as has already been concluded, it is not opposable to the Federal Republic.

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70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice,-and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable

to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision concerned ***42** should, at all events potentially, be of a fundamentally normcreating character such as could be regarded as forming the basis of a general rule of law. Considered in abstracto the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of jus cogens, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,-but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm- creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention-of which there is at present no official indication-it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is,

though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.

***43** 74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

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75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle-in the majority of the cases by agreement, in a few others unilaterally-or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway-Denmark- Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, a priori, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of ***44** their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no

lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection-and it seems necessary to stress it-is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinio juris; - for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the Lotus case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, mutatis mutandis, to the present case (P.C.I.J., Series A, No. 10, 1927, at p. 28):

'Even if the rarity of the judicial decisions to be found ... were sufficient to prove ... the circumstance alleged ..., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, ... there are other circumstances calculated to show that the contrary is true.'

Applying this dictum to the present case, the position is simply that in certain cases-not a great number-the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt ***45** legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so-especially considering that they might have been motivated by other obvious factors.

79. Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of

Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law,-more particularly where lateral delimitations are concerned.

80. There are of course plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance-mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the continental shelf.

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81. The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.

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83. The legal situation therefore is that the Parties are under no obligation to apply either the 1958 Convention, which is not opposable to the Federal Republic, or the equidistance method as a mandatory rule of customary law, which it is not. But as between States faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties. Equally, it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule.

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101. For these reasons,

THE COURT,

by eleven votes to six,

finds that, in each case,

(A) the use of the equidistance method of delimitation not being obligatory as between the Parties; and

(B) there being no other single method of delimitation the use of which is in all circumstances obligatory;

(C) the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the agreements of 1 December 1964 and 9 June 1965, respectively, are as follows:

(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;

(2) if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;

(D) in the course of the negotiations, the factors to be taken into account are to include:

***54** (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;

(2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;

(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

Done in English and in French, the English text being authoritative at the Peace Palace, The Hague, this twentieth day of February, one thousand nine hundred and sixty-nine, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany, to the Government of the Kingdom of Denmark and to the Government of the Kingdom of the Netherlands, respectively.

(Signed) J. L. BUSTAMANTE R., President.

(Signed) S. AQUARONE, Registrar.

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DISSENTING OPINION OF JUDGE LACHS

It is generally recognized that provisions of international instruments may acquire the status of general rules of international law. Even unratified treaties may constitute a point of departure for a legal practice. Treaties binding many States are, a fortiori, capable of producing this effect, a phenomenon not unknown in international relations.

I shall therefore now endeavour to ascertain whether the transformation of the provisions of Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf, and in particular the equidistance rule, into generally accepted law has in fact taken place. This calls for an analysis of State practice, of the time factor, and of what is traditionally understood to constitute opinio juris.

***226** Ten years have elapsed since the Convention on the Continental Shelf was signed, and 39 States are today parties to it.

Delay in the ratification of and accession to multilateral treaties is a well- known phenomenon in contemporary treaty practice. (According to a recent study conducted by the United Nations Institute for Training and Research, 55 out of 179 multilateral treaties in respect of which the Secretary-General of the United Nations performs depositary functions had received an average of only about 27 per cent. of possible acceptances.) It is self-evident that in many cases substantive reasons are at the root of these delays. However, experience indicates that in most cases they are caused by factors extraneous to the substance and objective of the instrument in question. Often the slowness and inherent complication of constitutional procedures, the need for interdepartmental consultations and co-ordination, are responsible (lack of ratification does not, however, prevent States from applying the provisions of such conventions). Frequently, again, there is procrastination, due to the lack of any sense of urgency, or of immediate interest in the problems dealt with by the treaty, for so long as there are other important issues to deal with. This may be illustrated by a comparison between the Convention on Diplomatic Relations (signed at Vienna on 24 April 1961) and the Convention on the High Seas (signed at Geneva on 29 April 1958). Both are eminently instruments which codify existing law. Yet the first, within a period of about seven years, had received 77 ratifications, accessions or notifications of succession, while after a lapse of ten years only 42 States had become parties to the latter. The reasons seem self-evident: the Convention on Diplomatic Relations is of direct, daily interest for every State. It took ten years for an instrument codifying existing law, the Convention on the Prevention and Repression of the Crime of Genocide (adopted by the General Assembly of the United Nations on 9 December 1948), to obtain 59 ratifications and accessions, while by the end of 1967-20 years after its adoption-71 States had become parties to it.

These overlong delays in ratification and their causes, not related to the substance of the instruments concerned, are factors for which due allowance has to be made.

I may have dwelt on this point at excessive length. I have done so because it is relevant to the issue now before the Court. For it indicates that the number of ratifications and accessions cannot, in itself, be considered conclusive with regard to the general acceptance of a given instrument.

In the case of the Convention on the Continental Shelf, there are other elements that must be given their due weight. In particular, 31 States came into existence during the period between its signature (28 June 1958) and its entry into force (10 June 1964), while 13 other nations have since acceded to independer ce. Thus the time during which these ***227** 44 States could have completed the necessary procedure enabling them to become parties to the Convention has been rather limited, in some cases very limited. Taking into account the great and urgent problems each of them had to face, one cannot be surprised that many of them did not consider it a matter of priority. This notwithstanding, nine of those States have acceded to the Convention. Twenty-six of the total number of States in existence are moreover land-locked and cannot be considered as having a special and immediate interest in speedy accession to the Convention (only five of them have in fact acceded).

Finally, it is noteworthy that about 70 States are at present engaged in the exploration and exploitation of continental shelf areas.

It is the above analysis which is relevant, not the straight comparison between the total number of States in existence and the number of parties to the Convention. It reveals in fact that the number of parties to the Convention on the Continental Shelf is very impressive, including as it does the majority of States actively engaged in the exploration of continental shelves.

Again, it is noteworthy that while 39 States are parties, initial steps towards the acceptance of the Convention have been taken by 46 States, who have signed it: half of them have ratified it. Thus to the figure of 39 that of 23 States is to be added, i.e., those States which by signing it have acquired a provisional status vis-a-vis the Convention, each of them being 'obliged to refrain from acts which would defeat the object and purpose of the treaty ...' until it 'shall have made its intention clear not to become a party to the treaty' (Article 15a of the Draft Articles of the Law of Treaties, prepared by the I.L.C., as amended and adopted by the Committee of the Whole of the Conference on the Law of Treaties; Doc. A/CONF. 39/C.1/L.370/Add. 4, p. 8).

This mathematical computation, important as it is in itself, should be supplemented by, so to speak, a spectral analysis of the representativity of the States parties to the Convention.

For in the world today an essential factor in the formation of a new rule of general international law is to be taken into account: namely that States with different political, economic and legal systems, States of all continents, participate in the process. No more can a general rule of international law be established by the fiat of one or of a few, or-as it was once claimed-by the consensus of European States only.

This development was broadly reflected in the composition of the Geneva Conference on the Law of the Sea; it is now similarly reflected within the number of States which are parties to the Convention on the Continental Shelf. These include States of all continents, among them States of various political systems, with both new and old States representing the main legal systems of the world.

***228** It may therefore be said that, from the viewpoints both of number and of representativity, the participation in the Convention constitutes a solid basis for the formation of a general rule of law. It is upon that basis that further, more extensive practice has developed:

(a) A considerable number of States, both parties and not parties to the Convention (and quite apart from the Parties to the present cases), have concluded agreements delimiting their continental shelves. Several of these make specific reference to the Geneva Convention ('having regard to ...', 'bearing in mind ...' or 'in accordance with the Geneva Convention on the Continental Shelf', 'bearing in mind Article 6 of the Geneva Convention on the Continental Shelf' or 'in accordance with the principles laid down in the Geneva Convention on the Continental Shelf of 1958, in particular its Article 6 '). At least six other agreements (registered with the United Nations) have accepted as a basis the equidistance or median lines, though without actually referring to the Convention. (Texts: United Nations Doc. A/AC. 135/11 , and Add. 1.)

(b) A considerable number of States (both parties and not parties to the Convention) have passed special legislation concerning their continental shelves, or included provisions on the subject in other instruments. Some of them have enacted a unilateral delimitation of their continental shelf on the basis of the equidistance rule. Fifteen have referred specifically to the Convention of 1958, invoking it in a preamble or in individual articles, or employing definitions derived from it (sometimes with slight modifications). One instrument refers to 'law and the provisions of international treaties and agreements', 'law or ratified international treaties' (Guatemala), and another accepts the median line as a definitive boundary (Norway). Another (U.S.S.R.) reproduces mutatis mutandis the full text of Article 6 of the Convention, while three (Finland, Denmark and Malaysia) make specific reference to that Article. Another, yet again, invokes 'established international practice sanctioned by the law of nations' (Philippines). (Texts: U.N. Doc. A/AC. 135/11 , and Add. 1.)

(c) In some cases the unilateral adoption of the equidistance rule has had a direct bearing on its recognition by other States. To give but one instance: Australia's Federal Petroleum (Submerged Lands) Act, 1967, which defines adjacent areas (section 5) and their delimitation (Second Schedule), is based on the application of the equidistance rule. This delimitation appears to have been effected on the assumption that a neighbouring State could not advance any claim beyond the equidistance line.

All this leads to the conclusion that the principles and rules enshrined in the Convention, and in particular the equidistance rule, have been ***229** accepted not only by those States which are parties to the Convention on the Continental Shelf, but also by those which have subsequently followed it in agreements, or in their legislation, or have acquiesced in it when faced with legislative acts of other States affecting them. This can be viewed as evidence of a practice widespread enough to satisfy the criteria for a general rule of law.

For to become binding, a rule or principle of international law need not pass the test of universal acceptance. This is reflected in several statements of the Court, e.g.: 'generally ... adopted in the practice of States' (Fisheries, Judgment, I.C.J. Reports 1951, p. 128). Not all States have, as I indicated earlier in a different context, an opportunity or possibility of applying a given rule.

The evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case the great majority of the interested States.

Thus this test cannot be, nor is it, one endowed with any absolute character: it is of its very nature relative. Criteria of frequency, continuity and uniformity are involved. However, not all potential rules are susceptible to verification by all these criteria. Frequency may be invoked only in situations where there are many and successive opportunities to apply a rule. This is not the case with delimitation, which is a one-time act. Furthermore, as it produces lasting consequences, it invariably implies an intention to satisfy the criterion of continuity.

As for uniformity, 'too much importance need not be attached to' a 'few uncertainties or contradictions, real and apparent' (Fisheries, Judgment, I.C.J. Reports 1951, p. 138).

Nor can a general rule which is not of the nature of jus cogens prevent some States from adopting an attitude apart. They may have opposed the rule from its inception and may, unilaterally, or in agreement with others, decide upon different solutions of the problem involved. Article 6, paragraph 2, of the Convention on the Continental Shelf, by virtue of the built-in exceptions, actually opens the way to occasional departures from the equidistance rule wherever special circumstances arise. Thus the fact that some States, as pointed out in the course of the proceedings, have enacted special legislation or concluded agreements at variance with the equidistance rule and the practice confirming it represents a mere permitted derogation and cannot be held to have disturbed the formation of a general rule of law on delimitation.

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***230** With regard to the time factor, the formation of law by State practice has in the past frequently been associated with the passage of a long period of time. There is no doubt that in some cases this may be justified.

However, the great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge: one it must meet, lest it lag even farther behind events than it has been wont to do.

To give a concrete example: the first instruments that man sent into outer space traversed the airspace of States and circled above them in outer space, yet the launching States sought no permission, nor did the other States protest. This is how the freedom of movement into outer space, and in it, came to be established and recognized as law within a remarkably short period of time. Similar developments are affecting, or may affect, other branches of international law.

Given the necessity of obviating serious differences between States, which might lead to disputes, the new chapter of human activity concerning the continental shelf could not have been left outside the framework of law for very long.

Thus, under the pressure of events, a new institution has come into being. By traditional standards this was no doubt a speedy development. But then the dimension of time in law, being relative, must be commensurate with the rate of movement of events which require legal

regulation. A consequential response is required. And so the short period within which the law on the continental shelf has developed and matured does not constitute an obstacle to recognizing its principles and rules, including the equidistance rule, as part of general law.

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Can the practice above summarized be considered as having been accepted as law, having regard to the subjective element required? The process leading to this effect is necessarily complex. There are certain areas of State activity and international law which by their very character may only with great difficulty engender general law, but there are others, both old and new, which may do so with greater ease. Where continental shelf law is concerned, some States have at first probably accepted the rules in question, as States usually do, because they found them convenient and useful, the best possible solution for the problems involved. Others may also have been convinced that the instrument elaborated within the framework of the United Nations was intended to become and would in due course become general law (the teleological element ***231** is of no small importance in the formation of law). Many States have followed suit under the conviction that it was law.

Thus at the successive stages in the development of the rule the motives which have prompted States to accept it have varied from case to case. It could not be otherwise. At all events, to postulate that all States, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction-and in fact to deny the possibility of developing such rules. For the path may indeed start from voluntary, unilateral acts relying on the confident expectation that they will find acquiescence or be emulated; alternatively, the startingpoint may consist of a treaty to which more and more States accede and which is followed by unilateral acceptance. It is only at a later stage that, by the combined effect of individual or joint action, response and interaction in the field concerned, i.e., of that reciprocity so essential in international legal relations, there develops the chain-reaction productive of international consensus.

In view of the complexity of this formative process and the differing motivations possible at its various stages, it is surely over-exacting to require proof that every State having applied a given rule did so because it was conscious of an obligation to do so. What can be required is that the party relying on an alleged general rule must prove that the rule invoked is part of a general practice accepted as law by the States in question. No further or more rigid form of evidence could or should be required.

In sum, the general practice of States should be recognized as prima facie evidence that it is accepted as law. Such evidence may, of course, be controverted-even on the test of practice itself, if it shows 'much uncertainty and contradiction' (Asylum, Judgment, I.C.J. Reports 1950, p. 277). It may also be controverted on the test of opinio juris with regard to 'the States in question' or the parties to the case.

In approaching this issue one has to take into account the great variety of State activity-manifesting itself as it does today in many forms of unilateral act or international instrument or

in the decisions of international organizations-, the multiplicity and interdependence of these processes.

With the ever-increasing activities of States in international relations, some rules of conduct begin to be accepted even before reaching that state of precision which is normally required for a rule of law. If their binding force is contested, courts operating within the traditional framework of certitude may apply tests of perfection and clarity they could not possibly pass. The alternative would be to fall back on some general and, it may be, elusive principle. This may not be conducive to strengthening the edifice of international law, which is so important for presentday ***232** international relations. One should of course avoid the risk of petrifying rules before they have reached the necessary state of maturity and by doing so endangering the stability of and confidence in law. It may, however, be advisable, without entering the field of legislation, to apply more flexible tests, which, like the substance of the law itself, have to be adapted to changing conditions. The Court would thus take cognizance of the birth of a new rule, once the general practice States have pursued has crossed the threshold from haphazard and discretionary action into the sphere of law.

As to the cases before the Court, the situation leaves little room for doubt. The conclusion by States of agreements in the field of continentalshelf delimitation has self-evidently expressed their willingness to accept the rules of the Convention 'as law' and has in fact represented a logical furtherance of the provisions of Article 6, paragraph 2. As for the unilateral acts concerned, they also, by their reference to the Convention or borrowing of its very wording, have given recognition to its provisions. Other States have done so by acquiescence.

The foregoing analysis leads to the conclusion that the provisions of Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf, and more especially the equidistance rule, have attained the identifiable status of a general law. This may be contested in a particular case by a State denying its opposability to itself. Then, of course, the matter becomes one of evidence.