## SEPARATE OPINION OF JUDGE FOUAD AMMOUN

*[Translation]*

1. The Legal Basis and the Definition of the Continental Shelf.

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Since the Court was called upon, under the Special Agreements by the notification of which it was seised, to state the principles and rules applicable to the disputes between the Federal Republic of Germany and the Kingdoms of Denmark and the Netherlands as to the delimitation of the areas of the continental shelf which makes up the whole of the North Sea which appertain to each of these countries, the Court had to establish in the first place the actual concept of the continental shelf the delimitation of which was in issue.

Even up to the time of the Conference on the Law of the Sea held at Geneva in 1958, this concept was still subject to controversy [1]; and even last year, in 1968, in the course of the deliberations of the *Ad Hoc* Committee set up by the United Nations to study the peaceful uses of the seabed and the ocean floor, the limits, if not the definition, of the continental shelf provided material for discussion by the representatives of States, who apparently did not find the definition either sufficiently precise or sufficiently comprehensive [2]. What is more, in the course of the hearings in the present cases, the representative of the Federal Republic of Germany stated that "it is not possible to speak of the continental shelf concept as an already fixed or completed concept [3]". This observation, coming from one of the Parties, is fraught with consequences, in particular for the time when the Parties, on the basis of the Court's Judgment, come to exercise their rights over the area of continental shelf which has been recognized as appertaining to each of them. It will be sufficient in this connection to mention the differences of opinion, to which I shall refer later, as to the extension of the sovereignty of the coastal State over the continental shelf [4] and as to its outer limits [5].

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[1] See statements to the Conference made by the representatives of France, Greece, and the Federal Republic of Germany (*Official Records*, Vol. VI, p. 1 and pp. 5-7).

[2] Report of the *Ad Hoc* Committee to the General Assembly of the United Nations, 1968.

[3] Address of 5 November 1968.

[4] *Infra*, para. 17.

[5] *Infra*, para. 7.

In fact the Court, not having faced the question directly as I have suggested, has been unable to avoid discussing a number of its aspects, and coming back to the point throughout its reasoning. The Court has in fact had to consider, with a view to the delimitation which is the subject of the present cases, whether the continental shelf is the natural prolongation of national territory under the sea, thus justifying the delimitation of the areas naturally appertaining to each of the coastal States and excluding the contention for a sharing out among such States; or whether it is dependent on the idea of contiguity, of which the corollary would be the equidistance rule, to be compulsorily applied to the delimitation in question [1]; or whether again delimitation on the equidistance basis is inherent in the concept of the continental shelf, or follows implicitly from the exclusive nature of the rights recognized as belonging to the coastal States [1].

Finally it was not without interest to ascertain whether the continental shelf has acquired the status of a rule of law by virtue of the said Convention, or as a result of custom, since its legal régime could differ according to which was the case.

All these are questions which should have been dealt with, in my opinion, from the very beginning, in order to clarify the reasoning and so as to leave no lurking uncertainty as to the scope and significance of the Judgment.

2. At all events there was no ground for accepting the opinion expressed by the Kingdom of the Netherlands, that the Court is not invited to pronounce on the question of what part of the bed of the sea and of the subsoil of the high seas should be considered, from the legal point of view, as constituting the continental shelf. It must be borne in mind that the integrity of the high seas, the freedom of which is hallowed by a general custom, is in issue, and all States, not merely the Parties to the disputes, are directly interested therein.

It goes without saying that the Court is bound by the Special Agreements just as much as the Parties. The quotations taken from the Judgments concerning the cases of the *Lotus* and of the *Territorial Jurisdiction of the International Commission of the River Oder* are relevant in this connection. It is nonetheless the case that the Court has the right, when appropriate, to interpret the special agreement by which it has become seised of a case, as it has to interpret any convention, following a settled line of decisions. And however restrictive such interpretation should be—in view of the sovereignty of States and the optional nature of the Court's jurisdiction—it is nonetheless abundantly clear that the Parties could not have asked the Court to state principles and rules which could have no application in law. A convention cannot be isolated from its legal context, which in the present case is the problem of the continental

[1] *Infra*, para. 15.

shelf. If, for the sake of argument, this were not recognized in law, there could be no dispute as to its delimitation, and in the absence of a dispute there would be no reason to define principles and rules to resolve it. It is appropriate to recall the rule of interpretation stated by this Court in its Advisory Opinion of 3 March 1950 on the subject of the *Competence of the General Assembly for the Admission of a State to the United Nations*, to the effect that the text should be recognized as authoritative, unless its terms are ambiguous or lead to an unreasonable result; for it would not be reasonable to abide closely by the letter of the Special Agreements and not to elucidate the whole tenor thereof or any implicit elements.

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3. When this has been said, the question with which the Court was faced first of all was whether there exists a general international convention, within the meaning of Article 38, paragraph 1 *(a)*, of its Statute, which has modified the principle of the freedom of the high seas and sanctioned the concept of the continental shelf.

It should be sufficient to observe that the Geneva Convention of 29 April 1958 on the Continental Shelf has up to the present been ratified by only 39 States, out of a total of about 140 making up the international community. The Convention remains, by analogy with internal law of the nations, *res inter alios acta*, and could not bring about a modification *erga omnes* of the principle of the high seas, or limit the scope or legal consequences thereof. This interpretation, it should be added, indisputably applies to norm-creating treaties as well as to contract-treaties, particularly since the falling into disuse of the privilege which a limited number of Powers used to claim to legislate in the name of all the nations of the world, whether colonized or independent.

It is true that, in order to claim sovereign or exclusive rights over the continental shelf bordering on their respective territorial seas, the Parties rely on the provisions of Articles 1 and 2 of the Convention on the Continental Shelf mentioned above. The Kingdom of the Netherlands and the Kingdom of Denmark are obviously bound by the stipulations of that Convention. The Federal Republic of Germany, which has not ratified it, is nonetheless bound, by virtue of the principle of good faith in international relations, as is every State as a result of a unilateral declaration [1], by the statements made in the Memorial, affirmed in the course of the speeches of 4 November 1968, in which the Federal Republic declared that the definition of the continental shelf and the rights of the coastal States as determined by Articles 1 and 2 before referred to are generally recognized: it explained that it "recognizes that the submarine

[1] As to the effects of the unilateral declaration, see *infra*, para. 21.

areas of the North Sea constitute a continental shelf over which the coastal States are entitled to exercise the rights defined in Article 2 of the Convention [1]".

Although the Parties to the case are bound, each with regard to the other, by the obligations which they have assumed in the ways which have been mentioned, it is nonetheless the case that the definition and the rights mentioned above cannot be relied on, solely on the ground of the Convention mentioned above, as against States which have not ratified it, or have not declared that they accept its terms.

Consequently the affirmation is justified that the freedom of the high seas, settled by virtue of a custom of international law which is universally accepted, should be respected in principle and as to its consequences, and, in the absence of a convention of universal scope cannot be modified or limited except by a custom backed by a general consensus, or in the last analysis by a general principle of law.

It is now as well to enquire whether a modification of the principle of the freedom of the high seas has not in fact taken place by virtue of a new customary rule of universal scope. This will be the subject of the following question.

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4. Failing a general convention, as specified above, is there an international custom, as contemplated in paragraph 1 *(b)* of Article 38 of the Statute of the Court, which has modified the principle of the freedom of the high seas and sanctioned the concept of the continental shelf?

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Whereas the Geneva Convention of 29 April 1958 on the High Seas codifies certain rules of customary international law, and in particular the freedom of the high seas outside territorial waters, the question arises whether this is also the case with the Geneva Convention of the same date on the Continental Shelf; and if not, has a custom been formed subsequently which, modifying the custom establishing the freedom of the high seas, confers exclusive rights over stretches of these or over certain of their component parts?

It should of course be observed that the Convention on the High Seas mentions, in its preamble, the intention of the parties to "codify the rules of international law relating to the high seas"; whereas the Convention on the Continental Shelf says nothing of that kind. Furthermore, Article 1 of the latter Convention, when giving a definition of the continental shelf, limits it to the purposes of the articles of that Convention. It would not however be possible to use these considerations as an

[1] Memorial, para. 8.

argument for stating that the concept of the continental shelf as opposed to that of the freedom of the high seas, is not yet accepted in customary international law. Proof of the formation of custom is not to be deduced from statements in the text of a convention; it is in the practice of States that it must be sought. Indeed, custom, which Article 38, paragraph 1 *(b)*, of the Statute of the Court takes as evidence of a general practice accepted as law, or which the teaching of publicists, following Gentilis [1], interprets rather as a practice capable of demonstrating its existence, requires the consent, express or tacit, of the generality of States, as was taught by Grotius with reference to the customary law of nations of the period. It is therefore a question of enquiring whether such a practice is observed, not indeed unanimously, but, as is quite clear from the above-mentioned Article, by the generality of States with actual consciousness of submitting themselves to a legal obligation.

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5. The facts which constitute the custom in question are to be found in a series of acts, internal or international, showing an intention to adapt the law of nations to social and economic evolution and to the progress of knowledge; this evolution and this progress have given impetus to the exploitation of the riches of the soil and subsoil of the sea at ever-increasing depths, and to the use of new means of communication and transport which develop unceasingly, and to the extension, sometimes ill-considered, of deep-sea fishing, which has its dangers for the conservation of marine species and, in general, of the biological resources which have become more and more necessary for the feeding of rapidly growing populations.

Such are the declaration of the Russian Imperial Government of 29 September 1916; the bilateral treaty between the United Kingdom and Venezuela of 26 February 1942; the Proclamation and Executive Order of President Truman of 28 September 1945; the subsequent chain of proclamations, those of Mexico in 1945 and 1949; of Cuba in 1945; of Argentina and Panama in 1946; of Peru, Chile, Ecuador and Nicaragua in 1947; of Costa Rica, of the United Kingdom on behalf of Jamaica and the Bahamas, and of Iceland in 1948; of British Honduras, Guatemala, Saudi Arabia, Abu Dhabi, Bahrain, Kuwait, Qatar, Ajam, Dubai, Sharjah, Ras al Khaimah, Umm al Qaiwain, and the Philippines in 1949; Brazil, El Salvador, Honduras, Nicaragua, Pakistan, and the United Kingdom on behalf of the Falkland Isles in 1950; of South Korea and Israel in 1952; of Australia in 1953; of Iran in 1955; of Portugal in 1956; of Iraq, Burma and Ceylon in 1957; and finally those of the States bordering on the North Sea, since natural gas and petroleum were

[1] A. Gentilis: The law of nations is "... the product of prolonged agreement between peoples, established by usage, which itself is revealed by history".

discovered there, namely: Royal Proclamation of Norway of 31 May 1963; Royal Decree of Denmark of 7 June 1963; Proclamation of the Federal Republic of Germany of 20 January 1964; Orders in Council of the United Kingdom of 15 April 1964 and 3 August 1965; Netherlands Law of 23 September 1965.

There should be added to these States some 30 others which, while not being numbered among the authors of unilateral declarations, have signed and ratified, or merely signed, the Geneva Convention of 29 April 1958 on the Continental Shelf.

For if the said Convention, ratified up to the present day by 39 States, is not yet such as to modify by agreement the international custom concerning the high seas, it nonetheless constitutes, by the legal act of its ratification, and by the deliberate legal fact of its mere signature, a group of precedents which contribute, together with State practice, judicial and arbitral decisions, resolutions of legal conferences and of international bodies, as well as the positions there taken up, to the elaboration of the material element of custom.

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6. Not so long ago, an eminent jurist [1] could still write that the proclamations of States do not constitute more than a recital of facts in which it is difficult to "trace an ethic widely accepted as constituting law, that is to say, embodying a concept of general interest or of equity". He saw therein rather the contrary, discerning, of course, "in the background, pretexts or anxieties as to the needs of humanity", but considering as by far the most dominant "a concern for individual interests and, at the most, for national interest, which in the law of nations is no more than an individual interest".

The representatives of certain countries echoed this doctrinal point of view at the Geneva Conference on the Law of the Sea in 1958 [2].

And in fact, up to the eve of that Conference, it could be claimed that the doctrine of the continental shelf was still no more than a custom in the process of formation.

Today it must be admitted that these encroachments on the high seas, these derogations from the freedom thereof, beginning with the Truman Proclamation of 28 September 1945, are the expression of new needs of humanity. From this it may be deduced that just as reasons of an economic nature concerning navigation and fishing justified the freedom of the high seas, reasons of the same nature which are no less imperative, concerning the production of new resources with a rich future, and their conservation and their equitable division between nations, may henceforward justify the limitation of that freedom. Thus the American Pro-

[1] G. Scelle, *Plateau continental et droit international*, 1955, pp. 35 and 36.
[2] *Supra*, note 1, p. 100.

clamation, which deliberately cut the Gordian knot of the question whether the immense resources discovered under the high seas would remain, on the model of the high seas themselves, at the disposal of the international community, or would become the property of the coastal States, set the fashion, and was followed by a series of similar documents and by the support of legal writers, culminating in the Geneva Convention of 29 April 1958 on the Continental Shelf. The proposal of the Federal Republic of Germany for the exploitation of submarine riches for the benefit of the international community, which adopted an idea of P. Fauchille, received no support at the Conference, a number of countries being anxious to reserve their rights over the continental shelf or the epicontinental platform prolonging their coasts, and certain of them fearing in addition the enterprises of the industrialized nations, which were better equipped for a *de facto* monopoly of this exploitation.

This aggregate body of elements, including the legal positions taken up by the representatives of the majority of the countries at the Geneva Conference, even by those who expressed reservations [1], amounts here and now to a general consensus constituting an international custom sanctioning the concept of the continental shelf, which permits the Parties to lay claim to delimitation between them of the areas of the North Sea continental shelf appertaining to them, for the exercise of exclusive rights of exploration and exploitation of the natural resources secreted in the bed and subsoil of the sea.

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7. If the concept of the continental shelf has thus been definitively recognized, there remains a related question, namely the extent of the continental shelf or its outer limit. This is a question which is subject to controversy, and which caused the representative of the Federal Republic of Germany to say: "a crucial question has not yet been settled —what are the outer limits of the continental shelf towards the open sea [2]?"

The interest of the question lies in the fact that a judgment stating the principles and rules applicable to the delimitation of the continental shelf should not allow it to be understood that the Court has accepted, without examination, the concept of the continental shelf.

It is possible to enquire whether the delimitation of the continental shelf appearing in Article 1 of the Convention has alone passed into customary law, or whether the latter does not imply—as in the case of historic waters—other outer limits of the area of the high seas subjected to the jurisdiction of the coastal State under the title of continental shelf or of epicontinental platform, or under some other denomination.

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[1] *Supra*, note 1, p. 100.
[2] Address of 5 November 1968.

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8. It will in fact be observed that some of the acts mentioned above, forming part of State practice, had remained open to challenge as a result of the extension which those acts gave to the appropriation of the high seas. In particular, in the most western hemisphere, such were the laws, proclamations or decrees issued in 1946 by Argentina, in 1947 by Peru, Chile and Ecuador, in 1948 by Costa Rica, and in 1950 by Honduras and El Salvador; these acts extended the bounds of the continental shelf adjacent to the coasts of these States beyond the break in the slope occurring at a depth between 130 and about 550 metres [1], or, in the absence of a submarine prolongation of territory in the form of a shelf, replaced this with an area of the high seas, the continental slope or the epicontinental platform, limited by some of these acts to a minimum of 200 miles from the coast [2], and left by others without any limits whatever.

It is relevant to stress, in this connection, the guiding role played by Peru—a country which is almost without a continental shelf—as a result of the above-mentioned decisions of the United States, Mexico and Argentina, the last two of which already claimed, in addition to the continental shelf, exclusive areas of the epicontinental platform. How is it, it was emphasized in Peru, that the only States which can take advantage of a natural phenomenon which permits them to annex immense areas of subsoil and of the high seas, can profit from them exclusively, and can condemn those who are handicapped by geographical configurations to stand idly by in face of the immense riches secreted by their adjacent waters, and that to the profit of capitalist enterprises better endowed than their own and powerfully protected [3]. The immense riches disputed between the maritime Powers and Peru were the incalculable piscatory riches secreted by its epicontinental platform, which it was determined to preserve in order that the production of guano should not be prejudiced, in the interest of the national economy, which incidentally coincided with the interest of agricultural production throughout the world [4].

Thus a common declaration by Peru, Chile and Ecuador proceeded to reinforce this claim in the following terms:

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[1] Geneva Conference, Preparatory documents, Vol. I, pp. 39-40.

[2] The 200-mile limit is well within the extreme width of the continental shelf which in certain regions is as much as 1,300 kilometres.

[3] Quoted by G. Scelle, *op. cit.*, p. 46.

[4] Cf. M. W. Mouton, *The Continental Shelf*, p. 80, who states as follows: "Peru has an extra reason, because the fish form the food for guano birds, which are an economic asset to the country."

The decisions of municipal courts of Peru have confirmed this view: judgment of the Tribunal of Piata of 26 November 1954, in the case of the ships, *Olympic*, *Victor* and others.

"Governments are bound to ensure for their peoples access to necessary food supplies and to furnish them with the means of developing their economy. It is therefore the duty of each Government to ensure the conservation and protection of its natural resources and to regulate the use thereof to the greatest possible advantage of its country. Hence it is likewise the duty of each Government to prevent the said resources from being used outside the area of its jurisdiction so as to endanger their existence, integrity and conservation to the prejudice of peoples so situated geographically that their seas are irreplaceable sources of essential food and economic materials. For the foregoing reasons the Governments of Chile, Ecuador and Peru, being resolved to preserve for and make available to their respective peoples the natural resources of the areas adjacent to their coasts, . . . declare as follows:

Owing to the geological and biological factors affecting the existence, conservation and development of the marine fauna and flora, . . . the former extent of the territorial sea and contiguous zone is insufficient . . . [for] those resources, to which the coastal countries are entitled . . . [They] therefore proclaim as a principle of their international maritime policy that each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast.

Their sole jurisdiction and sovereignty over the zone thus described includes sole sovereignty and jurisdiction over the sea floor and subsoil thereof . . ." *[English text by the United Nations Secretariat.]*

In succession, Costa Rica, El Salvador and Honduras adopted this concept, against which the maritime Powers did not fail to protest [1]. But their opposition did not succeed in muting the interventions of the representatives of the States at the Geneva Conference, any more than it muted the voices of eminent jurists who pointed out, particularly on the International Law Commission, the injustice which would be suffered by countries which did not possess a continental shelf, or only possessed

[1] United States Protest Notes of 2 July 1948 to Peru, Chile and Argentina, of 12 December 1950 to El Salvador and 7 June 1951 to Ecuador; United Kingdom Notes of 6 February 1948 to Peru and Chile, of 9 February 1950 to Costa Rica, of 12 February 1950 to El Salvador, of 23 April 1951 to Honduras and of 14 September to Ecuador. France, which was asked by the United Kingdom to make its position known, in its reply of 7 April 1951 gave its support to the positions taken up by the two other great maritime Powers.

However, the American Professor L. Henkin, concurring with the views of the Latin American countries, writes: "The United States . . . might consider also a declaration, alone or with others, that under the Convention (of Geneva) it claims a shelf out to the 600, 1,000, 2,000 or even 3,000 metres isobath, or out to 50, 100 or more miles from shore." (*The Mineral Resources of the Seas*, pp. 38-39).

Professor Henkin reports furthermore that the United States has granted permits

one of a very small extent [1]. It is in fact necessary to consider whether these statements of position, particularly those of Peru, Chile and Ecuador, were not purely declaratory of an already established custom, and whether the objections of the maritime Powers were not in consequence belated.

In any event, the position of these States has been reinforced by two fresh facts.

In the first place, there is the Italian-Yugoslav Agreement of 8 January 1968 delimiting the whole breadth of the Adriatic Sea between the two parties [2]. It is of course there stated that the delimitation deals with the continental shelf; but it is unnecessary to concentrate on the wording when the facts are clear. The depths of the area delimited, on average about 800 metres, in fact attain 1,589 metres. There is therefore no question of a continental shelf in the sense of Article 1 of the Geneva Convention, to which Yugoslavia has acceded, since the delimitation line is not merely beyond the 200 metres depth line, but also beyond the depths which, in the present state of technology, permit of the exploitation of the natural resources of the seabed, and this has not yet reached 200 metres. It is only exploration that has gone further. It is with the epicontinental platform, on the model of the countries of Latin America, that the agreement between Yugoslavia and Italy therefore deals.

The second fact is the claim by Saudi Arabia over the depths of the Red Sea, which has just been announced [3]. The Red Sea had been kept

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for exploitation on the high seas which he lists as follows: "The U.S. has issued phosphate leases some 40 miles from the California coast in the Forty-Mile Bank area in 240 to 4,000 ft. of water . . . Oil and gas leases some 30 miles off the Oregon coast in about 1,500 ft. of water; and . . . (has) threatened litigation against creation of a new island by private parties on Cortez Bank, about 50 miles from San Clemente Island off the coast of California, or about 100 miles from the mainland. Each of the California areas is separated from the coast by trenches as much as 4,000 to 5,000 ft. deep. Additionally, the Department of the Interior has, by publishing OCS leasing maps, indicated an interest to assume jurisdiction over the ocean bottom as far as 100 miles off the Southern California coast in water depths as great as 6,000 ft." (*Op. cit.*, p. 38, note 117.)

[1] At the 67th Session of the International Law Commission in 1950, J. L. Brierly said: ". . . if the Commission was of the opinion that the right of control and jurisdiction depended on the presence of the continental shelf, it was committing an injustice towards certain countries, such as Chile, that possessed no continental shelf." G. Amado and J. Spiropoulos supported the same argument, and the former proposed a lineal limitation of waters 20 miles from the coasts. At the 117th Session of the I.L.C. in 1951, J. M. Yépès submitted a draft to this effect, "with Peru and Chile in mind".

[2] Common Rejoinder, Annex 7.

[3] *Le Monde*, 30 October 1968.

Beneath the Red Sea there are metalliferous muds, rich in copper, zinc, etc. . . . In some of its deeps there are hot brines. The deposits in solution, as well as the geothermal energy associated with these hot brines offer resources that may become available in the not too distant future (Report of the *Ad Hoc* Committee mentioned on p. 100, note 2).

as a *mare clausum* under the authority of the Arabs and then of the Ottoman Empire up to the beginning of the 19th century. The Saudi Arabian declaration is said not to affect freedom of navigation. A correlation, from the geophysical point of view, between this sea, which has an average depth of 490 metres and reaches 2,359 metres, with the Adriatic Sea, is inescapable. A delimitation will undoubtedly be fixed by agreement between Saudi Arabia and the United Arab Republic which is opposite to it.

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9. A few extracts from the most outstanding statements made in the course of the Geneva Conference are appropriate to illustrate the problem with which we are dealing.

El Salvador, adopting a legal standpoint, accepted "the rights of the coastal State, not only over the continental shelf, but also over an exclusive fishing zone, and its rights to regulate the conservation of natural resources in zones of the high seas adjacent to that exclusive fishing zone, in the conviction that that view constituted recognition of the legal unity of different aspects of the law of the sea [1]".

Ghana intervened in turn to raise the question of the economic and social interests of certain smaller States, including its own, a young country, which possessed a very narrow continental shelf as a result of a sharp drop of the seabed near the coast, and which depended almost exclusively on fisheries for its protein supply. The definition adopted by the Conference, it concluded, "might operate to the disadvantage of those countries [2]". It was observed at the same Conference that the Ivory Coast is in an almost identical situation. The cry of alarm by Ghana, on behalf of the smaller countries, remains as witness to a disturbing reality.

The United Arab Republic proposed a fixed limit, whatever the depth of the sea, in order that "consideration should be given to the desire of countries without a continental shelf [3]". Norway suggested that the limit should be based, not on the configuration of the seabed or the depth of the water, but on distance from the coast. Such a solution, "in the light of the principle of State equality, would be fairer [4]". Guatemala thought it advisable to "provide for a new concept, which might perhaps be termed the 'continental terrace', comprising an area bounded by a line drawn at a given distance from the baseline of the territorial sea of the coastal State[5] ". Yugoslavia made a formal proposal for a limit situated 100 miles

[1] Geneva Conference, Vol. VI, p. 24, paras. 20 and 22.
[2] *Idem.*, p. 11, para. 22.
[3] *Idem.*, p. 27, para. 7.
[4] *Idem.*, p. 5, para. 21.
[5] *Idem.*, p. 31, para. 2.

from the coast, i.e., half that adopted by Peru, Chile and Ecuador, in order to avoid recourse to a double criterion, the 200-metres depth criterion and that of the possibility of exploitation [1].

The opinion of Panama was that "the term 'continental base' would be more accurate than 'continental shelf', for the former referred to the continental shelf and the continental slope [2]". Finally the Netherlands proposed, "in line with statements made by several representatives, including the representative of Panama, ... that the whole of the 'continental terrace', which included both the continental shelf proper and the continental slope, should be covered by the articles [3]" of the Convention.

Finally, Chile, Ecuador and Peru made a common declaration confirming the one quoted above. In it they stated that "In the absence of international agreement on sufficiently comprehensive and just provisions recognizing and creating a reasonable balance among all the rights and interests, and also in view of the results of this Conference, the regional system applied in the southern Pacific ... remains in full force" and they therein affirmed their resolve to assist "in the establishment and extension of a more just régime of the sea [4]".

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10. It seems however that the Geneva Conference took a step in the direction of an extension of the continental shelf when it stipulated, in Article 1, that this extends to the 200-metres depth line or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil.

This fictitious extension of the continental shelf, effected by the Geneva Convention at the expense of the high seas, weakens the case of those who, having adopted it, oppose the claims of States which nature has not endowed with a continental shelf and which are able, by a similar fictitious extension thereof, to find legitimate compensation in the resources of the waters adjacent to their coasts [5].

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[1] *Idem.*, p. 32, para. 7, p. 42, para. 15, and proposal (A/CONF.13/C.4/L.12).
[2] *Idem.*, p. 5, para. 24.
[3] *Idem.*, p. 35, para. 6.
[4] *Idem.*, p. 132, Doc. A/CONF.13/L.50.
Attention should be directed also to the reservations made in 1968 by these three States and also by Argentina, Brazil and El Salvador on the occasion of the report of the Working Group to the *Ad Hoc* Committee set up by the General Assembly of the United Nations to study the peaceful uses of the seabed and the ocean floor, "understanding, in particular, that the conclusions reached by the Working Group in no way constitute a prejudgment concerning the legal aspects of the question".
[5] Cf. L. Henkin, *The Mineral Resources of the Seas*, p. 23: "... since geology was not crucial to the legal doctrine, it was difficult to resist claims of coastal States that had no geological shelf, whether in the Persian Gulf or in Latin America."

Inasmuch as the basic motivation of the claims of all concerned is economic in nature, it is fair that the interests of all States should receive satisfaction on a basis of equality. Equality in freedom had for centuries been adopted as a notion peculiar to the law of the sea, before being definitively extended by the Charter of the United Nations to every domain of the life of nations and of individuals, thus linking the tradition with Roman law, which discerned the idea of equality in the concept of equity [1]. Should not this idea remain the foundation of the law of the sea, and of any modification made or to be made to that law: equality as to the high seas, equality concerning the natural dependencies of the land, both for the continental shelf and for the epicontinental platform; consequently, equality in the delimitation of areas of the continental shelf, which is the question to be resolved in the present proceedings.

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11. Moreover, the claims of the majority of these countries go back as far as, if not further than, the principle of the freedom of the high seas. This freedom, hallowed by custom in the west since the 17th century, was not entirely free from legal limitations. There might be mentioned:

*(a)* Historic waters (gulfs, bays, etc.) such as the Gulf of Fonseca in Central America, assimilated to internal waters; the Gulf of the River Plate in Argentina; the Delaware and Chesapeake Bays in the United States; the Bays of Miramachi, Hudson and Chaleurs in Canada; the Gulf of Gascony and the Bay of Granville or of Cancale in France; the Bristol Channel in England; the Bay of Conception in Newfoundland; the Gulf of Manaar and the Bay of Polk in India; the Gulf of Finland; the Baie du Lévrier in Africa; the Bays of Tunis and Gabès in Tunisia; the Bay of El Arab on the Mediterranean coast of the United Arab Republic; the Arabian-Persian Gulf and the Gulf of Aqaba in the Arab seas [2].

*(b)* Sedentary fisheries and fisheries with fixed equipment, the customary rules relating to which were adopted by the Geneva Convention of

[1] Cf. C. del Vecchio, *Philosophie du droit*, p. 282, note 1.

[2] The historic character of the Gulf of Aqaba was disputed in the General Assembly of the United Nations in February 1957. The United States declared however that, should the case arise, it would accept the decision of the International Court of Justice (Memorandum of 11 February 1957 to Israel and Declaration by Secretary of State Dean Rusk of 5 March 1957). The former states that: "In the absence of some overriding decision to the contrary, as by the International Court of Justice, the United States, on behalf of vessels of United States registry, is prepared to exercise the right of free and innocent passage and to join with others to secure general recognition of this right", and the latter states that: ". . . The United States view is that the passage should be open unless there is a contrary decision by the International Court of Justice."

29 April 1958 on the High Seas. There might be mentioned, as examples, the fisheries of Ceylon and Bahrain (Arabian-Persian Gulf), the coral banks in the Mediterranean off the coasts of Algeria, Sicily and Sardinia, and lastly innumerable fisheries in the Red Sea and in the seas of the Far East [1].

*(c)* Preferential fishing zones possessed by or claimed by a certain number of States for special reasons of a vital economic nature, including Peru, Chile, Ecuador, United Arab Republic, Iceland, etc. [2]

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12. In fact, the States which claim rights of this kind, from the States of Latin America to those of Europe, Asia and Africa, rely, according to the case, on historic title or on regional custom, which could not and cannot be prejudiced by the establishment of the custom of the freedom of the high seas, by reason of the priority or effectiveness of the former; whereas rights over the continental shelf are considered to be exercised *ipso jure*, without the aid of effectiveness.

These States can consequently avail themselves of the adage *quieta non movere* [3], and take shelter behind situations consolidated by time [4] which have changed into rules of law, no longer admitting for the future of any possible protests [5]. The feeling of society, it must be concluded,

[1] The pearl oyster fisheries of Ceylon and Bahrain had already received the attention of Vattel (*The Law of Nations*, 1758). P. C. Jessup (*The Law of Territorial Waters*, 1927, p. 15), also recalled that the pearl fisheries of Ceylon go back in history as far as to the sixth century B.C. Whilst those of the Arabian-Persian Gulf were, as is well known, mentioned about the year 1000 in the *Arabian Nights*.

M. W. Mouton was thus able to write: "We believe, that prescriptive rights could develop quietly, and had existed long enough to be respected when people became conscious of the freedom of the seas" (*op. cit.*, p. 145).

[2] Cf. L. Henkin, *op. cit.*, p. 26: "Some writers saw in the cases on sedentary fisheries and submarine mining a basis in customary law for the Truman proclamation and for the later Convention on the continental shelf."

*Ibid.*, p. 27: "Some of them (the cases cited against *res communis*) occurred before the freedom of the sea was established as a principle of the international law. In the few cases involving pearl or oyster fisheries the claims were based not on occupation, but on prescription or historic rights."

[3] See Arbitral Award of 13 October 1909 in the *Grisbadarna* case between Sweden and Norway, where it is stated that "it is a settled principle . . . that a state of things which actually exists and has existed for a long time should be changed as little as possible". This is a principle of general law supported particularly by G. Gidel, *Le droit international public de la mer*, Vol. III, p. 634. It is also the case in Muslim law, *Majallat El Ahkam*, Art. 5.

[4] The Arbitral Tribunal, in the *North Atlantic Coast Fisheries* case, recognized in its award of 27 January 1909 that "conventions and established usage might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays".

[5] Cf. Ch. de Visscher, *Problèmes d'interprétation judiciaire en droit international public*, p. 176.

is in general favourable to the recognition of historic rights, whether such recognition be shown by the conduct of States, by judicial or arbitral decisions, or in the teaching of publicists. Furthermore the possibility is not excluded of similar legal situations coming to birth by the normal operation of legal creation.

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13. It must, of course, be added that the fact that Articles 1 to 3 of the Convention on the Continental Shelf are not subject to any reservations at the time of the signature or ratification of the Convention, does not involve any contradiction or incompatibility between the concept of the continental shelf and that of the epicontinental platform; the area of the platform would simply have to be added, when appropriate, to the area of the shelf. Thus the Declaration by Argentina of 9 October 1946 proclaims its sovereignty over both these areas simultaneously [1]. The Declaration by Mexico of 29 October 1945 claiming exclusive fishing zones beyond the continental shelf has been interpreted as expressing the same conception [2]. Similarly in the course of the Geneva Conference, proposals were formulated to join the continental slope to the shelf. To sum up, the situation is that the concept of the epicontinental platform does not constitute a derogation from the definition of the continental shelf in Article 1; the shelf and the platform are not mutually exclusive; in the present stage of development of law, they are called upon to supplement each other in order to meet factual situations differing in some ways and resembling each other in many others.

It will therefore be impossible henceforth to consider the concept of the continental shelf without having regard to the parallel or supplementary concept of the epicontinental platform.

* * *

14. Two supplementary questions remain, which should be resolved in order to give a complete picture of the concept or the legal status of the continental shelf, satisfying the requirements of the arguments in the present case:

*(a)* Is the continental shelf referable to the concept of contiguity, or should it be considered rather as a natural submarine prolongation of the land territory of the coastal State?

*(b)* Does the continental shelf consist of an extension of territorial sovereignty, or does it simply confer rights, either sovereign rights or exclusive rights?

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[1] The said Declaration reads: "It is hereby declared that the Argentine epicontinental sea and continental shelf are subject to the sovereign power of the nation."

[2] Cf. M. W. Mouton, *The Continental Shelf*, p. 74.

15. Is the continental shelf referable to the concept of contiguity, or should it be considered rather as a natural submarine prolongation of the land territory of the coastal State?

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The argument of contiguity put forward in the Counter-Memorials and in the course of the speeches made by the representatives of Denmark and the Netherlands, to the effect that the submarine areas nearest to a State are presumed to appertain to it rather than to another State, is claimed to follow from the actual definition of the continental shelf given in Article 1 of the relevant Convention and to be inherent in the idea that that State possesses *ipso jure* a title to these areas or exclusive rights over them, and thus a direct and essential link—in other words, a link that is inherent and not merely implicit—founded on the *ratio legis* of the fundamental concept of the continental shelf is said to have been established between that concept and the delimitation rule of Article 6.

This view would not seem to be accepted as a rule of international law, as is clear, in particular, from the Award dated 23 January 1925 in the *Island of Palmas* case. That Award, delivered by one of the three great Swiss arbitrators, M. Huber, stressed that "it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size)".

This decision, which is generally accepted, also, by analogy, resolves the case of submarine areas.

The line of argument advanced in the Counter-Memorials is also categorically refuted by previous judicial decisions inasmuch as, in the interpretation of the texts, it openly violates the natural meaning of the words, when it maintains that the term "adjacent" which appears in Article 1 of the Convention on the Continental Shelf is the equivalent of the term "equidistant", and proceeds to deduce therefrom that the said Article which defines the continental shelf at the same time determines the rule by which it is to be delimited, namely the equidistance rule. But if such had been the intention of the authors of the Convention, they would have expressed it, instead of allowing it to be deduced in such a laborious fashion. Further, nothing is to be found in the *travaux préparatoires* in support of this opinion, as the Court has shown by referring to the documents of the International Law Commission and the Committee of Experts. On the other hand, the use of the term "adjacent" is naturally explained by an intention to confine the continental shelf to a limited part of the high seas, that part which prolongs the coast, to the exclusion of the open sea. It would moreover be difficult to accept that, contrary to good legislative technique, the subtleties and consequences of which were well known to them, the authors of the Convention used in the same

sense two absolutely different words. The term "adjacent" refers only to the fact of the reciprocal situation of two territories or of two neighbouring maritime areas. The term "equidistant", on the contrary, relates to a measurement to be determined between the two territories or the two adjacent maritime areas.

Finally, it would not be superfluous to stress the seriousness of the consequences which the acceptance of this argument would involve. It would justify territorial or maritime acquisitions repugnant to the fundamental principles of contemporary international law: for example the appropriation of large areas of the Arctic Ocean and the Antarctic Continent, an appropriation which also relies on the doctrine of sectors, which doctrine, in certain of its elements, is reminiscent of the abandoned concept of spheres of influence; for example also, the policy derived from the Berlin Treaty of 1885, which, having divided up Africa, considered as *res nullius*, permitted extension of sovereignty starting from the coast which had been effectively occupied. And should there not be added to these examples the doctrine of *Lebensraum* extending beyond the bounds of a country?

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16. The continental shelf is to be conceived, on the contrary, as a submarine prolongation of the territory: a natural prolongation, without breach of continuity. It is not therefore a question of a debatable legal fiction, but of geological reality.

It was this idea which was adopted as basis by the States which led the way in respect of claims over the continental shelf (United States) [1], or over the epicontinental platform (Mexico, Argentine, Peru) [2]. The authority of legal writers is generally favourable to it [3], and the International Law Commission made it its own.

This concept can also be deduced from the concept, universally recognized, of the territorial sea, which is itself a prolongation or extension of the national territory.

It is, however, necessary to make a reservation; namely that there must not be deduced from the unity of the territory and of the continental shelf or the platform, a unity of legal régime. The difference will appear in the course of examination of the following question concerning the rights of coastal States.

Judicial decisions support this reasoning, with a Judgment of this

[1] The Truman Proclamation provides in its fourth paragraph: ". . . since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it."

[2] These States used terms similar to those which appear in the Truman Declaration. The following wording is used: "The continental shelf forms a single morphological and geological unity with the continent."

[3] Cf. the writers mentioned by M. W. Mouton, *op. cit.*, p. 33.

Court itself, that of 18 December 1951 in the Anglo-Norwegian *Fisheries* case, according to the terms of which "it is the land which confers upon the coastal State a right to the waters", which can just as well include the bed of the waters. It is moreover apparent that the Geneva Conference was guided by this Judgment in its conception of the continental shelf.

* * *

17. Does the continental shelf consist of an extension of territorial sovereignty, or does it simply confer rights, either sovereign right or exclusive rights?

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The conduct of States is various and subject to change. Nonetheless three attitudes may be discerned which correspond to the three possibilities comprised in the last question raised, in order to round off the question of the legal status of the continental shelf: a North American attitude which holds fast to the notion of exclusiveness; a South American attitude claiming territorial sovereignty; and lastly the Geneva attitude, which culminated in the Convention sanctioning rights qualified simultaneously as sovereign and exclusive.

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The Truman Proclamation claimed an exclusive right over the continental shelf, and without claiming to exercise formal sovereignty thereover, nonetheless affirmed that the American Government regarded the natural resources of the subsoil and of the seabed and of the continental shelf, beneath the high seas and contiguous to the coasts of the United States, as appertaining to it and subject to its jurisdiction and control.

The series of declarations which followed did not all refrain from proclaiming the sovereignty of the coastal State over the bed and subsoil of the high seas. This was the case with the majority of the States of Latin America which extended their sovereignty for 200 nautical miles over the epicontinental platform, or beyond.

As for the Geneva Conference, after wavering between the concepts of exclusive rights and sovereign rights, it opted for the latter in Article 2, paragraph 1, of the Convention, and in paragraph 2 of the same Article, it described the sovereign rights as exclusive.

The United States, mentioned above, ranged itself on the side of this latter concept by ratifying the Convention.

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18. Nonetheless, however varied State practice may be, it should be possible to make it subject to a dual criterion. The rights which coastal States can exercise over the continental shelf or the epicontinental platform are capable of being determined as a group by the economic objectives given for them, and by the consideration that the freedom of the high seas should not be affected except to the extent required for the realization of these objectives. In other words, since it is a question of a principle of the law of nations from which economic, social and political development, as well as scientific and technological progress, may bring about necessary derogations, the rights which the coastal State can exercise over the continental shelf or the epicontinental platform should be limited to those which can be justified from the standpoint of the realization of the ends for which they were instituted, that is to say, generally speaking, the exclusive exploitation, as against other States, of submarine resources in the one case, or of fishing in the other.

As to the sovereign character attributed to these rights, it would appear, in the three situations to which attention has been drawn, to be a case of a somewhat dismembered territorial sovereignty, of which certain attributes are exercised over the continental shelf or the epicontinental platform. The legal content of the sovereign rights remains limited to those acts which are strictly necessary for the exploration, exploitation or protection of the resources of the continental shelf, to the exclusion of the waters and of the area lying above them. In the same way, the legal content of what has been called sovereignty by the States of Latin America is limited to the objects mentioned above, to which is to be added fishing, excluding freedom of navigation and the right to lay and maintain cables and pipelines. There would thus be no question, in any case, of sovereignty in the form in which it is exercised over the territorial sea.

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19. The dual criterion of the economic objectives given for the rights of coastal States and of respect, to the necessary extent, of the freedom of the high seas, naturally excludes the use of the continental shelf, just as of the high seas, for military purposes. The freedom of the high seas, a principle of positive international law, remains sacrosanct so long as a rule of the same nature has not subjected it to restrictions by specifying individual rights which States would be empowered to exercise therein [1].

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20. It will hereinafter be established that the three Parties to the present case are bound by the provisions of the aforementioned Article 2

[1] This reasoning does not seem to be that followed by the *Ad Hoc* Committee set up by the United Nations to study the peaceful uses of the seabed and the ocean floor.

of the Geneva Convention on the Continental Shelf, the Netherlands and Denmark by having ratified the Convention, and the Federal Republic of Germany by having acquiesced in the application to it of that same Article.

* * *

21. The concept of the continental shelf being recognized, together with the rights exercised thereover, as forming part of customary international law, the request made of the Court by the Parties involves first of all the following question:

Does there exist a general or particular convention, within the meaning of Article 38, paragraph 1 *(a)*, of the Statute of the Court, containing rules applicable to the delimitation between coastal States of the areas of the continental shelf of the North Sea which they claim?

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The Governments of the Kingdom of the Netherlands and the Kingdom of Denmark rely on the provisions of Article 6 of the Geneva Convention on the Continental Shelf of 29 April 1958 for the delimitation of the areas of the North Sea continental shelf.

The Government of the Federal Republic of Germany, which has not ratified the Convention, has also not recognized the relevant dispositions of Article 6, relied on by the Governments of the Netherlands and Denmark, as it has done in the case of the first two articles of the said Convention [1].

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The conduct of the Federal Republic and certain declarations made by it have however been interpreted by the opposing Parties as amounting to a commitment on its part to submit to the provisions of Article 6 of the Convention.

The Court, in its study of the effects of the declarations made by or the conduct of a State, concludes—"that only the existence of a situation of estoppel could suffice to lend substance to this contention [sc., that the Federal Republic of Germany is bound by its declarations]—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice".

[1] *Supra*, para. 3.

The Judgment does not take into account a well-settled doctrine that a State may be bound by a unilateral act [1].

As a consequence of its argument, the Judgment mentions in paragraph 31 that—"it seems to the Court that little useful purpose will be served by passing in review and subjecting to detailed scrutiny the various acts relied on by Denmark and the Netherlands as being indicative of the Federal Republic's acceptance of the régime of Article 6".

While agreeing with the Judgment that Article 6, as such, is not applicable to the delimitations envisaged in the present cases, I consider that the unilateral acts and the conduct of the Federal Republic should be analysed in order to clinch this conclusion.

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22. The Federal Government's delegation announced, as is mentioned in the minutes of the negotiations with the Netherlands Government dated 4 August 1964 [2], that its Government "is seeking to bring about a conference of States adjacent to the North Sea . . . in accordance with the first sentence of paragraph 1 and the first sentence of paragraph 2 of Article 6 of the Geneva Convention on the Continental Shelf" and that "the Netherlands delegation has taken note of this intention". But this commitment, expressly limited to two provisions of Article 6 concerning the advisability of preferably having recourse to agreements for the delimitation of the continental shelf, cannot be interpreted as a declaration referring to the whole of the provisions of that Article. The letter of the text is categorically opposed to such an interpretation. In particular, the provision concerning delimitation of the continental shelf by application of the equidistance rule remains outside this commitment.

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An attempt has nonetheless been made to see in the treaties of 1 December 1964 and 9 June 1965, between the Federal Republic of Germany on the one side and the Kingdom of the Netherlands and the Kingdom of Denmark on the other, an acquiescence in the application of the equidistance rule.

Acquiescence flowing from a unilateral legal act, or inferred from the conduct or attitude of the person to whom it is to be opposed—either by application of the concept of *estoppel by conduct* of Anglo-American equity, or by virtue of the principle of western law that *allegans contraria non audiendus est*, which has its parallel in Muslim law [3]—is numbered among the general principles of law accepted by international law as

[1] E. Suy, *Les actes juridiques internationaux*, 1962, pp. 148 and 152.
[2] Memorial, Annex 4.
[3] *Majallat El Ahkam*, Art. 100.

forming part of the law of nations, and obeying the rules of interpretation relating thereto. Thus when the acquiescence alleged is tacit, as it would be in the present case inasmuch as it is inferred from the conduct of the party against whom it is relied on, it demands that the intention be ascertained by the manifestation of a definite expression of will, free of ambiguity.

But the Federal Government formally declared in the joint minutes of 4 August 1964, referred to above, that "it must not be concluded from the direction of the proposed partial boundary that the latter would have to be continued in the same direction". It was also mentioned in the Protocol to the German-Danish Treaty of 9 June 1965 [1], that "as regards the further course of the dividing line, each Contracting Party reserves its legal standpoint".

Considering that the negotiations which culminated in the treaty of 1 December 1964, as well as those which culminated in the treaty of 9 June 1965 and the annexed Protocol of the same date, constitute an indivisible whole, the Court cannot disassociate therefrom the declarations mentioned above of 4 August 1964 and 9 June 1965 which brought each set of negotiations to a close, and of which the meaning does not lend itself to any equivocation, and is such as not to allow any doubt to subsist as to the intention of the Federal Republic of Germany to exclude the application of equidistance pure and simple to the delimitation beyond latitude 54 degrees north. There is in fact no reason why, in the interpretation of unilateral declarations, the settled jurisprudence of the Court should not be followed, to the effect that the terms of the treaty should be interpreted "in their natural and ordinary meaning [2]". It should also be remarked that the German-Danish treaty allegedly includes only one equidistance point, the terminal of the partial boundary [3].

It would be no less incorrect to say, as a result of similar reasoning concerning the true intention of the Federal Government, that the latter, by its Proclamation of 20 January 1964 and the *exposé des motifs* of the law on the continental shelf which it promulgated on 24 July of the same year, "acknowledges the Geneva Convention as an expression of customary international law", as the other Parties to the case claim [4]. Nor is this in fact the case as regards the provisions of the 1958 Convention concerning the equidistance line, which could naturally not acquire, by means of a recognition which for the purposes of argument

[1] Memorial, Annex 7.

[2] Advisory Opinion of 28 May 1948 on *Admission of a State to Membership in the United Nations*; Advisory Opinion of 3 March 1950 on the *Competence of the General Assembly for the Admission of a State to the United Nations*; Judgment in the *Asylum* case of 20 November 1950; Advisory Opinion of 8 June 1960 on the *Constitution of the Maritime Safety Committee*.

[3] Reply, para. 29.

[4] Counter-Memorial of the Danish Government, para. 24 and Counter-Memorial of the Netherlands Government, para. 25.

we will suppose to be efficacious, the status of a customary law rule which it does not possess [1].

Furthermore, what legal effect should be attributed to the signature by the Federal Republic of Germany of the Protocol for Provisional Application of the European Fisheries Convention of 9 March 1964, Article 7 of which provides for recourse to the median line, every point of which is equidistant from the coasts of each of the adjacent or opposite parties? The commitment of the Federal Republic to the application of the equidistance line to fishing zones, which it confirmed by the *aide-mémoire* of 16 March 1967, is not open to argument. But does its scope, exceeding the object for which it was agreed, extend to the continental shelf? The reply is more than doubtful, because of the express opposition by the Federal Government to the application of the equidistance line, in the documents which have successively been discussed, dated 4 August 1964, 9 June 1965, 20 January 1964 and 24 July 1964. Such seems to be the interpretation to be given to the intention of the Federal Republic.

This being the case, the Court does not have to embark, in addition, on an enquiry into the private thoughts of the Federal Republic, as the Netherlands Government calls upon it to do, by asking in its Counter-Memorial why the Federal Republic stressed, in the minutes of 4 August 1968, that the boundary should be determined with due regard to the special circumstances prevailing in the mouth of the Ems, if it did not have in mind the terms of paragraph 2 of Article 6 of the Geneva Convention, i.e., the equidistance rule.

It is not therefore possible to interpret the treaties of 1 December 1964 and 9 June 1965, between the Federal Republic on the one side, and the Netherlands and Denmark on the other, in the light of the minutes of 4 August 1964 and the Protocol of 9 June 1965, nor the declaration of the Federal Government of 20 January 1964 and the *exposé des motifs* of the law of 24 July of the same year, as an acquiescence in the application of the equidistance line as contemplated in the Convention of 29 April 1958 on the Continental Shelf.

* * *

23. To sum up the delimitation between the Parties of the areas of the North Sea continental shelf over which they claim sovereign rights is not governed by the provisions of Article 6 of the Geneva Convention of 29 April 1958 on the Continental Shelf, which applies the principle of equidistance.

There is therefore no need to embark on the interpretation of the provisions of the said Article 6 as a legal text binding on the Parties. Nonetheless, we may subsequently return to this point, if the adoption of the concepts included in it could afford inspiration for a solution

[1] *Infra*, paras. 24-30.

drawn from another source of law, such as a general principle of law recognized by the nations.

* * *

24. In the absence of an international convention establishing rules expressly recognized by the Parties to the dispute, do not principles or rules of customary international law exist which are applicable to the delimitation of the continental shelf?

And in the event of there being no general custom, might there be a regional custom peculiar to the North Sea?

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The Kingdoms of Denmark and of the Netherlands have contended that having fixed the boundaries of their parts of the continental shelf on the specific basis of the principles and rules of law generally recognized, those boundaries are not *prima facie* contrary to international law and are valid as against other States. They base their contention on the provisions of Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf, according to which, in the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is to be determined by application of the principle of equidistance from the baselines from which the breadth of the territorial sea of the adjacent States in measured.

The unilateral action on which the Danish and Netherlands Governments rely would have been opposable to other States and consequently to the Federal German Government, if the rule of delimitation to which they attribute an effect *erga omnes* had become a norm of positive international law binding States which, like the Federal Republic, are not parties to the 1958 Convention.

As has been seen, Articles 1 and 2 of the said Convention, which establish the institution of the continental shelf, were not the result of a codification of the international law in force, forming part of the *lex lata*, but the effect of the progressive development of the law, *de lege ferenda*, referred to in Article 13 of the Charter of the United Nations and Article 15 of the Statute of the International Law Commission. The case of the provisions of Article 6, paragraph 2, could not be different, inasmuch as they apply the principle laid down in Articles 1 and 2.

Has this progressive development of the law reached the stage, in respect of what is stated in paragraph 2 of Article 6, of settled custom, since the adoption of the equidistance method by the International Law Commission in 1953, and subsequently by the Geneva Conference in 1958, in both cases by a very large majority?

Admittedly, the notion of the continental shelf itself, which made its first appearance in State practice in 1945, took only a dozen years to

become a universally recognized custom. The voices of authoritative writers [1] and jurists of all kinds, at international conferences, were unable to stem the current of legal thinking resulting from unprecedented scientific progress and the rapid development of the economic and social life of the nations. That is to say that this recent rule of the law of the sea, under the pressure of powerful motives and thanks to State practice and the effect of international conventions, was within a short time converted into a customary law meeting the pressing needs of modern life.

Can the same be said of the concept of equidistance in Article 6 of the Geneva Convention?

It is necessary to ascertain, in a first limb of the discussion, what State practice has been, both before the date of the Convention of 29 April 1958 on the Continental Shelf and after that date.

* * *

25. One prior question calls for resolution: what are the acts of delimitation which must be tabulated in order to select those which have contributed to the formation of the material element of custom, both with reference to the nature of the waters delimited, and with reference to the situation of the coastal States of those waters, adjacent States and opposite States.

The Court has considered that only delimitations concerning the continental shelf and made between adjacent States can be taken into account as precedents. It seems however that the acts which must be taken into account in this investigation are, with reference to the nature of the waters, all those pertaining to the delimitation of maritime waters of whatever kind: territorial seas, straits, contiguous zones, fishing zones, continental shelf, epicontinental platform—to which must be added lakes. The underlying concept common to all these stretches of water, which is decisive by way of analogy, is that they all proceed from the notion of the natural prolongation of the land territory of the coastal States [2]. Thus, the 1953 Committee of Experts, drawing no distinction in this connection between the territorial sea and the continental shelf, wrote in its report that it had "considered it important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves . . .".

On the other hand, it is obvious that boundary lines dividing rivers should not be selected as precedents. Moreover, such boundary lines

[1] In particular, those of G. Scelle and A. de Lapradelle; the representative of the Federal Republic of Germany, Dr. Münch, still said of the continental shelf rule at the Geneva Conference that "many authorities reject it *de lege lata* and *de lege ferenda*."

[2] *Supra*, para. 15.

follow the thalwegs or the navigable channels much more frequently than the middle of the stream.

The acts of delimitation with reference to adjacent or opposite States require more detailed examination.

All such acts should be drawn on, again on the ground of their common underlying concept. The example has been set by the three conventions adopted at Geneva concerning respectively the territorial sea, the contiguous zone and fishing zones. All three take, in so many words, as their basis for delimitation "the median line every point of which is equidistant from the nearest points on the baselines . . .". And those conventions laid it down that this provision was applicable to lateral delimitations just as to delimitations between opposite States [1].

Should not this assimilation between these two types of delimitation be reflected in the interpretation of Article 6 of the Convention on the Continental Shelf, even though the two different terms, median line and equidistance line, are there employed?

It is imperative in the present case to interpret the Convention on the Continental Shelf in the light of the formula adopted in the other three conventions, in accordance with the method of integrating the four conventions by co-ordination. For the four conventions, voted on the same day at one and the same meeting, constitute a body of treaties all falling within the same legal framework, that of the law of the sea. Thus they were drawn up by the International Law Commission of the United Nations and submitted to the Geneva Conference in a single document. Must it not consequently be agreed that, notwithstanding the differences of wording, or the disparity between the terminology noticed in the three conventions mentioned on the one hand, and the Convention on the Continental Shelf on the other, the same equidistance rule is applicable, according to the meaning of the four conventions, to lateral delimitations just as to median delimitations?

It will be noticed that the rule having been understood in this way in international circles, the 13 States which signed the Convention concluded in London on 9 March 1964 took over word for word from the three above-mentioned Geneva conventions their common formula for States lying opposite or adjacent to each other.

If nevertheless the text of the Convention on the Continental Shelf emerged from the deliberations of the conference with a wording different from that of the other three conventions, that fact is to be attributed to the contingencies of discussion at a meeting. Delimitations both between adjacent States and between States lying opposite each other formed the subject, before the International Law Commission, of a single form of words covering both situations. The fact that they were mentioned, in

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[1] Convention on the Territorial Sea, Article 12; on the Contiguous Zone, Article 24; on Fishing and Conservation of the Living Resources of the High Seas, Article 7, which refers to Article 12 of the Convention on the Territorial Sea.

the convention drawn up during the conference in separate paragraphs of Article 6, and that the two texts were drafted in somewhat different terms, is to be explained by the vicissitudes of discussion in two Committees, and does not permit of the deduction therefrom of a difference between a median line applicable to States lying opposite each other and an equidistance line for demarcating the boundary between adjacent States. The *travaux préparatoires* are no less explicit, in this respect, than the clarity of the terms employed in the four conventions concerning the law of the sea, which refer, as to a single whole, to the median line and equidistant points as applicable to adjacent States and States lying opposite each other. This amounts to saying, in short, that the notion of equidistance is the rule for both sorts of delimitation.

* * *

26. The instruments prior to the Convention on the Continental Shelf, concerning the delimitation of maritime waters—territorial sea, straits, lakes, contiguous zone, fishing zones, continental shelf, epicontinental platform—could not be more varied in nature.

It will subsequently be seen that the proclamations and other pronouncements made in 1945 by the United States, in 1947 by Nicaragua, in 1949 by Saudi Arabia and the States of Kuwait, Bahrain, Qatar, Abu Dhabi, Sharjah, Ras al Khaimah, Umm al Qaiwain and Ajman, and in 1955 by Iran, all relied on justice or equity. This was the largest group of States.

The treaty of 27 September 1882 between Mexico and Guatemala, as well as the decree of the Government of Cambodia of 30 December 1957, adopted the method of a line perpendicular to the coast.

The method of extending the land frontier seawards was followed in the decree of the French Government of 25 May 1960, confirming the agreement between France and Portugal concerning Senegal and what is referred to as Portuguese Guinea. The same was done in respect of the boundaries laid down in 1953 under the Australian pearl fisheries legislation of 1952-1953.

The delimitation of the epicontinental platform between Chile, Ecuador and Peru followed geographical parallels of latitude.

The Agreement of 15 June 1846 between the United States and Canada, and the 1928 Act endorsing the Agreement of 19 October 1927 between Singapore and Johore both follow the channel between the two coasts.

A number of agreements were noted which opted for equal division, employing the following expressions: "equidistant from" or "half-way between" the coasts, or along "the middle line". Such were, for example, the Agreement of 11 April 1908 between the United States and Great Britain, the Agreements of 28 September 1915 between Malaysia and Indonesia, of 28 April 1924 between Norway and Finland, the Peace Treaty of 4 January 1932 between Italy and Turkey, the Agreements of

30 January 1932 between Denmark and Sweden, and those of the Peace Treaty with Italy of 10 February 1947, delimiting the territorial waters of Trieste, and, finally, the Agreement of 22 February 1958 between Saudi Arabia and Bahrain.

Delimitations of lakes sometimes referred to the median line or the middle of the water, sometimes to the thalweg, and sometimes followed the banks of the lake or did not purport to be based on any method.

A rather special case was that of the Agreement of 25 February 1953 between France and Switzerland for the delimitation of the Lake of Geneva along ". . . a median line and two transversal arms . . .", this line being "replaced, for practical reasons by a six-sided polygonal line with a view to effecting a compensation as between the areas".

Finally, a number of agreements and other instruments made no reference to any method whatsoever. This was the case with the Agreements of 1918 between China and Hong Kong and of 1925 between the United States and Canada; the 1942 treaty between the United Kingdom and Venezuela and the 1957 Agreement between the Soviet Union and Norway.

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27. It does not seem that any conclusion can be drawn from these extremely varied formulae which have been employed, unless it be that they constitute a set of methods to which States might freely have recourse in order to reconcile their respective interests. Accordingly, the use of one method or another, not excepting that which employs the median line, does not indicate any *opinio juris* based on the awareness of States of the obligatory nature of the practice employed.

* * *

28. Since the above-mentioned acts adopting the median line or the equidistance line are not capable of creating a custom, it remains to be seen whether those which have occurred since the signature of the Convention on the Continental Shelf, by being added thereto, have had this effect.

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In order to resolve this question, the Court argues that a norm-creating convention has, as such, an influence on the formation of custom. The function of State practice is envisaged, on this line of reasoning, as being appropriate cases to support the potentially norm-creating nature of the convention.

It appears to me that this reasoning is contrary to both the letter and the spirit of Article 38, paragraph 1 *(b)*, of the Court's Statute, which

bases custom on State practice. The 1958 Convention, like any other convention, has therefore no other influence on the formation of custom than that which is conferred upon it by the States who have ratified it, or have merely signed it: the deliberate legal act of ratification, and the legal fact of signature, both constitute attitudes which count in the enumeration of the elements of State practice.

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29. Consequently, in order to draw up as complete as possible a current list of precedents of such a kind as to contribute towards the transformation of the equidistance method into a rule of customary law, it would be necessary to tabulate:

*(a)* the deliberate legal acts of ratification of the aforesaid Conventions;
*(b)* the legal facts of signature of the Conventions;
*(c)* the various acts of delimitation of the territorial sea, the contiguous zone, fishing zones, straits, lakes, the continental shelf and the epicontinental platform.

States whose acts of delimitation have been referred to and which are included under sub-paragraphs *(a)* and *(b)* include: the Soviet Union, Finland, Australia, the United Kingdom, Sweden, Denmark, the United States and the Federal Republic of Germany. There is thus no need to include them once again among the total number of States which have carried out acts of delimitation.

In addition to the above-mentioned States, the Netherlands and Denmark mention in their Common Rejoinder those which have opted for the equidistance line.

So far as Kuwait is concerned, the representatives of the Federal Republic argued that its agreement with the concessionary company could not be regarded as a precedent, since it was not a convention between States.

Numerous concessions under public law have given rise to judicial precedents in various questions of international law. Nevertheless, an agreement concerning a concession by a State to a company does not, *per se* or as such, constitute an element of the practice which contributes to the creation of international custom. It is only by a legitimate assimilation of the position taken up by the State granting the concession, to a unilateral act, that the case of Kuwait might be considered. Nevertheless, the attitude which is attributed to it, like that attributed to Iran, demands careful thought. They might have been considered as precedents contributing towards the establishment of custom if those States had not refrained from referring to the equidistance method, although their legal advisers must assuredly have been aware of the discussions that had taken place at the Geneva Conference. The inmost thoughts of those States cannot be plumbed, so as to claim that an *opinio juris* attached to the

demarcations which they made without referring to a rule they believed themselves obliged to apply. The more so in that on account of the steps taken by each of them in drawing lines of demarcation of their continental shelves one cannot help looking back to their respective declarations of 1947 and 1955, in which they specified that they would rely in this connection on the notion of equity.

So far as Iraq is concerned, it was stated in the Rejoinder that that State "automatically considered that the equidistance principle expressed in Article 6 of the Continental Shelf Convention would govern the delimitation of her continental shelf in the absence of an agreement or of special circumstances justifying another boundary line [1]". But the declaration of Iraq was made on 10 April 1958, i.e., before the signature of the Geneva Convention; the reference to Article 6 thereof is consequently out of place. The Iraqi declaration can nevertheless be taken into consideration, like the Truman Proclamation, as starting a trend towards a new custom.

The Agreement between the United Kingdom and Norway, signed on 10 March 1965, which adopted the equidistance rule, constitutes another precedent. The same can be said of the Agreement of 8 December 1965 between Denmark and Norway, the Proclamation of 30 March 1967 by the President of the Republic of Tanzania concerning the delimitation of the territorial sea between Tanzania and Kenya, the Agreement of 20 March 1967 between Morocco and Spain dealing with the Straits of Gibraltar, and the Agreement of 24 July 1968 between Sweden and Norway.

But what view should be taken of the attitude of Belgium? Although it did not sign the Convention on the Continental Shelf, the Belgian Government, in a Note of 15 September 1965 from the Belgian Embassy to the Netherlands Ministry of Foreign Affairs, stated that "the two countries are in agreement on the principle of equidistance and on its practical application". Furthermore, the provisions of the Convention on the Continental Shelf were adopted in a bill, accompanied by an *exposé des motifs* which was submitted to the Chamber of Representatives on 23 October 1967. The bill, while totally devoid of legal effect, nevertheless expresses the official point of view of the Government. It constitutes one of those acts within the municipal legal order which can be counted among the precedents to be taken into consideration, where appropriate, for recognizing the existence of a custom. In any event, the attitude of the Belgian Government is expressed without any possible equivocation in the statement contained in the State to State communication of 15 September 1965, to which the character of precedent cannot be denied [2].

Furthermore, since the European Fisheries Convention of London of 24 March 1964 adopted the equidistance formula on the model of the

[1] Rejoinder, para. 72.

[2] *Supra*, para. 21, on the effect of unilateral declarations.

Geneva Conventions on the Territorial Sea, the Contiguous Zone and Fishing Zones [1], it should be noted that seven States which are not parties to those conventions signed the London Convention. They are to be added to those States, already mentioned, which have applied the equidistance method.

Thus, finally, in the course of the decade which has elapsed since the institution of the new rule by treaty, a dozen States not parties to the 1958 Convention on the Continental Shelf can be counted which have opted, in addition to the signatory States of that Convention, for the equidistance method.

However important these precedents may be, and despite the fact that those relating to all kinds of waters have been drawn upon, their number amounts to only about half of that of the international community. It is difficult to find in this elements capable of constituting the generally accepted practice of Article 38, paragraph 1 *(b)*, of the Statute of the Court.

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30. There is a textual argument which is of all the more account in that it firmly confirms this view of the matter. It is that drawn from Article 12 of the Convention on the Continental Shelf, which makes a distinction between Articles 1 to 3 and all the other articles, by providing that to the former alone no reservations may be made. The Court has dealt extensively with this point, and I need only refer to it in order to add that the power to subject the implementation of the provisions of Article 6 to reservations implies the absence, in the minds of the signatories of the Convention, of the *opinio juris sive necessitatis*. The latter requires consciousness of the binding nature of the rule, and it is self-evident that a rule cannot be felt to be binding when the right not to apply it is reserved.

The conclusion cannot therefore be avoided that the equidistance method of Article 6 of the said Convention of 29 April 1958 has not acquired the nature of a customary rule which it did not have formerly.

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31. Nor are there to be found therein the elements which go to make up a regional custom. For while a general rule of customary law does not require the consent of all States, as can be seen from the express terms of the Article referred to above—but at least the consent of those who were aware of this general practice and, being in a position to oppose it, have not done so [2]—it is not the same with a regional customary rule, having

[1] *Supra*, para. 22.

[2] Thus the right of countries becoming independent, which have not participated in the formation of rules which they consider incompatible with the new state of affairs, is preserved.

regard to the small number of States to which it is intended to apply and which are in a position to consent to it. In the absence of express or tacit consent, a regional custom cannot be imposed upon a State which refuses to accept it. The International Court of Justice expressed this clearly in its Judgment of 20 November 1950 in the *Asylum* case in the following terms: "The Party which relies on a custom of this kind [sc., regional or local custom] must prove that this custom is established in such a manner that it has become binding on the other Party [1]."

Accordingly, the Federal Republic of Germany cannot be bound by a so-called regional customary rule which it rejects. It has expressly recorded its opposition to the rule in question; firstly in its Reply of 26 August 1963 to the *note verbale* from the Netherlands Embassy in Bonn; and subsequently in the Special Agreement of 2 February 1967, in which the Government of the Netherlands took formal note of this, as did the Government of Denmark. Moreover, in its Proclamation of 20 January 1964, the Federal Government distinguished between the principle of the continental shelf itself and the rules concerning its delimitation [2].

* * *

32. Consequently it cannot be accepted, as the Governments of the Kingdoms of Denmark and of the Netherlands maintain, that the rule in Article 6 of the Geneva Convention concerning the delimitation of the continental shelf has acquired the character of a general rule of international customary law or that of a regional customary rule.

The equidistance line having been rejected as a rule of positive law, recourse may be had to it, after the fashion of those States which have applied it voluntarily, as a method which can, subject to necessary rectifications in accordance with the circumstances, ensure an equitable delimitation.

Thus it is necessary in the last analysis to have regard to the general principles of law recognized by nations.

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However the Court has not considered that it should do this; it has taken the view that, failing a method of delimitation which the Parties are bound to use, they should be called upon to negotiate an agreement by the application of equitable principles.

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[1] In support of this opinion, cf. I.C.J., *Asylum* case, Judgment of 20 November 1950; and the Judgment of 27 August 1953 in the *Rights of Nationals of the United States of America in Morocco* case.

[2] Counter-Memorial of the Netherlands and Denmark, Annex 10. *Exposé des motifs* of the German Bill on the Provisional Determination of Rights over the Continental Shelf.

The equity which the Court recommends to the Parties' consideration would appear to be nothing other than justice: "whatever the legal reasoning of a court of justice", says the Judgment, "its decisions must by definition be just, and therefore in that sense equitable". The Judgment arrives at the obvious truth that it is necessary to be just, and does not give much indication to the Parties, each of whom considers that its own position is equitable.

What is just is however not always equitable, witness the well-known adage: *summum jus summa injuria*. And it is in order to mitigate this inconvenience of strict justice that recourse may be had to equity whose role is to moderate the rigour of law.

The truth of the matter is that the principle of equity which must be applied is not the abstract equity contemplated by the Judgment, but that which fills a lacuna, like the principle of equity *praeter legem*, which is a subsidiary source of law. Contrary to the opinion of the Court, there is a lacuna in international law when delimitation is not provided for either by an applicable general convention (Article 38, paragraph 1 *(a)*), or by a general or regional custom (Article 38, paragraph 1 *(b)*). There remains sub-paragraph *(c)*, which appears to be of assistance in filling the gap. The question which arises is therefore as follows:

33. Does there exist a general principle of law recognized by the nations, as provided for by Article 38, paragraph *(c)*, of the Statute of the Court, from which would follow a rule to the effect that the continental shelf could, in case of disagreement, be delimited equitably between the Parties?

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It is important in the first place to observe that the form of words of Article 38, paragraph 1 *(c)*, of the Statute, referring to "the general principles of law recognized by civilized nations", is inapplicable in the form in which it is set down, since the term "civilized nations" is incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law [1].

The discrimination between civilized nations and uncivilized nations, which was unknown to the founding fathers of international law, the protagonists of a universal law of nations, Vittoria, Suarez, Gentilis, Pufendorf, Vattel, is the legacy of the period, now passed away, of colonialism, and of the time long-past when a limited number of Powers

[1] S. Krylov, in his dissenting opinion in the case of *Reparation for Injuries Suffered in the Service of the United Nations*, decided on 11 April 1949, omits the word "civilized" when referring to the general principles of law. He does not however give reasons for this omission. But in his course of lectures at The Hague Academy of International Law in 1947, he raised his voice against the arbitrary treatment given to the so-called native States (*Recueil des Cours*, 1947, I, p. 449).

established the rules, of custom or of treaty-law, of a European law applied in relation to the whole community of nations. Maintained and sometimes reinforced at the time of the great historical settlements—Vienna 1815, Berlin 1885, Versailles 1920, Lausanne 1923, Yalta 1945—European international law had been defended by jurists of indisputable authority in the majority of branches of international law, such as Kent, Wheaton, Phillimore, Anzilotti, Fauchille, F. de Markas, Westlake, Hall, Oppenheim, Politis: thus the last-mentioned writer's *La morale internationale* is striking by reason of the fact that it is centered on Europe alone and Europe's exclusive interests. However great and powerful the thinking of these renowned jurists may be, their concept of a family of European and North Atlantic nations is nonetheless beginning to be blurred by the reality of the universal community, in the thinking of the internationalists of a new age such as S. Krylov, M. Katz, W. Jenks and M. Lachs. What is more, the universalist jurists of Europe had been preceded by those of Asia and the Middle East: Sui Tchoan-Pao, Bandyopadhyoy, Rechid.

Whether the adepts in the notion of the law recognized by civilized nations assess degrees of civilization by reference to the competence of authority to preserve the rights of foreigners [1], or to its power to ensure the protection of the fundamental rights of the human person [2], it is impossible to avoid the thought that the colonial régime should not have been excluded from the factors of assessment belonging to one or other of these criteria, since the colonized were foreigners vis-à-vis the colonizers, and had been deprived of certain of their fundamental rights [3].

Moreover, the discrimination condemned by writers is in absolute contradiction with the provisions of the United Nations Charter, stipulating henceforward "the sovereign equality" of all the Member nations, and for their participation both in the elaboration of international law in the organs of the United Nations, particularly the International Law Commission on which all nations are called upon to sit, and in the application, interpretation and to a certain extent the development and evolution of international law, by virtue of Article 9 of the Statute of the Court, according to which "the electors shall bear in mind . . . that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured".

Thus it is that certain nations, to whose legal systems allusion was made above, which did not form part of the limited concert of States which did the law-making, up to the first decades of the 20th century, for the whole of the international community, today participate

[1] Westlake and R. Y. Jennings.

[2] A. Favre.

[3] W. Jenks recalls that at an earlier period, the Latin American writers had had a similar reaction in face of the law of Europe (*The Common Law of Mankind*, p. 74).

in the determination or elaboration of the general principles of law, contrary to what is improperly stated by Article 38, paragraph 1 *(c)*, of the Court's Statute. The American delegate Root did well to suggest to the Committee of Jurists in 1920 that the Court should apply, besides treaty law and customary law, "the universally recognized principles of law". Nonetheless, under the influence of ideas borrowed from The Hague Conference of 1907, where the jurists of European allegiance were dominant, he substituted for this formula that which was to appear in Article 38, paragraph 1 *(c)*, of the Statute, which has thus been inherited, as it were without *beneficium inventarii*, from concepts as anachronistic as they are unjustified. And over and above this, the particularly docile line taken by international decisions, understood by "civilized nations" those composing the "Concert of Europe", from whose systems of law alone they avowedly borrowed general principles of law by way of analogy [1].

If it is borne in mind particularly that the general principles of law mentioned by Article 38, paragraph 1 *(c)*, of the Statute, are nothing other than the norms common to the different legislations of the world, united by the identity of the legal reason therefor, or the *ratio legis*, transposed from the internal legal system to the international legal system, one cannot fail to remark an oversight committed by arbitrarily limiting the contribution of municipal law to the elaboration of international law: international law which has become, in short, particularly thanks to the principles proclaimed by the United Nations Charter, a universal law able to draw on the internal sources of law of all the States whose relations it is destined to govern, by reason of which the composition of the Court should represent the principal legal systems of the world.

In view of this contradiction between the fundamental principles of the Charter, and the universality of these principles, on the one hand, and the text of Article 38, paragraph 1 *(c)*, of the Statute of the Court on the other, the latter text cannot be interpreted otherwise than by attributing to it a universal scope involving no discrimination between the members of a single community based upon sovereign equality. The criterion of the distinction between civilized nations and those which are allegedly not so has thus been a political criterion,—power politics,— and anything but an ethical or legal one. The system which it represents has not been without influence on the persistent aloofness of certain new States from the International Court of Justice [2].

It is the common underlying principle of national rules in all latitudes which explains and justifies their annexation into public international law. Thus the general principles of law, when they effect a synthesis and digest of the law *in foro domestico* of the nations—of all the nations—

[1] See in particular the decisions of the Permanent Court of Arbitration of 11 November 1912 in the *Russian Indemnity* case and of 13 October 1922 in the *Norwegian Shipowners' Claim* case.

[2] Cf. W. Jenks, *The Common Law of Mankind*, p. 79.

seem closer than other sources of law to international morality. By being incorporated in the law of nations, they strip off any tincture of nationalism, so as to represent, like the principle of equity, the purest moral values. Thus borne along by these values upon the path of development, international law approaches more and more closely to unity.

To conclude this account, it appears that the Court, when quoting, as necessary, paragraph 1 *(c)* of Article 38, could omit the adjective referred to, and content itself with the words "the general principles of law recognized by . . . [the] nations"; or could make use of the form of words used by Sir Humphrey Waldock in his address of 30 October 1968, namely: "the general principles of law recognized in national legal systems". One might also say, quite simply: "the general principles of law"; jurists, and even law students, would not be misled. All this pending the revision of the Court's Statute, or certain of its provisions, being put in hand.

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34. The meaning of Article 38, paragraph 1 *(c)*, of the Statute of the Court having thus been restored, it is possible to give an adequate reply to the question raised: Is there a general principle of law recognized by the nations from which would follow a rule to the effect that the continental shelf could be delimited equitably between the Parties?

In their addresses of 30 October 1968, the Netherlands and Denmark stressed that they were not aware of any decision supporting the idea of the application of a general principle recognized by national systems which was in contradiction with positive law.

This objection has been amply answered by showing that the equidistance method does not constitute a rule of positive law. There is, in the circumstances, a lacuna which is to be filled *praeter legem* and not *contra legem*, by inferring a general principle of law recognized in national legal systems.

It cannot in fact be denied that an international court, by progressively diverging from the thesis of the formal or logical plenitude of international law, contributes to the remedying of its insufficiencies and the filling-in of its lacunae. It is true that the Court is bound, by virtue of Article 38 of the Statute, "to decide in accordance with international law such disputes as are submitted to it". But the law to which the text refers does not have the limited meaning, confined to treaties and custom, often given to the term "law" [1]. The provision of the Article mentioned above, according to which the Court shall apply "the general principles of law recognized by . . . [the] nations" conflicts with the voluntaristic point of

[1] As was pointed out by the American-Norwegian Tribunal in 1922 in the *Norwegian Shipowners' Claim* case.

view—which was that of the Judgment of the Permanent Court of International Justice of 7 September 1927 in the *Lotus* case—and expressly authorizes the Court, which it directs to use the method of analogy, to draw the legal norms from sources other than those founded on the express or tacit consent of States.

In a renewed effort by Romano-Mediterranean legal thinking, breaking the chrysalis of outgrown formalism which encompasses it, international law at the same time tears apart its traditional categories, though it be slowly and bit by bit, in order to open the door to political and social reality in a human society which no longer recognizes any exclusive domains.

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35. In order to pronounce on the propriety of the application of this or that method with a view to an equitable and just delimitation of the continental shelf, there would, failing a legal obligation requiring the use of one or other method, be need to have recourse ultimately to equity, State practice having referred thereto more than once.

For if there is a principle recognized by the municipal law of the community of nations which demands adoption by analogy into international law as a general principle of law, at least as much as so many others which it has already borrowed, it is clearly the principle which nominates equity as the basis of law and as the objective of its implementation.

The general principles of law are indisputably factors which bring morality into the law of nations, inasmuch as they borrow from the law of the nations principles of the moral order, such as those of equality, responsibility and *faute*, *force majeure* and act of God, estoppel, non-misuse of right, due diligence, the interpretation of legal documents on the basis of the spirit as well as of the letter of the text, and finally equity in the implementation of legal rules, from which derive the principles of unjust enrichment and *enrichissement sans cause* [1], as well as good faith "which is no more than a reflection of equity and which was born from equity [2]".

* * *

[1] French case-law, which initiated the principle of non-misuse of right, clearly drew inspiration from equity. See Judgment of the *Cour de Cassation* of 18 January 1892 which refers to "the action . . . based on the principle of equity which forbids enrichment at the expense of another".

The case-law of the Lebanon, before *enrichissement sans cause* appeared in its new code of obligations, deduced the concept from the rules of equity of *Majallat el Ahkam*, the Muslim code of civil law which was there in force.

[2] Expression of K. Strupp, Course at The Hague Academy of International Law, *Recueil des Cours*, 1930, Vol. III, p. 462.

Cf. M. P. Fabreguettes, *La logique judiciaire*, p. 399, who writes: "In a higher legal sense, equity (from *aequitas*, from *aequis*, equal), is distributive justice, which forbids

36. It is not possible to have recourse simply to the concept of what is reasonable, in preference to what is equitable.

The idea of the reasonable saw the light as long ago as in the writings of the Romano-Phoenician jurisconsult Paul [1]. But the reasonable, if it excludes the equitable, does not completely satisfy the mind. In the way in which it is formulated, in time as in space, it has an element of subjectivity, or even of relativity, which contrasts with the objective nature of the equitable [2]. Furthermore it may be wondered whether the champions of the reasonable have in mind pure reason, or are referring to practical reason. There is a difference, worthy of notice, between the one doctrine and the other, namely that which separates the understanding from the moral law. Morality, it has been said, hovers around the law; and one may add, with N. Politis and following Ulpian and Cicero, that it should have dominion over it [3]. In turning away from it, international law condemns itself to sterility in face of a society bubbling over with life. The normative school and its pure theory of law, in rejecting the moral, social and political elements, described as meta-juridical, become isolated from international realities and their progressive institutions: *ubi societas, ibi jus.*

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any respecting of persons, or being guided by reasons other than those of law."

Cf. also Ch. de Visscher, *Theory and Reality in Public International Law* (trans. P. Corbett, Princeton, 1957), p. 357, who in turn stresses that "it is significant that in the . . . cases in which members of the Court have expressly invoked 'the general principles', they have done so under cover of some of the most elevated and most general categories of the legal order, such as 'justice' or 'equity'."

See decision of 11 November 1912 of the Arbitral Tribunal in the *Russian Indemnity* case, which refers to equity in order to assess the responsibility of a State, and its implementation.

[1] P. Roubier, former Director of the School of Law of Beirut, *Théorie générale du Droit*, p. 129.

[2] It should be recalled that Plato and Aristotle, who were so to speak reason personified, offered justification for slavery, against all equity, and it was not definitively condemned in the name of equality between man and man until the coming of Christianity. Even then it was tolerated as reasonable up to the French Revolution.

Let it not be overlooked also that colonialism, so inequitable as between nations, was considered reasonable by great Western jurists right up to very recent times. The same could be said of the social and economic inequalities existing at all times and in all places.

Finally public feeling in many very developed countries still finds it reasonable that there should be inequality between wife and husband in the enjoyment or exercise of certain civic, civil or family rights.

[3] N. Politis, in *La morale internationale*, p. 26, recalls the saying of Cicero, *quid leges sine moribus*, and relates the moral basis of modern international law back to Ulpian of Tyre, who was himself inspired, as P. Roubier observes (*ibid.*, p. 128, note 1) by that other Phoenician, Zeno, the founder of the stoic school, and his disciples Seneca and Marcus Aurelius, p. 51: *honeste vivere, alterum non laedere, suum cuique tribuere.*

37. Although international justice has generally not specified the municipal sources of the general principles of law which it has derived, when referring to a concept of such wide scope as equity, and one which permits of more than one interpretation, as we have just seen, it is important that the underlying elements thereof be specified: both in time, by going back to legal traditions which have continued up to our own day, and in space, by glancing rapidly over the various national contributions.

Thus it appears legitimate to recall that Greek philosophy, which has never been rejected by succeeding generations right down to our own, already conceived of equity as a corrective to law in general, as a form of justice better than legal justice, because the latter, in view of its general nature, cannot always correspond perfectly to all possible cases [1]. In the course of time, the concept of justice and equity has become associated with that of law, whether justice be defined, as by Ulpian of Tyre, as the intention to attribute to each what is rightfully his [2], or as the art of that which is good and equitable [3], or whether the law should draw inspiration from the idea of justice and tend to its realization [4].

The just and equitable solution, in the sense given by Ulpian's definition of law: *jus est ars boni et aequi*, is not to be confused with the faculty possessed by the Court by virtue of Article 38 *in fine* to decide a case, with the agreement of the parties, *ex aequo et bono*, in the sense which modern law gives to that expression. It is in this sense that it had already been taken in arbitration cases [5]. But above all it is appropriate to refer to the Judgment of 28 June 1937 by the Permanent Court of International Justice in the *Diversion of Water from the Meuse* case between the Netherlands and Belgium, as a precedent for the effective application of equity within the framework of law, affirmed, if there were need for this, by the individual opinion of Judge Manley Hudson [6]. The Permanent Court thus preserved the spirit which had presided over the preparation of its Statute, and which was expressed by the president of the Advisory

[1] Aristotle, *Nicomachean Ethics*, quoted by G. del Vecchio, *Philosophie du droit*, p. 282. See also K. Strupp, Course at The Hague Academy of International Law, *Recueil des Cours*, 1930, Vol. III, p. 462.

[2] Ulpian: *Justitia est constans et perpetua voluntas jus suum cuique tribuendi.*

[3] Ulpian following Celsus: *Jus est ars boni et aequi.* Equity was in fact no stranger to the *jus civile*: cf. P. Arminjon, B. Nolde and M. Wolff, *Traité de droit comparé*, p. 528.

[4] Since Accarias.

[5] The Award of 25 June 1914 by the arbitrator C. E. Lardy, in the dispute concerning the boundaries in the *Island of Timor*, in which the arbitrator was requested by the arbitration agreement to decide on the basis of the treaties and the general principles of international law, stated as follows: "If one takes the point of view of equity, which it is important not to lose from view in international relations . . ."

[6] Judge Hudson said ". . . under Article 38 of the Statute, if not independently of that article, the Court has some freedom to consider principles of equity as part of the international law which it must apply".

Committee of Jurists, Baron Descamps, in the statement which he made at the second meeting, on 17 June 1920, where may be found the following words: "If it is the duty of the judge to apply the law, where it exists, we must not forget that equity is, in international as well as in national law, a necessary complement of positive law . . ." *[Translation by the Secretariat of the Advisory Committee.]*

Thus it is necessary to make a distinction between the principle of equity in the wide sense of the word, which manifests itself, in the phrase of Papinian, *praeter legem*, as a subsidiary source of international law in order to remedy its insufficiencies and fill in its logical lacunae; and the settlement according to independent equity, *ex aequo et bono*, amounting to an extra-judicial activity, in the expression of the same jurisconsult, *contra legem*, whose role is, with the agreement of the parties, to remedy the social inadequacies of the law.

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38. Incorporated into the great legal systems of the modern world referred to in Article 9 of the Statute of the Court, the principle of equity manifests itself in the law of Western Europe and of Latin America, the direct heirs of the Romano-Mediterranean *jus gentium*; in the common law, tempered and supplemented by equity described as accessory [1]; in Muslim law which is placed on the basis of equity (and more particularly on its equivalent, equality [2]) by the Koran [3] and the teaching of the four great jurisconsults of Islam condensed in the Shari'a [4], which comprises, among the sources of law, the *istihsan*, which authorizes equity-judgments; Chinese law, with its primacy for the moral law and the common sense of equity, in harmony with the Marxist-Leninist philosophy [5]; Soviet law, which quite clearly provides a place for considerations of equity [6]; Hindu law which recommends "the individual to act, and the judge to decide, according to his conscience, according to justice, according to equity, if no other rule of law binds them [7]"; finally the law of

[1] See K. Strupp, Course at The Hague Academy of International Law, *Recueil des Cours*, 1930, Vol. III, p. 468.

[2] Equity, as a principle of equality already perceived by the Phoenician-Roman jurisconsults, is to be found even in the terminology of the law of Islam. English law in turn was to say that "Equality is equity".

[3] Among others, Sura IV, verse 61 and Sura V, verses 42 and 46: "If thou judge, then judge with fairness and equity."

[4] See *Majallat el Ahkam*, Arts. 87 and 88, which implement the principle of equality mentioned in the note above.

[5] Cf. Chan Nay Chow, *La doctrine du droit international chez Confucius*, emphasizing the virtue of equity in the social, economic and judicial field, as well as on the international level, pp. 50, 51, 55, 56 and 60. Cf. also René David, *Les grands systèmes de droit contemporain*, pp. 534 and 540.

[6] René David, *ibid.*, p. 122.

[7] *Ibid.*, p. 152.

the other Asian countries, and of the African countries, the customs of which particularly urge the judge not to diverge from equity [1] and of which "the conciliating role and the equitable nature [2]" have often been undervalued by Europeans; customs from which sprang a *jus gentium* constituted jointly with the rules of the common law in the former British possessions, the lacunae being filled in "according to justice, equity and good conscience [3]; and in the former French possessions, jointly with the law of Western Europe, steeped in Roman law.

A general principle of law has consequently become established, which the law of nations could not refrain from accepting, and which founds legal relations between nations on equity and justice [4].

* * *

39. A series of acts translates this concept onto the factual plane, so as to derive therefrom the rule governing the delimitation of the continental shelf. These are the Truman Proclamation, the proclamations of the numerous States of the Arabian-Persian Gulf, those of Saudi Arabia, Iran and Nicaragua. These States, with the exception of the United States, did not form part of the Concert of Nations which used to monopolize the privilege of elaborating law for the whole of the international community. Their role in one of the most important problems of the law of the sea deserves to be taken note of.

According to the terms of the American Proclamation, "in cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles [5]". Saudi Arabia, for its part, provided that the boundaries of the areas of the subsoil and seabed over which it proclaimed its sovereignty would be determined in accordance with equitable principles [6]. The Arab States of Bahrain, Qatar, Abu Dhabi, Kuwait, Dubai, Sharjah, Ras al Khaimah, Umm al Qaiwain, and Ajman refer for the delimitation of their areas in the Arabian-Persian Gulf, to the principle of equity and of justice [7]. Finally, for the Iranian Empire, "if differences of opinion arise over the

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[1] Cf. T. O. Elias, *The Nature of African Customary Law*, p. 272; and M. Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia*, pp. 202-206.

[2] René David, *Les grands systèmes de droit contemporain*, p. 572.

[3] *Ibid.*, p. 568. This formula has been interpreted by English judges as referring to the common law.

[4] Cf. Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, p. 213: "Adjudication *ex aequo et bono* is a species of legislative activity. It differs clearly from the application of rules of equity in their wider sense. For inasmuch as these are identical with principles of good faith, they form part of international law as, indeed, of any system of law."

[5] Proclamation of 28 September 1945.

[6] Royal pronouncement of 28 May 1949.

[7] Successive proclamations of 5, 8, 10, 12, 14, 16, 17 and 20 June 1949.

limits of the Iranian continental shelf, these differences shall be solved in conformity with the rules of equity [1]". *[English translation from Reply, Annex, Section A.* 16, p. 449.*]*

No State is to be found, on the other hand, whatever method of delimitation it may itself have used, which opposes this concept based on equity to resolve the problem of the determination of the boundaries of the continental shelf between adjacent or opposite States, and this throughout the whole pre-convention period, up to 1958, the date on which this same concept seems to have been accepted by the Geneva Convention.

It is true that Saudi Arabia and Bahrain, after having referred to the principle of equity in their respective proclamations of 28 May and 5 June 1949, had recourse, in an Agreement of 22 February 1958, to delimitation on the basis of the median line, taking into account, of course, the special geographic circumstances of the region. Nonetheless, the earlier declarations have not ceased to remain in force, and the Agreement of 22 February 1958 is to be considered as an application of the principle of equity upon which depends the solution of the problem of the delimitation of the continental shelf.

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Is not the conclusion therefore justified, to round off the enumeration of those international acts which refer to equity, that these acts constitute applications of the general principle of law which authorizes recourse to equity *praeter legem* for a better implementation of the principles and rules of law? And it would not be premature to say that the application of the principle of equity for the delimitation of the areas of the continental shelf in the present case would thus be in line with this practice

* * *

40. In addition, the adoption by the Geneva Convention of the median line and the equidistance line, subject to possible special circumstances, appears to be a similar equitable solution, to which recourse was had in order to preserve the authority of the principle of equity by a sort of compromise, inspired in fact by the conclusions of the study undertaken by the Committee of Experts appointed in 1953 by the International Law Commission, concerning the régime of the territorial sea. The five solutions put in first place by this study were rejected for reasons which were not unconnected with concern for legal precision or for equity. When it began to discuss the equidistance rule, the International Law Commission had remarked that in certain cases it would not permit an equitable solution to be attained. It was thus that it was qualified by the

[1] Decree of 10 May 1949 and Act of 19 June 1955.

condition concerning special circumstances, and finally extended to delimitation of the continental shelf. The commentary of the Commission also explains that the equidistance rule may be departed from when this is necessitated by an exceptional configuration of the coast [1].

* * *

41. The teaching of legal writers has not been any less loyal than State practice to this moral concept of law. The notion of justice and equity is to be found in the writings of the publicists [2], as also over the names of the numerous jurists in the *travaux préparatoires* of the Geneva Convention; to which should be added the proceedings of the *Ad Hoc* Committee set up in 1967 by the United Nations to study the peaceful uses of the seabed and ocean floor [3].

International decisions have in turn had occasion to refer to the principle of equity *praeter legem* [4].

Thus it is permissible to conclude that all these manifestations of legal thinking finally merge in the framework of a normative legal concept, the principle of equity.

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[1] *Report of the International Law Commission* on the proceedings of its eighth session, p. 24, commentary 1 on Article 72, which became Article 6.

[2] One might quote among others: B. S. Murty, in *Manual of International Law*, edited by M. Sørensen, p. 691: "Equity, in the sense of general rules dictated by fairness, impartiality and justice, may be said to form part of international law, serving to temper the application of strict rules, and a tribunal may include equity, in this sense, in the law it applies, even in the absence of express authorization."

Ch. de Visscher, *Theory and Reality in Public International Law* (trans. P. E. Corbett, Princeton, 1957), p. 336: "Equity can be something other than an independent basis of decision, as when, in a decision which in other respects is founded on positive law *(infra legem)*, the judge chooses among several possible interpretations of the rule the one which appears to him, having regard to the particular circumstances of the case, most in harmony with the demands of justice. . . . Clearly the requirement of special agreement between the Parties does not refer to this necessary function of equity."

Also C. W. Jenks, *The Prospects of International Adjudication*, 1964; Bin Cheng, "Justice and Equity in International Law", in *Current Legal Problems*, 1955, pp. 185 ff.; O'Connel, *International Law*, 1965, Vol. I, p. 14, cited in the Reply.

[3] Report of the *Ad Hoc* Committee to the General Assembly, pp. 18, 46-47, 63-64.

[4] The Anglo-Turkish Arbitral Tribunal, in the case of *W. J. Armstrong & Co. Ltd.* v. *Vickers Ltd.* (1928) placed on the basis of rules of equity the general principle of law, accepted by international law, forbidding unjust enrichment.

The Franco-Venezuelan Mixed Commission, in the *Frederick & Co.* case (1902), assimilating equity with equality under the inspiration of Roman law, expressed itself as follows: "If the conditions on both sides are regarded as producing an equilibrium, justice is done." This is also a concept of Muslim law (*supra*, note 1, p. 136).

42. The principle of equity having been accepted, there are two questions to be examined:

*(a)* Although the equidistance method has been discarded as not binding the Federal Republic of Germany either by agreement, or by the effect of an international custom, can the equidistance line, strictly applied, that is to say, without any modification whatsoever, as desired by the Kingdoms of the Netherlands and Denmark, constitute a solution of the case submitted to the Court as meeting the requirements of equity?

*(b)* In the case of a negative answer, what is the rule flowing from the principle of equity which would effect a just and equitable delimitation of the areas of the North Sea continental shelf appertaining to the Parties?

* * *

43. Can the strict equidistance line be envisaged as an equitable method of delimitation as applied to the present issue?

The Federal Republic is justified in rejecting, as not in conformity with equity, the delimitation of its continental shelf according to the strict equidistance method.

That much has been demonstrated by the Federal Republic by pointing, on the one hand, to the map showing the delimitation of the three areas of the continental shelf in conformity with the equidistance method, based upon the baselines of the territorial seas of the Parties and, on the other hand, to the map showing the delimitation as it would result on the assumption that the equidistance lines took their departure from coasts free of irregularities. The junction of those lines, as occurring towards the middle of the North Sea, illustrates the considerable difference as between the two hypotheses. Expressed in figures, this demonstration, as appears from the text and figures 2 and 21 of the Memorial, would give something like 23,600 square kilometres in the first instance and 36,700 square kilometres in the second [1]. The Federal Republic adequately demonstrates that the share which would fall to it would thus be reduced to a small fraction of the continental shelf such as would not correspond to the extent of its territory's contact with the North Sea and would be out of all proportion to the respective lengths of coastal frontage of the Parties.

Let it be for an instant imagined, for the sake of argument, that the Federal Republic of Germany had had the possibility, like the Netherlands, of reclaiming areas from the high seas to such a point that the entire concavity of the coast had been filled in. Would not the equidistance lines have produced quite a different result, and one of which the Federal Republic would have had no reason to complain?

[1] Memorial, para. 91, subject to the sector theory and its effect on the area. Figure 2, p. 27. Figure 21, p. 85.

Moreover, the Court cannot be averse to having recourse to the *travaux préparatoires* of an international document if they are such as to cast further light on the questions of international law which are to be resolved. An examination of the circumstances in which the equidistance method of Article 6 of the Convention on the Continental Shelf was adopted shows in fact that the strict equidistance line claimed by Denmark and the Netherlands has been judged to be inequitable in a number of cases. If reference is made to the records of the 1958 Conference, and if one goes as far back as the report and minutes of the International Law Commission and the report of the experts appointed in this connection in 1953, the role of equity in the decision to couple the equidistance line with the mention of special circumstances which was taken by the States assembled in Geneva will become apparent.

It was in fact the consideration of certain factors which led the Committee of Experts, and subsequently the International Law Commission, to arrive at the notion of special circumstances, with a view to mitigating, if need be, the inequitable consequences of the equidistance method, based upon the baselines serving for the delimitation of the territorial sea, which they had decided to adopt. The Committee of Experts, remaining within its terms of reference, made a point, when introducing the notion of special circumstances, of drawing attention to the fact that the equidistance method could fail to produce an equitable solution. And, during the discussions at the Geneva Conference, there were many representatives of the countries taking part who stressed this view [1]. The Court cannot do otherwise.

* * *

44. At the end of this reasoning, it should be recalled that the Federal Republic of Germany, after having asked the Court, in its written pleadings and oral arguments, to declare that the equidistance method is not applicable to the case and, as a subsidiary point, that there exist special circumstances which exclude its application, contended that the Court should therefore refer the Parties back to negotiate an agreement with a view to another delimitation, taking into account the guide-lines which it would supply. And the Federal Republic submitted that the delimitation on which the Parties are to agree is to be determined by the principle of the just and equitable share, by reference to the criteria applicable to the particular geographic situation of the North Sea.

The Kingdoms of the Netherlands and Denmark retorted that, in view of the terms of the Special Agreements, such a decision would be nothing more than a *non liquet*.

Explaining his line of thought more precisely, the representative of the Federal Republic said, during the second round of speeches, that he

[1] Memorial, **para. 70.**

was not asking what boundaries should be drawn, but that guide-lines be given concerning the principles to be applied. And the representative of Denmark stressed that the Federal Republic was leaving it entirely to the Court to find out what might be the consequence of the clause of special circumstances possibly being applicable [1].

In fact, after having excluded the application of the equidistance line pure and simple and having established the existence of special circumstances, to refer the Parties to the negotiation of an agreement which would attribute to each of them an equitable share of the continental shelf is not to determine the principles and rules applicable to the delimitation of the areas of the continental shelf, which are referred to in the Special Agreements. A decision limited in this way would amount to the determining of the objective aimed at, without any mention of the means of attaining it. It would not have satisfied the letter of the Special Agreements any more than the spirit thereof.

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45. Besides, to do no more than declare that agreement should be reached on an equitable delimitation is not to resolve the question, for the Parties may well be divided as to what is an equitable delimitation and as to the means of determining it. The Court should therefore, after having first excluded the application of the equidistance line as a rule of law, state the rule which is capable of being adopted by application of the principle of equity.

The Geneva Convention provided a rule embodying the equidistance-special circumstances method. It was for the Court, in rejecting this treaty rule in the relationships between the Parties, to replace it by another serving the same purpose, deduced from equity as a general principle of law. What the Convention did, the Court can do.

The Court could in addition refer, as a judicial precedent, to the Judgment which it gave on 18 December 1951 in the Anglo-Norwegian *Fisheries* case, which laid down the rule of straight baselines for the determination of the outer limit of the territorial sea. It will be seen subsequently that a solution also based on a straight baseline is the one which may constitute the rule to be derived from the principle of equity. By so doing the Court would not have overstepped the limits of its jurisdiction as already fixed by it.

* * *

46. Furthermore it may be observed that the Federal Republic's claim for an apportionment—rather than a delimitation—of the areas of the

[1] Hearing of 8 November 1968.

continental shelf between coastal States is not in accordance either with the letter of the Special Agreements, or with the definition of the continental shelf.

This idea is to be found, it is true in a treaty precedent, the agreement between France and Switzerland of 25 February 1953 on the delimitation of the Lake of Geneva. According to the terms of this agreement, the median line is replaced by a polygonal line "with a view to effecting a compensation as between the areas". But this is a unique case where free play was given to voluntary agreement. It does not fit in with the definition of the continental shelf, which rests, as has been stated [1] on the principle affirmed by the International Court of Justice in its Judgment of 18 December 1951 already referred to, to the effect that "it is the land which confers upon the coastal State a right to the waters". What is inherent in this definition is the right to the prolongation of the national territory under the waters. The idea of equity and justice is thus realized by taking into consideration, for each Party, the extent of the link between the land and the waters, the coastal State's right and the equitable limit of its claim being a function of the land factor.

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47. In the words of the Judgment, paragraph 85 *(a)*: "the Parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when one of them insists upon its own position without contemplating any modification of it . . .".

The Judgment justifies such a obligation in paragraph 86, by saying that "not only . . . the obligation to negotiate which the Parties assumed by Article 1, paragraph 2, of the Special Agreements arises out of the Truman Proclamation, which, for the reasons given in paragraph 47, must be considered as having propounded the rules of law in this field, but also . . . this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations".

And the Judgment goes on, in paragraph 87: "so far therefore the negotiations have not satisfied the conditions indicated in paragraph 85 *(a)*".

I dispute that there is such an obligation in the present case. It cannot be inferred from the Truman Proclamation, nor yet from Article 33 of the Charter, which concerns disputes the continuance of which is likely to endanger the maintenance of international peace and security, and is

[1] *Supra*, para. 16.

the less imperative inasmuch as it empowers the Security Council "when it deems necessary, [to] call upon the parties to settle their dispute by such means".

In any event, a submission that there was an obligation to negotiate, and that the negotiations carried out "were not meaningful", would amount to a prejudicial objection to the hearing of the case. The Judgment should therefore have followed its reasoning right through, i.e., the Court, after having drawn the attention of the Parties to the question in its legal and practical aspects, should give judgment on the objection before turning to the merits.

However, I understand the Judgment as considering that the negotiations had simply been suspended in face of the difficulties which had been encountered, in order to be re-opened and completed in the light of the indications to be given by the Court.

* * *

48. The strict equidistance method having been discarded because it does not constitute an equitable solution appropriate to all cases, and particularly to that submitted to the Court, one must enquire what rule should be deduced from the principle of equity with a view to the delimitation in question.

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49. One preliminary clarification is perhaps not unnecessary: the words principle and rule are no more synonymous in legal than in philosophical language. The Court has however not always made this distinction. Thus the wording of the Special Agreements, where these terms are used cumulatively, cannot be criticized as being tautological. It is from the principle, defined as being the effective cause, that the rules flow. It is therefore necessary, after having gone back to the principle, namely equity, to state what rules applicable to the matter can be deduced from it.

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50. Several methods were debated in the course of the proceedings.

The first, adopting as basis the notion of sectors converging to the approximate centre of the North Sea, presupposes that the three areas of the continental shelf of the south-west coast ought necessarily to reach the median line between the continent and the British Isles, which however is anything but proved. In fact, the question being that of determining the lateral boundaries between the areas of continental shelf of each of the Parties, the Court should confine itself to the solution of this question, without concerning itself with the question whether the demarcation lines thus ascertained will reach the median line, or will meet before reaching it.

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51. The second method, which has been adopted by the majority of the Court in order to be proposed to the Parties simply as a factor for them to assess, is that based on the relationship between the length of the coast and the extent of the areas of continental shelf.

Although this does not refer to any sort of practice [1], it starts from the idea of natural prolongation of the land territory, and implies the realignment, in the form of a single straight baseline, of the concave coast of the Federal Republic of Germany.

It could nonetheless be criticized, in its practical application, for failing to avoid overlappings of one sector of the continental shelf over another at some distance from the coast. It would thus appear to entail acceptance of parts of the continental shelf constituting the prolongation of more than one territory. This hypothesis is vitiated by an internal contradiction, for an area of land can only be the prolongation of a single territory. Furthermore, for this common sector, the Court recommends division into equal shares. But is this not a return to the solution, which has already been rejected, of apportionment into just and equitable shares, according to the terms used by the Federal Republic of Germany?

Lastly, this method determines surface areas, but does not assist in drawing lateral boundaries, which are exactly the problem which is to be resolved: is their meeting-point to be shifted somewhat towards Denmark or towards the Netherlands?

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52. A third method, that of equidistance-special circumstances, is the one which seems to me to be the rule to be applied. This method, which was rejected as not being a rule of treaty law or customary law, may be re-adopted by virtue of a general principle of law, namely equity.

The explanations which follow will show that recourse can be had to the equidistance method if the application thereof is subordinated, in appropriate cases, with a view to the preservation of equity, to the effect of special circumstances. The question which will arise will therefore be whether there exist such circumstances in this case. In that event the equidistance-special circumstances rule deduced from the principle of equity *praeter legem* could be proposed to the Parties.

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53. Special circumstances have not been defined by a text of positive law; nor could they be listed exhaustively, in view of the extreme variety of legal and material factors which may be of account.

Nonetheless, if reference is made once again to the *travaux préparatoires*

[1] In particular the precedents mentioned in para. 26.

which have been mentioned, there is nothing to show that the notion of special circumstances was limited in the way in which the representatives of Denmark and the Netherlands would have it. On the contrary, the International Law Commission, upon the report of the experts which it had appointed, stated in its commentary on Article 72 of the draft which it presented to the conference and which there became Article 6 that there might be ". . . departures (sc., from the equidistance rule) necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels . . ." and the International Law Commission went on: ". . . This case may arise fairly often . . ."

In short, a special circumstance affecting the equidistance method may be the effect of a particular legal situation: a treaty, or historic waters. It may also be the consequence of geographical considerations. On the basis of the map and measurements already mentioned [1], the configuration of the coast of the Federal Republic of Germany constitutes such a circumstance, which should be taken into account to avoid the inequitable application of the equidistance line pure and simple.

No mention was made, on the other hand, of economic objectives, such as the unity of deposits, with a view to the examination thereof by the Court. In any case, any consideration of submarine resources, referred to in the course of the proceedings, is irrelevant. To adopt as basis in order to draw up boundaries, among other factors, the riches secreted by the bed of the sea, would amount to nothing less than an apportionment of the continental shelf, whereas all that is in question is a delimitation of the areas originally appertaining to the coastal States, as has already been stated [2]. In addition, since potential riches will for a long time hence go on being discovered unceasingly, such delimitation, faced with a deposit overlapping two areas, would continually be subject to rectification. Consequently, if the preservation of the unity of deposit is a matter of concern to the Parties, they must provide for this by a voluntary agreement (by transfer or joint exploitation), and this does not fall within the category of a factor or rule of delimitation.

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In addition, the following passage from paragraph 69 of the Judgment should be stressed: "Such a rule (sc., the equidistance-special circumstances rule) was of course embodied in Article 6 of the Convention, but as a purely conventional rule." But if the equidistance-special circumstances method can, on the Court's own admission, amount to a rule of conventional law, it can also constitute such a rule, as a matter of logic, by virtue of the principle of equity. The Court, which is called

[1] *Supra*, para. 43.
[2] *Supra*, para. 46.

upon to state principles and rules, after having adopted the principle of equity, should, in my opinion, therefore have deduced therefrom the rule of equidistance-special circumstances.

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54. The equidistance-special circumstances rule flowing from a general principle of law, namely equity, having been accepted, and it having been established that in the present case there exists a special circumstance, what would the effect of this circumstance be on the equidistance line?

The idea which would seem to constitute the point of departure is that which follows from the nature of the shelf: since this is geologically the prolongation of the territory, starting from the coastal front, as has already been explained in the considerations concerning the concept of the continental shelf [1], it is this front which forms the basis of the shelf extending under the high seas.

An attempt has been made to justify the contiguity criterion and thus the equidistance line as an imperative rule of international law by pointing out that the geographical realities of the actual coastline are the basis for the determination of the extent in space of the sovereign rights of the coastal State [2]. But what are these geographical realities, if they are not the actual coastline, or the coastal front, extending under the waters of the high seas, without the front or coastline being affected by the depressions in the surface which merely modify the line along which they break surface.

The front must thus not be understood as meaning the coast with its more or less pronounced bends on the waterline, these irregularities being the result of a subsidence or sloping of the land below the level of the sea. They are not such as should modify the line which the front would have followed if it had not been affected by such geological accidents. Consequently, the corrugations of the bases of the shelf must not influence the latter's natural configuration by modifying any co-ordinates thereon established.

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55. What would the front look like as thus understood?

It is by having recourse, by way of analogy, to the method of delimiting the territorial sea based on the straight baselines sanctioned by the Court's Judgment of 18 December 1951 in the Anglo-Norwegian *Fisheries* case, that the solution might be found. Such resort to analogy is justified on account of the identity of *ratio legis*, or again on account of the similarity of the essential elements in the two sets of circumstances, namely the

[1] *Supra*, para. 15.
[2] Address of 31 October 1968 on behalf of the Netherlands.

jagged and indented nature of the two coasts, and the economic factor which is present in both cases [1].

The solution envisaged would be no more contrary to the principles or rules of international law than the Norwegian Decree of 12 July 1935 delimiting the territorial sea on the basis of straight lines following the general direction of the coast and linking fixed points located on *terra firma* or on adjacent islands. However, the configuration of the German coast possessing, as it does, the form of a bay, it is the drawing, as in the case of open bays, of a single straight baseline along the coast that would be called for; its line of opening would not necessarily be restricted to a pre-ordained length, as the above-mentioned Judgment of the Court stipulated for bays in general. It will in this connection be recalled that there has been a proposal to apply this rule to indentations [2] and troughs [3] forming interruptions in the bed of the continental shelf.

This solution is all the more acceptable because it does not involve either internal waters or the territorial sea; it does not affect the configuration of the latter, as the waters seaward thereof but landward of the straight baseline will not cease to form part of the continental shelf and will remain subject to the régime governing the shelf.

As applied to the German coast, the straight baseline would extend from one of its extremities to the other and would thus completely obliterate its concavity.

The Netherlands and Danish coasts would be maintained as they are, in view of the fact that, from the points of their respective intersections with the German coast, they follow a straight course free of disproportionate projections.

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56. The bases for the delimitation of the continental shelf as between the Parties having been determined, how should the lateral boundaries be fixed?

It was said above that the Geneva Convention on the Continental Shelf did not depart from the notion of equity in adopting the equidistance line accompanied by the condition referring to special circumstances.

It is therefore as a solution based on equity that recourse may be had to the equidistance-special circumstances rule for the purpose of determining the lateral boundaries of the continental shelf as between the Parties to the dispute.

It is all the more justifiable to recommend the application of the

[1] Article 4 of the Geneva Convention on the Territorial Sea, which concerns straight baselines, is based upon economic interests, which are even more prominent in the case of the continental shelf. Cf. L. Cavaré, *Droit international public*, Vol. I, p. 231.

[2] Geneva Conference, Prep. docs., p. 44, para. 37.

[3] R. Young, cited by L. Cavaré, *Droit international public*, Vol. II, p. 235.

equidistance rule, starting from straight baselines, in that Denmark and the Netherlands are parties to the 1958 Geneva Convention on the Continental Shelf and because the Federal Republic of Germany, without asking for the application of this method, has not rejected it to the extent that it ensures an equitable solution [1].

In a normal case, that is to say one not involving special circumstances, the equidistance lines would have been made up of the points nearest to the baselines from which the breadth of the territorial sea is measured. In the present case, it is by taking as the starting-point the intersection of the straight baselines marking the coastal fronts of the Federal Republic and Denmark, with due regard for the partial delimitation agreed upon, that the equidistance line between the respective continental shelf areas of those two States could be fixed; and it is by taking as the starting point the intersection of the said baseline of the Federal Republic and that of the Netherlands, that the equidistance line between the two latter States, again with due regard to the agreed partial delimitation, could be fixed. This would be done in two separate operations. The area appertaining to the Federal Republic would be contained between the two equidistance lines and would extend out to sea as far as their point of intersection.

Whilst bearing in mind the partial delimitations, reference may be made to the attached map upon which the coastal front is shown in the form of a straight baseline, the Danish and Netherlands coasts remaining as they are, and which the cartographer has completed by adding (thin full lines) the equidistance lines starting from the points of intersection B and C and converging to their junction at the point A before reaching the median line Great Britain-Continent.

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To sum up, I am in agreement with the majority of the Court in declaring that the equidistance method provided for in Article 6, paragraph 2, of the 1958 Convention, is not opposable as a rule of treaty-law to the Federal Republic of Germany, and that this rule has also not up to the present time become a rule of customary law.

On the other hand, I consider that recourse may be had to the equidistance method, qualified by special circumstances, as a legal rule applicable to the case and derived from a general principle of law, namely equity *praeter legem*.

Since the Court has, for the reasons which it has set forth, not considered that it should go as far as I have done, I have felt that I should, with all the consideration to which it is entitled, and while supporting the Judgment, append thereto the present separate opinion, covering the points on which my reasoning has been different, or on which I have come to a different conclusion.

*(Signed)* Fouad AMMOUN.

[1] Reply, paras. 49, 65-67, 71, 74-76.