

such boundaries «shall be determined by the United States and the State concerned in accordance with equitable principles». These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, had underlain all the subsequent history of the subject. It had been largely on the recommendation of a committee of experts that the principle of equidistance for the delimitation of continental shelf boundaries had been accepted by the United Nations International Law Commission in the text it had laid before the Geneva Conference of 1958 on the Law of the Sea which had adopted the Continental Shelf Convention. It could legitimately be assumed that the experts had been actuated by considerations not of legal theory but of practical convenience and cartography. Moreover, the article adopted by the Commission had given priority to delimitation by agreement and had contained an exception in favour of «special circumstances».

The Court consequently considered that Denmark and the Netherlands inverted the true order of things and that, far from an equidistance rule having been generated by an antecedent principle of proximity inherent in the whole concept of continental shelf appurtenance, the latter was rather a rationalization of the former.

The Equidistance Principle
Not a Rule of Customary International Law
(paras. 60—82 of the Judgment)

The question remained whether through positive law processes the equidistance principle must now be regarded as a rule of customary international law.

Rejecting the contentions of Denmark and the Netherlands, the Court considered that the principle of equidistance, as it figured in Article 6 of the Geneva Convention, had not been proposed by the International Law Commission as an emerging rule of customary international law. This Article could not be said to have reflected or crystallized such a rule. This was confirmed by the fact that any State might make reservations in respect of Article 6, unlike Articles 1, 2 and 3, on signing, ratifying or acceding to the Convention.

While certain other provisions of the Convention, although relating to matters that lay within the field of received customary law, were also not excluded from the faculty of reservation, they all related to rules of general maritime law very considerably antedating the Convention which were only incidental to continental shelf rights as such, and had been mentioned in the Convention simply to ensure that they were not prejudiced by the exercise of continental shelf rights.

Article 6, however, related directly to continental shelf rights as such, and since it was not excluded from the faculty of reservation, it was a legitimate inference that it was not considered to reflect emergent customary law.

It had been argued on behalf of Denmark and the Netherlands that even if at the date of the Geneva Convention no rule of customary international law existed in favour of the equidistance principle, such a rule had nevertheless come into being since the Convention, partly because of its own impact, and partly on the basis of subsequent State practice.

In order for this process to occur it was necessary that Article 6 of the Convention should, at all events potentially, be of a norm-creating character. Article 6 was so framed, however, as to put the obligation to make use of the equidistance method after a primary obligation to effect delimitation by agreement. Furthermore, the part played by the notion of special circumstances in relation to the principle of equidistance, the controversies as to the exact meaning and scope of that notion, and the faculty of making reservations to Article 6 must all raise doubts as to the potentially norm-creating character of that Article.

Furthermore, while a very widespread and representative participation in a convention might show that a conventional rule had become a general rule of international law, in the present case the number of ratifications and accessions so far was hardly sufficient. As regards the time element, although the passage of only a short period of time was not necessarily a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, it was indispensable that State practice during that period, including that of States whose interests were specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should

have occurred in such a way as to show a general recognition that a rule of law was involved. Some 15 cases had been cited in which the States concerned had agreed to draw or had drawn the boundaries concerned according to the principle of equidistance, but there was no evidence that they had so acted because they had felt legally compelled to draw them in that way by reason of a rule of customary law. The cases cited were inconclusive and insufficient evidence of a settled practice.

The Court consequently concluded that the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle, its subsequent effect had not been constitutive of such a rule, and State practice up to date had equally been insufficient for the purpose.

The Principles and Rules of Law Applicable
(paras. 83—101 of the Judgment)

The legal situation was that the Parties were under no obligation to apply the equidistance principle either under the 1958 Convention or as a rule of general or customary international law. It consequently became unnecessary for the Court to consider whether or not the configuration of the German North Sea coast constituted a «special circumstance». It remained for the Court, however, to indicate to the Parties the principles and rules of law in the light of which delimitation was to be effected.

The basic principles in the matter of delimitation, deriving from the Truman Proclamation, were that it must be the object of agreement between the States concerned and that such agreement must be arrived at in accordance with equitable principles. The Parties were 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 were so to conduct themselves that the negotiations were meaningful, which would not be the case when one of them insisted upon its own position without contemplating any modification of it. This obligation was merely a special application of a principle underlying all international relations, which was moreover