DISSENTING OPINION OF JUDGE LACHS

A disagreement has arisen concerning the delimitation of the continental shelf in the North Sea as between the Federal Republic of Germany and the Kingdom of the Netherlands. The two States have succeeded in reaching agreement only on the delimitation of the coastal continental shelf and concluded on 1 December 1964 a convention to this effect. They were, however, unable to agree on the further course of the boundary, negotiations to that end having failed.

A similar situation has arisen between the Kingdom of Denmark and the Federal Republic. They too concluded, on 9 June 1965, a convention concerning the delimitation of the coastal continental shelf. The question of the further boundary line has remained unresolved, as negotiations to this end have proved unsuccessful.

Thus important differences on the subject subsist and in order to solve them the three States, by two Special Agreements, have requested the Court to decide: "what principles and rules of international law are 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 Conventions of 1 December 1964 and 9 June 1965 respectively. They have further declared that they shall delimit the continental shelf "by agreement in pursuance of the decision requested from the International Court of Justice" (Article 1, paragraph 2, of both Special Agreements).

I

In the light of these requests the Court is obviously faced with a question of law. To that extent, its task is clear. To discharge it two methodological approaches are possible: it can address itself directly to the question of the law "applicable" "as between the Parties" or, alternatively, ascertain in general if there exist any "principles and rules of international law" on the subject, and, in the affirmative, decide as to their applicability in the cases before it.

The latter approach may be justified in cases where the law is of very recent origin and doubts may exist as to the real status of a principle or rule. This is, indeed, the situation in the cases before the Court.

The need for a legal regulation of the exploration and exploitation of

the continental shelf has only recently become imperative as a result of the great strides of technology, which have enabled man to reach out for many of the treasures so jealously guarded by nature. Thus the law on the continental shelf is one of the newest chapters of international law.

The point of departure for any analysis of the issues involved is the Geneva Convention of 1958 on the Continental Shelf. The question of its applicability—and in particular of the applicability of its Article 6, paragraph 2, dealing with determination of the boundary of the continental shelf adjacent to the territories of two adjacent States—has dominated the whole proceedings in the present cases: it was raised in the written pleadings and again in the course of the oral proceedings. Thus it seems only logical to deal with this issue first. Moreover, the need to seek solutions outside Article 6, paragraph 2, or outside the Convention as a whole, will arise only if the reply as to their applicability is negative.

The substance and meaning of Article 6, paragraph 2, are determined by the interrelation of its three elements: agreement—equidistance—special circumstances. To consider them in that order:

(a) The paragraph specifies that in the first place it is by agreement, that the boundary is to be determined. This does not mean, however, that it imposes any more far-reaching obligation than the duty to negotiate of which certain other instruments speak and which, as is well-known, constitutes one of the general principles of contemporary international law. Thus this provision may not be construed as imposing an absolute obligation to reach agreement, but rather as emphasizing the obligation to make every possible effort in that direction: the parties concerned are to endeavour to resolve their differences round a conference table.

It is, then, essential that they open negotiations. The substance of the agreement is left to their discretion; they are perfectly free to decide on its basis and constituents. They may agree to apply one of the other two elements of Article 6, or find another basis for determining the boundary. The law on the subject does not impose any restrictions upon them except those that are essential in all negotiations; in other words, all that is required is that the negotiations be conducted in good faith. Hence the parties can move within the general limits imposed by law.

(b) The second element of Article 6, paragraph 2, is that of equidistance. The words "shall be determined" are used twice in that paragraph: once in relation to the agreement between the parties, and a second time providing for the application of equidistance "in the absence of agreement". This latter term obviously refers to two situations: either the failure of negotiations or the fact that none took place. For one can very well imagine that two neighbouring States may not even enter into negotiations; there may be compelling reasons which prevent both, or

one of them, from doing so. Should the boundary in such event remain uncertain, with all the resulting inconveniences, or even risks? There is no juridical basis for such an inference. Equidistance is also applicable if there are no "special circumstances" justifying another solution.

Not only the text but also the discussion that took place in the International Law Commission should dispel all doubts as to the true bearing of the notion of equidistance. When the Special Rapporteur suggested the addition of the words "as a general rule", one of the members of the Commission (Lauterpacht) opposed it as "it was at least arguable that they deprived the rule of its legal character". He argued that "No judge or arbitrator could interpret a text so worded, because any party to a dispute could always argue that its case did not fall within the general rule, but formed an exception to it". It was then that the words "unless special circumstances should justify ... [another] delimitation" were introduced. They were linked with the deletion of the words "as a rule". And the chairman made the point quite clear by stating that the amendment "stressed the exceptions rather than the rule" (*Yearbook of the International Law Commission*, 1953, Vol. I, pp. 128, 131, 133). The intention of the drafters is further elucidated in the commentary of the Commission:

> "The rule thus proposed is subject to such modifications as may be agreed upon by the parties. Moreover, while ... the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances." (*Yearbook of the International Law Commission*, 1953, Vol. II, p. 216, para. 82.)

The decision taken at the Geneva Conference is based on the conclusions of the International Law Commission. The rejection of the Venezuelan amendment ("the boundary of the continental shelf appertaining to such States shall be determined by agreement between them or by other means recognized by international law") demonstrated the determination of States to accept a clear and definitive rule; no uncertainty was to be allowed on the subject. In no way did it affect the basic concept of what was to become Article 6 of the Convention.

(c) In the logical order I ought now to deal with the third element of Article 6, paragraph 2, namely "special circumstances". However, this being an exception to the general rule, I shall dwell on its applicability at a later stage.

*

These clarifications seem to go to the essence of the matter. Their purpose, as suggested above, is to elicit the true significance of the notion of equidistance within the framework of Article 6, while placing the latter in its true perspective and establishing its proper relationship to Articles 1 and 2 of the Convention.

For, in cases "where the same continental shelf is adjacent to the territories of two adjacent States", thus where a boundary problem arises, the exercise of the rights defined in Article 2 is conditioned (if not wholly, certainly in some degree) by the application of Article 6, paragraph 2. One may therefore view it as laying down the rules concerning the implementation of Article 2 in specific circumstances. To this extent it has an inescapable impact on Article 2.

Having analysed what to my mind is the real meaning and scope of the notion of equidistance, I do not propose to dwell on its virtues or advantages. It may suffice to say that it is practical and concrete. It thus qualifies as a rule, and I shall henceforth so term it. It is admitted that no other principle or rule of delimitation partakes of the same facility and convenience of application and certainty of results. At this stage I would merely add that by the entry into force of the Convention on the Continental Shelf the equidistance rule has become part of the treaty law on the subject.

II

Only two States (the Kingdom of Denmark and the Kingdom of the Netherlands) appearing before the Court in the present cases are parties to the Convention. The Federal Republic, not having ratified it, is not contractually bound by it. In fact no claim in that sense has been advanced.

The question which arises, therefore, is whether the rules expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf have acquired a wider status, so as to be applicable to States not parties to the Convention, in particular whether they were susceptible of becoming and have in fact become part of general international law.

Both these contentions have been advanced, and both have been denied. To substantiate these denials the history of the Article has been invoked. Special stress is laid on the facts that hesitations accompanied the adoption of the equidistance rule, that other possible solutions were discussed and that the equidistance rule was adopted only at a later stage, on the basis of non-legal considerations.

True as these facts may be, they are not conclusive. They constitute but part of the history, above referred to, of how Article 6, paragraph 2, came into being. Doubts and hesitations did exist. But is the same not true of many new rules of law? Even in science, a successful experiment is frequently greeted with suspicion. Some laws of nature, self-evident today, were once viewed as heresy. How much more is this true in the sphere of man-made law, and in particular when a new chapter of law is brought into being?

It is all to the credit of the International Law Commission that it discussed the issues involved in Article 6 at such length before adopting its final text. Meanwhile the comments of governments were invited and received. In fact it took three years (from 1953 to 1956) until that text was finalized and submitted to the General Assembly of the United Nations. It passed through all the stages contemplated by the Statute of the International Law Commission for its work in implementation of Article 13, paragraph 1 *(a)*, of the Charter. At the Geneva Conference itself it was the subject of further discussion—before being finally voted into the Convention.

Even if it be conceded that the Committee of Experts, in which the equidistance rule originated, was guided by considerations of practical convenience and cartography, this can have no effect on its legal validity. There are scores of rules of law in the formation of which non-legal factors have played an important part. Whenever law is confronted with facts of nature or technology, its solutions must rely on criteria derived from them. For law is intended to resolve problems posed by such facts and it is herein that the link between law and the realities of life is manifest. It is not legal theory which provides answers to such problems; all it does is to select and adapt the one which best serves its purposes, and integrate it within the framework of law. This, for example, is how *medium filum aquae* has been recognized as the boundary rule for non-navigable rivers, and the rule of the "talweg" for navigable rivers dividing two States. Geography, likewise, lies at the basis of the rules concerning bays (Article 7, paragraph 2, of the Convention on the Territorial Sea). Many illustrations can be derived from other chapters of international law.

Nor can the insertion of the primary obligation to determine the boundary by agreement cast doubt on the character of the provision. It is true that this general principle of international law is not normally stated. Yet one can find a similar stipulation in the Projet de Convention sur la Navigation des Fleuves Internationaux drafted 90 years ago: "In the absence of any stipulation to the contrary, the frontier of States separated by a river corresponds to the *talweg*, i.e., the median line of the channel" *[translation by the Registry]* (Engelhardt, *Du régime conventionnel des fleuves internationaux*, Paris, 1879, pp. 228 f.). Reference may

also be made to the provisions of Article 12 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.

It is also stated that the faculty of making reservations to Article 6, provided by Article 12, paragraph 1, of the Convention, while not preventing the equidistance rule from becoming general law, creates considerable difficulties in this respect. Here we touch the very essence of the institution of reservations. There can be little doubt that its birth and development have been closely linked with the change in the process of elaboration of multilateral treaties, the transition from the unanimity to the majority rule at international conferences.

This new institution reflected a new historical tendency towards a greater rapprochement and co-operation of States and it was intended to serve this purpose by opening the door to the participation in treaties of the greatest possible number of States. Within this process, reservations were not intended to undermine well-established and existing principles and rules of international law, nor to jeopardize the object of the treaty in question. Thus they could not imply an unlimited right to exclude or vary essential provisions of that treaty. Otherwise, instead of serving international co-operation the new institution would hamper it by reducing the substance of some treaties to mere formality.

Such was, indeed, the view of this Court when it stated that "the object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 24).

These considerations apply to all multilateral treaties, the Convention on the Continental Shelf being no exception. Special attention should be drawn to the fact that it reflects elements of codification and progressive development of international law, both closely interwoven.

As for Article 6, paragraph 2, the right to make reservations is determined by the three elements of which it is composed. First: can a reservation be made to the provision that the boundary of the continental shelf "shall be determined by agreement between" the States concerned? Can any State contract out of the obligation to seek agreement by consent? Obviously not, for, as was indicated earlier, this stipulation should be read as the application *ad casum* of a general obligation of States.

Can the reservation apply to the remaining part of the paragraph? In view of a special situation a State may claim that in the relationship between rule (equidistance line) and exception (special circumstances) the latter should prevail. It may also be that a State recording a reservation aims at the exclusion of "special circumstances" and thus states its

opposition to any exception from the rule. No better proof can be offered that the possibilities of reservation are limited to these two than the practice of States. Such was, indeed, the object of the reservations made by Venezuela and France on the one hand (a special definition of "special circumstances" is reflected in the reservation made by Iran). On the other hand the reservation made by Yugoslavia shows the desire to strengthen the rule by excluding any exceptions to it. (But even here the scope of the reservations is not unlimited, as objections to some of them indicate.)

These considerations lead to the conclusion that the very substance of paragraph 2 of Article 6 does not admit of reservations which purport "to exclude . . . the legal effects" of its provisions, but only of those which may "vary" those legal effects (Draft Articles of the Law of Treaties, Article 2).

The right to make reservations to Article 6 could not have been intended as creating an unlimited freedom of action of the parties to the Convention. This would have opened the door to making it wholly ineffective, with the obvious result of creating a serious loophole in the Convention.

This is confirmed by the practice, covering as it does a period of ten years.

This practice:

(a) constitutes important evidence as to the interpretation of the faculty to make reservations to Article 6;

(b) indicates that the provisions of Article 6 have been generally accepted without reservation by the parties to the Convention.

As to the wider issue, there is evidence that reservations made to important law-making or codifying conventions have not prevented their provisions from being generally accepted as law. Five States made reservations to the Fourth Hague Convention (1907), yet the principles it incorporated have with the passage of time become part of general international law, binding upon all States.

The Geneva Convention on the High Seas is another case in point. It contains no clause expressly permitting reservations, but neither does it follow the example of the Convention on Slavery of 7 September 1956 (Article 9) and prohibit them. In fact, more reservations have been made to it than to the Continental Shelf Convention. Yet the Geneva Convention on the High Seas is obviously a codifying instrument par excellence: its Preamble speaks of "desiring to codify the rules" and describes the ensuing provisions as "generally declaratory of established principles of international law".

The Convention on Certain Questions Relating to the Conflict of Nationality Laws, signed at The Hague on 12 April 1930 (*League of Nations Treaty Series*, Vol. 179, pp. 91-113, No. 4137), was, to use its

own words, "a first attempt at progressive codification" (Preamble, para. 4) in that field. Yet its Article 20 authorized reservations to all of its substantive provisions. After a lapse of over 38 years, no more than 14 States are parties to it—with six reservations and two declarations. This notwithstanding, this Court has relied on the practice based, *inter alia*, on its provisions (Articles 1 and 5), even though the parties to the case were not parties to the Convention (*Nottebohm, Second Phase, Judgments, I.C.J. Reports 1955*, pp. 22 f.). It was also relied upon by the Italian/United States Conciliation Commission (*Merigé* claim (*I.L.R.*, 22 (1955), p. 450) and also *Flegenheimer* claim (*I.L.R.*, 25 (1958—I), p. 149)).

A further illustration is provided by Article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly on 21 December 1965: the new test therein introduced concerning the incompatibility of reservations with the object and purpose of the Convention has no bearing on the principle itself.

To summarize the foregoing observations: from the manner in which the Convention as a whole was prepared, from its obvious purpose to become universally accepted, from the structure and clear meaning of Article 6, paragraph 2, as a whole, from the genesis of the equidistance rule and from the fact that it has been enshrined in no less than four provisions of three conventions signed in Geneva in 1958, I find it difficult to infer that it was proposed by the International Law Commission in an impromptu and contingent manner or on an experimental basis, and adopted by the Geneva Conference on that understanding. Nor is there anything—including Article 12—that can disqualify the equidistance rule from becoming a rule of general law or constitute an obstacle to that process. Furthermore, there are no other known factors which may have had this effect.

III

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*.

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 independence. Thus the time during which these

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-à-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.

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

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.

* * *

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.

* * *

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

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 starting-point 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 present-

day 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 continental-shelf 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.

IV

I now turn to the principal issue concerning the law applicable to the present cases. Is the Federal Republic bound by Article 6, paragraph 2, of the Geneva Convention?

The Federal Republic of Germany signed the Convention on the Continental Shelf on 30 October 1958. This fact, as indicated earlier, cannot remain without influence on that State's relationship to the Convention.

Admittedly it does not imply an obligation to ratify the instrument, nor is it in itself sufficient to bind the Federal Republic to observance of its provisions. However, it certainly implies a link between the State concerned and the treaty to which it is not as yet a party.

The Court has made this perfectly clear by stating that "Without going into the question of the legal effect of signing an international convention, which necessarily varies in individual cases, the Court considers that signature constitutes a first step to participation in the Convention"; and the Court continued: "It is evident that without ratification, signature

does not make the signatory State a party to the Convention; nevertheless it establishes a provisional status in favour of that State" (*Reservations to Genocide Convention, Advisory Opinion, I.C.J. Reports 1951*, p. 28). Consequently the Court recognized, in the context of the case it was dealing with at the time, certain rights which "the signature confers upon the signatory". This obviously also implies some obligations.

Now, at no time did the Federal Republic make a statement which could be interpreted as a repudiation of the Convention or the abandonment of its intention to ratify it. This was made clear even in the course of the proceedings before the Court, by the admission that it had not "yet" ratified the Convention (hearing of 23 October 1968).

There is no need to stress the obvious. As long as this ratification has not been forthcoming, the Federal Republic cannot be considered as a party to the Convention. The Government may have changed its view, as governments do; parliament may eventually refuse ratification. However, the act of signature has to be viewed in the context of other voluntary and positive acts of the Federal Republic in this domain.

On 22 January 1964 the Federal Government issued a Proclamation which stated, *inter alia*:

> "The Federal Government will shortly submit to the Legislature an Accession Bill on this Convention in order to create the constitutional basis for ratification by the Federal Republic of Germany";

and further:

> "In order to eliminate legal uncertainties that might arise in the present situation until the Geneva Convention on the Continental Shelf comes into force and until its ratification by the Federal Republic of Germany, the Federal Government deems it necessary to affirm the following now:
>
> 1. In virtue of the development of general international law, as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf, the Federal Government regards the exploration and exploitation of the natural resources of the seabed and subsoil of the submarine areas adjacent to the German coast but outside the German territorial sea, to a depth of 200 metres and also—so far as the depth of the superjacent waters admits of the exploitation of the natural resources—beyond that, as an exclusive sovereign right of the Federal Republic of Germany. In the individual case the delimitation of the German continental shelf vis-à-vis the continental shelves of foreign States

remains subject to agreement with those States." *[Translation by the Registry* [1]*]*.

In the *exposé des motifs* of the Bill on the Continental Shelf, 25 July 1964, special reference is made to the Convention, as a manifest expression of a change in the general approach to the problem of the continental shelf:

"For a long time the possibility of individual States' acquiring special rights over the parts of the continental shelf lying off their coast had been denied in the theory and practice of international law. In recent years the opposite view, that the extraction and appropriation of the resources of the marine subsoil are not free but reserved to the coastal States, has come to prevail. A manifest expression of this change can in particular be seen in the Convention on the Continental Shelf of 29 April 1958 (reproduced in *Archiv des Völkerrechts*, Vol. 7, 1958-59, pp. 325 ff.), adopted at the Geneva Conference on the Law of the Sea, which was signed by the Federal Republic of Germany together with 45 other States and has since been ratified by 21 of those States. According to its Article 11 this Convention will come into force as soon as the next instrument of ratification is deposited.

Considering the above, one may proceed on the assumption that, at least since the Federal Government's Proclamation of 20 January 1964, which has remained unchallenged, the Federal Republic holds sovereign rights, coinciding as to content with those established for coastal States by the Geneva Convention, in the domain of the German continental shelf." *[Translation by the Registry* [2]*]*.

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[1] "Die Bundesregierung wird den gesetzgebenden Körperschaften in Kürze den Entwurf eines Zustimmungsgesetzes zu dieser Konvention vorlegen, um die verfassungsrechtliche Grundlage für die Ratifikation durch die Bundesrepublik Deutschland zu schaffen." "Um Rechtsunklarheiten zu beseitigen, die sich in der gegenwärtigen Situation bis zum Inkrafttreten der Genfer Konvention über den Festlandsockel und bis zu ihrer Ratifikation durch die Bundesrepublik Deutschland ergeben könnten, hält es die Bundesregierung für erforderlich, schon jetzt folgendes festzustellen:

1. Die Bundesregierung sieht auf Grund der Entwicklung des allgemeinen Völkerrechts, wie es in der neueren Staatenpraxis und insbesondere in der Unterzeichnung der Genfer Konvention über den Festlandsockel zum Ausdruck kommt, die Erforschung und Ausbeutung der Naturschätze des Meeresgrundes und des Meeresuntergrundes der an die deutschen Meeresküsten grenzenden Unterwasserzone ausserhalb des deutschen Küstenmeeres bis zu einer Tiefe von 200 m und—soweit die Tiefe des Darüber befindlichen Wassers die Ausbeutung der Naturschätze gestattet—auch hierüber hinaus als ein ausschliessliches Hoheitsrecht der Bundesrepublik Deutschland an. Im einzelnen bleibt die Abgrenzung des deutschen Festlandsockels gegenüber dem Festlandsockel auswärtiger Staaten Vereinbarungen mit diesen Staaten vorbehalten." (*Bundesgesetzblatt, Teil II, Nr. 5*, 6 February 1964.)

[2] "Lange Zeit hindurch war in der volkerrechtlichen Lehre und Praxis die Mög-

The Proclamation of the Federal Government of 22 January 1964 refers, then, to "the development of general international law, as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf". Here an opinion is expressed as to the character and scope of the law on the continental shelf. It constitutes in fact a value-judgment on the state of the law on the subject. Indeed it is emphatically implied that the mere signing of that instrument, at a time when it had not yet entered into force, was evidence of general international law. The Federal Republic viewed its own signature as a constituent element of that evidence, thus attaching to it far more importance than is normal in the case of signatures to instruments requiring ratification. If words have any meaning, these could be understood solely as the recognition by the Federal Republic that the Geneva Convention reflected general international law. Specific reference was made to State practice. It deemed this practice, covering, up to the date of the Proclamation, a period of over five years, to be adequate and sufficiently uniform to be considered as evidence of general international law, for if there had been variations within it, or it had been inadequate, no such conclusion as to the definitive state of the law could have been drawn. The Federal Government also linked the practice with the Geneva Convention. Events after 22 January 1964 could in no circumstances be held to weaken an official statement of this kind, but in fact they have only added to its force. For the Geneva Convention has become law, and subsequent practice has corroborated it further.

The Proclamation is, therefore, as binding upon the Federal Republic today as it was at the time it was made. A value-judgment of so final a nature may not be revoked. It should therefore be viewed as an unequi-

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lichkeit des Erwerbs von Sonderrechten einzelner Staaten an den ihrer Küste vorgelagerten Teilen des Festlandsockels verneint worden. In den letzten Jahren setzte sich die gegentielige Auffassung durch, dass die Gewinnung und Aneignung der Schätze des Meeresuntergrundes nicht frei, vielmehr den Küstenstaaten vorbehalten seien. Als sichtbarer Ausdruck dieser Wandlung kann namentlich die auf der Genfer Seerechtskonferenz zustande gekommene Konvention über den Festlandsockel vom 29. April 1958 (abgedruckt in Archiv des Völkerrechts Bd. 7 [1958/59] S. 325 ff.) gewertet werden, die neben 45 anderen Staaten auch von der Bundesrepublik Deutschland unterzeichnet und in der Zwischenzeit von 21 dieser Staaten ratifiziert worden ist. Nach ihrem Artikel 11 wird diese Konvention bereits mit der Hinterlegung der nächsten Ratifikationsurkunde in Kraft treten.

Es kann angesichts dessen davon ausgegangen werden, dass der Bundesrepublik spätestens seit der ohne Widerspruch gebliebenen Proklamation der Bundesregierung vom 20. Januar 1964 im Bereich des deutschen Festlandsockels Hoheitsrechte zustehen, die sich inhaltlich mit den in der Genfer Konvention zugunsten der Küstenstaaten festgelegten Rechten decken." (*Verhandlungen des deutschen Bundestages, 1964, Vol. 91, Drucksache* IV/2341.)

vocal expression of *opinio juris*, with all the consequences flowing therefrom. Indeed, if it may be claimed that the *opinio juris* of certain other States is in doubt or not fully proven, this is certainly not the case of the Federal Republic. This is a decisive point in the present cases.

As for the *exposé des motifs* of the Bill on the Continental Shelf, it stands on the Geneva Convention and the Federal Government's Proclamation of 20 January 1964, and states that: "The rules provided for in this Bill are to be the municipal supplement to the effects of the Proclamation in the field of international law" (*Verhandlungen des deutschen Bundestages, 1964, Vol. 91, Drucksache* IV/2341). It refers to the Convention as a whole with no exception or reservation. The great evidential weight attaching to documents of this nature is surely incontrovertible. This Court has held a number of *exposé des motifs* "conclusive" in a case before it (*Fisheries, Judgment, I.C.J. Reports 1951*, p. 135).

States may obviously change their intentions, conduct and policy, but it would seriously undermine the worth of and reliance upon statements made by governments if value-judgments of so important a nature were disregarded or held as not binding upon the governments which made them. For, to use the words which the Court employed in another context: "Language of this kind can only be construed as the considered expression of a legal conception . . ." (*Fisheries, Judgment, I.C.J. Reports 1951*, p. 136).

It has been submitted that the two official statements did not specifically cite Article 6. This is true; however, they did not exclude it either. The Convention as a whole is referred to, and that undoubtedly implicates Article 6. And although the actual wording of the first part of Article 6, paragraph 2, was employed, this cannot be understood as excluding its remaining provisions. Only a specific exclusion of the other parts of the paragraph could have had the effect alleged by the Federal Government. Any doubt as to this reasoning should be dispelled by the Proclamation's specific statement that "The Federal Government will shortly submit an Accession Bill on this Convention". There was no hint of any objections the Federal Republic might raise to any provisions of the Convention—more particularly Article 6, paragraph 2—, though this was surely the time and context for placing them on record. There is not even the slightest evidence that reservations to the paragraph, of whatever scope or nature, had been contemplated. If agreement between the parties was mentioned, this, as the Federal Republic has itself indicated *(ut infra)*, was because the paragraph in question refers to it "in the first place". This view is confirmed by a further recognition of Article 6, to be found in the joint minutes of the delegations of the Federal Republic and the

Netherlands, dated 4 August 1964 (Memorial, Annex 4). Though here, too, reference is specifically made to the determination of the continental shelf "by agreement", this is because agreement was the obvious objective of the conference contemplated at the time by the Federal Government (which in no way implies rejection of the other components of Article 6, paragraph 2).

This point has been confirmed by the Federal Government itself:

> "At that time the Federal Republic could still expect to come to an amicable agreement with its neighbours on the delimitation of the continental shelf before its coast on equitable lines inasmuch as Article 6 expressly refers the Parties to a settlement by agreement in the first place" (Reply, para. 27).

The Reply continues:

> "the insistence on the equidistance line as the only valid rule for the delimitation of the continental shelf, and the reliance on Article 6, paragraph 2, of the Convention for this purpose by the Kingdom of Denmark and the Kingdom of the Netherlands in the negotiations taken up on the instance of the Federal Republic of Germany . . . caused the Government of the Federal Republic to reconsider the advisability of ratifying the Continental Shelf Convention as long as the interpretation of Article 6, paragraph 2, is uncertain" *(ibid.)*.

And yet the Federal Republic denies that it has *ever* recognized Article 6, paragraph 2 (Reply, para. 28).

These statements call for some comment. For to refuse to recognize provisions, and to take exception to a given interpretation of them, are mutually exclusive positions. An interpretation is disputed in the name of a contrary conception, in upholding which one in fact defends the provisions as such. Thus *either* the Federal Republic has, as it claims, refused to recognize Article 6, paragraph 2, of the Convention beyond its first component (though this refusal leaves the binding force of its two official statements wholly intact), *or* it must have held a conception thereof which caused it to contest a particular interpretation. The two positions cannot be equated, for interpretation must needs concern the paragraph as a whole, which in no imaginable conception could have been reduced to a single element, i.e., the determination of the boundary by agreement. The difference of interpretation could in fact only have concerned the relationship between the rule and the exception, between equidistance and special circumstances.

In sum, the fragility of the claim to have withheld recognition from Article 6, paragraph 2, as a whole is manifest. It is a claim which has been argued from a change of position on the ratification issue the very purpose of which was to explain away definitive and unambiguous statements conveying such recognition. In fact the Federal Republic made clear its intention to ratify the Convention simultaneously with the Proclamation acknowledging it and the practice as expressive of "general international law". The link between such recognition and ratification may have been more than merely chronological, e.g. (the latter resulting from the former), one of cause and effect. Subsequently the Federal Government had second thoughts about ratifying the Convention. But, given the unreserved nature of the Proclamation and *exposé des motifs*, the expression of such second thoughts cannot alter the fact that the Federal Republic—whether or not it ratifies the Convention—has recognized the binding character of the rules concerned.

The whole of the Federal Republic's reasoning on the subject bears all the marks of an *ex post facto* construction. It has obscured the true legal issue in the present cases. It can have no effect on the recognition of the Convention (and within it of Article 6, paragraph 2) and of State practice, reflected in the two official statements placed on record by the Federal Government.

* * *

Having thus analysed the position taken by the Federal Republic, I reach the conclusion that it has recognized the provisions of the Convention on the Continental Shelf and in particular its Article 6, paragraph 2, as binding. Subsequent changes in its attitude, in view of the nature of its unequivocal statements, can have no legal effect. For, in the circumstances, its situation cannot be assimilated with that of a country which "has always opposed any attempt to apply" a rule (*Fisheries, Judgment, I.C.J. Reports 1951*, p. 131), nor with that of one having "repudiated" the relevant treaty (*Asylum, Judgment, I.C.J. Reports 1950*, p. 278).

* * *

In the light of all these facts and of the law, the real legal problem with which the Court has been confronted is not that of the binding effect of the equidistance rule upon the Federal Republic, for this is established, but the question of whether there are special circumstances

which would justify a departure from it in the present cases. Indeed, notwithstanding all that may have been alleged to the contrary, this is the implicit burden of the Federal Republic's claim.

Are there in fact any special circumstances justifying a departure from the equidistance rule? Within the meaning of Article 6, paragraph 2, "special circumstances" is to be understood as constituting merely an exception to the general rule. This should not be interpreted otherwise than in a restrictive manner. Indications to this effect were given by the International Law Commission: "As in the case of the boundaries of coastal waters, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or navigable channels" (*Yearbook of the International Law Commission*, 1953, Vol. II, p. 216, para. 82. Similar and other views were expressed at the Geneva Conference). There is furthermore room for the view that the presence of natural resources should not be overlooked.

What are called "special circumstances" should at all events rest on sound criteria. The term should not be made subject to vague and arbitrary interpretation (Conference on the Law of the Sea, 1958, *Official Records*, II, p. 93; VI, p. 91).

Nor should the concept of "special circumstances" be allowed to substitute another rule for the equidistance rule. The provision should be thus understood: that a *special situation*, created by "*special circumstances*" calls for a *special, ad hoc* arrangement.

There must be, in other words, a combination of factual elements creating a situation to ignore which would give rise to obvious hardship or difficulties. Here, as elsewhere, the application of the rule, and the admission of possible exceptions from it, call for a reasonable approach. "Reasonableness" requires that the realities of a situation, as it affects all the Parties, be fully taken into account.

The mere fact that on the application of the equidistance rule the area of continental shelf allotted to the Federal Republic would be smaller than those of Denmark or the Netherlands does not create a qualitatively anomalous situation such as could be regarded as a "special circumstance". For the area falling to the Federal Republic would not be inconsiderable. Moreover, if the notion of "special circumstances" is to be taken to imply a slanting reference to comparative bases, a much wider spectrum of factors should be taken into account—e.g., the comparative wealth and economic potential of the States concerned.

The evidence produced in the cases before the Court is not in fact sufficient to justify an exemption from the rule. It has not been shown that its application would, on account of the bend in the coast, expose the Federal Republic to any special hardship, impose upon it any undue

burdens or create for it any serious difficulties. Thus I find no adequate basis for exemption from the equidistance rule .

* * *

In the light of the grounds I have set forth, I deem it unnecessary to deal with the other issues raised by the three Parties, or the Submissions made by them. In particular, the question of the combined effect of the delimitations concerned in each respective case does not arise, as each is to be determined on the basis of the equidistance rule.

I conclude that 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 boundaries already determined by agreement is to be carried out in accordance with the provisions of Article 6, paragraph 2, of the Geneva Convention of 1958, and in particular by the application of the equidistance rule. There are no special circumstances which justify any departure from this rule.

To my great regret, therefore, I am unable to concur in the reasoning and conclusions of the Judgment.

(Signed) Manfred LACHS.