SEPARATE OPINION OF JUDGE PADILLA NERVO

I am in agreement with the Judgment of the Court, and particularly with its findings: that the use of the equidistance method of delimitation is not obligatory as between the Parties; that delimitation is to be effected by agreement in accordance with equitable principles in such a way as to leave to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory under the sea, without encroachment on the natural prolongation of the land territory of the other. I also concur in the statement of the Court regarding the factors that the Parties are to take into account in the course of the negotiations.

* * *

I wish to make the following observations which emphasize my individual point of view regarding the main issues before the Court, my analysis of the conflicting contentions of the Parties in the present case and the reasoning which leads me to agree with the Court.

When reference is made in the Special Agreements to "principles and rules of international law", it should be borne in mind that there are certain rules of a practical nature, so called "principles", which are in reality only methods or systems used to apply the principles. This is so in respect of the "equidistance rule" which is referred to as a "principle" in the Continental Shelf Convention.

In the present case, Denmark and the Netherlands rely on the application of the 1958 Geneva Convention on the Continental Shelf, which they have signed and ratified.

The Federal Republic of Germany contends that the Convention is not applicable, since it has not ratified it.

There is no doubt that the Federal Republic is not *contractually* bound by the Convention. There is no controversy about this point. Therefore on these bases *the 1958 Convention is not opposable as such to the Federal Republic.*

Denmark and the Netherlands contend that the Federal Republic has manifested its agreement to the Convention in respect of a number of its provisions, in particular that it has concluded with them two treaties for the purpose of drawing, according to what are in reality equidistance lines, those parts of the boundary lines between the German and Danish, and the German and Netherlands continental shelves which are near the coast.

In my opinion it does not follow from this fact that the Federal Republic is bound to accept equidistance lines "as regards the further course of the dividing line". It appears from the negotiations which took place for the purpose of concluding the above-mentioned two treaties that the Federal Republic did not rely on Article 6 of the Convention for drawing the boundary near the coast. Those lines were drawn by *agreement* among the Parties and their direction, extent and result were considered by them as being fair, just and equitable. If those lines were in reality equidistance lines to a certain extent (they suffered in fact some deviations) that circumstance does not change the fact that the boundary lines were determined by *agreement* between the Parties concerned. That emphasizes the assertion that only by agreement can, in the last resort, these problems be settled.

The fundamental issue between the Parties in the cases before the Court is the question whether or not the equidistance line should constitute the boundary line between their respective continental shelves beyond the partial boundaries they have already agreed upon.

On this question there has been disagreement between the Parties from the beginning of their negotiations. Denmark and the Netherlands insisted that the equidistance line alone could be the basis on which the boundary line might be fixed by agreement. The Federal Republic took the position that the geographical situation in that part of the North Sea required another boundary line which would be more fair to both sides.

If Article 6 of the Convention is not *contractually* binding on the Federal Republic, the Court must consider whether or not the rule it embodies or reflects is opposable to it on some other basis, and whether that part of Article 6 which relates to the equidistance principle constitutes a recognized rule of general international law which would as such be binding on the Federal Republic.

So far as State practice prior to the 1958 Convention is concerned, and as far as it has been possible for this to be ascertained, it does not appear that the cases of use of the equidistance line for the lateral delimitation of the continental shelves of adjacent States are numerous, nor does that practice show a uniform, strict and total application of the equidistance line in such cases so as to be qualified as customary. In my opinion, Article 6 does not embody a pre-existing accepted rule of customary international law, or one which has come to be regarded as such.

The equidistance rule is rather a conventional rule or technical method which could be altered by the parties to the Convention. According to the Convention the parties, by agreement, are able to disregard the principle of equidistance. If the equidistance rule was a pre-existing rule of general international law, Article 6 would not give primacy to settlement by agreement, nor could an agreement between the parties overlook, disregard or evade the application of a binding rule.

During the preparatory work of the International Law Commission there were many difficulties in respect of the text of Article 6 of the Continental Shelf Convention, as the Commission was doubtful regarding the criterion of equidistance and the unpredictable results of its application.

Although the International Law Commission reported on the whole law of the sea together, the 1958 Conference adopted separate conventions on the territorial sea, the high seas, and the continental shelf, and also a fourth convention on fishing.

Consideration of the fact that it was widely held that the continental shelf was a new concept and that international law on the subject was in process of development led to the decision to incorporate the articles relative to the continental shelf into a separate convention, allowing reservations to all of them except Articles 1 to 3 (formerly Articles 67, 68 and 69), as stated in Article 12.

Article 6 of the 1958 Convention did *not* at that time "embody already received rules of customary law and was not then declaratory of existing rules", and it has *not* since then, in my view, by the practice of States and accumulation of precedents, acquired the character of binding customary law.

The consideration that the law on the subject in 1958 was in process of development was emphasized by the provision in Article 13, allowing the *revision* of the Convention at the request of any contracting party, at any time after five years from the date the Convention entered into force. As a result of that Article, it will be feasible to modify the Convention after June 1969.

In practice, the application of the equidistance method for lateral delimitations, prior to 1958, has not been rigid in all cases. Certain factors or special circumstances have been taken into account as justifying a deviation from its rigid application, and the equidistance line has been replaced by other lines fixed *by agreement*. Its use can *not* be qualified as customary.

At Geneva, the equidistance principle was regarded as the most *equitable* method for fixing boundaries, though not the only one, but the purpose and the aim was to find or develop a rule which ought to be *equitable*. Justice and equity was an overwhelming consideration in the minds of the framers of the Continental Shelf Convention in their search for a rule which would not result in harsh inequities, so far as they could predict the actual results of its application.

Adjacent States parties to the Convention are not obliged, by Article 6, to determine the boundary of the continental shelf adjacent to their territories by the rigid application of the principle of equidistance; they are free to determine the boundary otherwise if they so desire, by *agreement* between them.

The criterion of equidistance is a *technical norm* which should aim at

realizing what is just according to the natural law of nations. (Article 38 (1) *(c)* of the Court's Statute.)

The Convention includes some technical rules which cannot yet be regarded as principles of international law.

The obligation to negotiate is a principle of international law. Preference should be given to agreement. The first sentence in Article 6 is categorical, it is a statement of principle—"the boundaries . . . *shall be* determined by agreement".

"The absence of agreement" cannot be considered as a weapon in the hands of any State to impose upon another adjacent State the application of the equidistance rule, but regard should be given to the special circumstances of the case, which may be the reason for the disagreement to the application of the equidistance rule. If the adjacent State disagrees as to the existence of special circumstances, the other State may not determine the boundary of its continental shelf by a unilateral act.

The existing agreements between States in the North Sea are *not* sufficient proof of the recognition by the States concerned of the equidistance principle in Article 6 as "generally accepted law" binding upon them. It could rather appear that since the delimitations by the equidistance method were made by *agreement* between the States concerned, there was some recognition of the fact that the *result* of the application of such method was *satisfactory* to those States and was considered by them to be *just* and *equitable*. If it had been considered to be unfair by one of the parties, no agreement could have been reached.

Geographical realities may justify a deviation from a rigid application of the equidistance principle.

Until settled by agreement or by arbitration, the question is open. In the cases before the Court, if there is no agreement, the boundary lines unilaterally fixed do not exist so as to be opposable to the Federal Republic.

The effect of the right conferred by Article 12 of the Continental Shelf Convention to make reservations to *(inter alia)* Article 6, as regards the *contention* that the Convention either crystallized the *equidistance method* as a general rule of law or is to be regarded as having founded such a rule, can be more clearly ascertained in the light of the discussion on the subject at the plenary meetings of the 1958 Conference on the Law of the Sea.

It was considered that since the continental shelf was *a new subject of international law* it was desirable that a large number of States should become parties to the Convention, even if they made reservations to articles other than Articles 67 to 69 (1 to 3), and many representatives were of the opinion that there should be a clear provision in the Convention regarding reservations, since great difficulties had arisen from the lack of such a provision in previous conventions.

It was stated that in discussing the question of reservations to the proposed articles, it should be remembered that the Conference had been convened to draw up international standards which would be *progressively* accepted *until they became common to all States.*

The Convention should be worded so that all States could become parties to it. The question of reservations was of fundamental importance. The Convention would be valueless if ratified by only a few States. Frequently, governments wanted to make to a convention reservations which did not affect common standards, and were unwilling to become parties to it unless they could do so.

Representatives wishing to permit reservations had been reproached for *defending national interests*; but, in fact, they were attending the Conference for that very purpose.

The debate showed that if an absolute prohibition of the making of reservations were pressed there could be no agreement.

International law, it was said, must be built up gradually, but that rule did not preclude attempts to base international instruments on *justice* and *equality* among States.

In conclusion it seems correct to affirm that the right to make reservations to Article 6 shows that the States at Geneva did *not intend to accept the equidistance method as a general rule of law from which they could not depart and which would be binding on them in all cases.* Therefore the contention that the Convention *crystallized* the *equidistance method as a general rule of law*, or is to be regarded as having founded such rule, *is not justified*, and it appears from the records that the debates at the Geneva Conference do not afford a basis for or give support to such a contention.

Although the cases of Denmark and the Netherlands have been joined for purposes of presentation to the Court, because both Parties are putting forward the same basic contentions, they remain separate cases in the sense that one relates to the Danish-German line of demarcation, and the other to the German-Netherlands line; but if these lines were taken separately and in isolation there would be no problem: it is the *simultaneous* existence of both lines, if constructed throughout on equidistance principles, that leads to an inequitable result, and causes the Federal Republic's objection. It is the existence of the three coasts with Germany in the middle (and its coastal configuration) which creates the problem.

Two lines are here involved which, by their interaction have in fact automatically determined the Federal Republic's area of the continental shelf. The Court cannot ignore this fact but has to take full account of it.

Geographically, the North Sea constitutes what for purely practical purposes may be called an "internal" sea, in the sense that while it has

some outlets to the ocean it is bordered along almost the whole of its periphery by the territories of a number of coastal States.

There is a general consensus on the part of all the coastal States to the effect that the bed of the North Sea constitutes in its totality a single continental shelf, the various parts of which each appertain to one State.

Several of the coastal States on the North Sea are *opposite* each other and others, lying on the same side of the sea, are *adjacent* and have *lateral boundaries*.

Consequently, the continental shelves appertaining to the coastal States whose coasts almost totally enclose the North Sea are converging continental shelves, with an initial base or boundary constituted by the coast of the territory of each State, and an end-point or boundary which touches the continental shelf of the *opposite* States *on the other side of the sea*.

In the case of the States parties to the present dispute, the Netherlands, the Federal Republic and Denmark are States the coasts of which are opposite to the coast of the United Kingdom. If in principle the rule contained in Article 6, paragraph 1, of the Continental Shelf Convention is applied, the boundary between the continental shelves of the Federal Republic of Germany and the United Kingdom would be constituted by the median line in the North Sea drawn between the coasts of the two States. But the possibility of drawing such a median boundary line is excluded on account of the fact that, under the treaty of 31 March 1966 between the Governments of the Netherlands and Denmark, two areas of the continental shelves which those States have bilaterally accorded each other are interposed in the central area of the North Sea, between the Federal Republic and the United Kingdom. In fact, such overlaps appear to prevent the implementation of the relevant treaty rules and it appears that this particular case, that of an internal sea, was not contemplated when the text of Article 6 was drafted. Neither paragraph 1 nor paragraph 2 of Article 6 have made provision for the *overlaps which* may arise from the *simultaneous existence of median* and *lateral equidistance lines* where there are both opposite and adjacent States in a particular internal sea. It appears therefore that the case of the North Sea, so far as the situation of the Parties to the present dispute is concerned, could be deemed a case in which special circumstances exist.

The delimitation should be *reasonable*. It is the repercussion or combination of both lines which caused the German objection and which does in fact lead to an *unreasonable* result. Their combined effect is not equitable in respect to the Federal Republic. That was the cause of the disagreement and the very reason why the Parties have brought their dispute to this Court.

I believe that the Parties, by submitting the matter to the Court in the way selected by them, recognized in effect that the respective lines cannot be determined in isolation from one another, and that the matter constitutes an integral whole.

On 30 October, during the oral proceedings, Counsel for the two Kingdoms said that in a sense the Netherlands and Denmark are slantingly opposite to each other but that by no stretch of imagination could they be called adjacent States.

If Article 6, paragraph 2, prescribes the equidistance method only in the case of two *adjacent* States, the fact that the two Kingdoms, not being adjacent States, have determined their boundaries between them on the basis of equidistance shows, it appears, that if their agreement is based on the Geneva Convention it had to be concluded under the first sentence of the first paragraph of Article 6, that is, merely as a bilateral *ad hoc* agreement and not on the basis of some principle.

There is no rule of international law which allows a State to delimit its continental shelf with every other State unilaterally by the application of the equidistance method, unless the other State acquiesces in such a boundary. The equidistance boundary may not be imposed upon a State which has not acceded to the Convention.

In the present case, the point in issue is whether that part of Article 6 of the 1958 Convention on the Continental Shelf which relates to the equidistance method does or does not embody a rule of general international law binding on the Federal Republic.

It is generally admitted that in State practice prior to the Geneva Conference of 1958 the tendency was to refer in general terms to the delimitation of continental shelf boundaries on "*equitable* principles", without mention of the "equidistance" principle in particular. State practice up to that date was not regarded by the International Law Commission as sufficiently consistent to establish any customary rule as already in existence with respect to the continental shelf.

I have said above what in my opinion is the character of the State practice after 1958, which does *not* show that the "equidistance" rule has yet evolved as customary law.

In the preparatory work of the International Law Commission, as at the Geneva Conference, the sentiment that the equidistance principle should not be an absolute rule was always predominant. When it was suggested that the "special circumstances" rule should be eliminated from the text of Article 6, the proposal to that effect was overwhelmingly rejected.

The equidistance method was to be applied, so to speak, in the last resort, only when agreement was not forthcoming and when the demarcation in any concrete case did not have characteristics which would justify the drawing of lines of delimitation by any other method.

The flexibility and adaptability of the text of Article 6 to a variety of situations, potential conflicting claims, geographical and geological differences regarding coastal States all over the world, were considerations and preoccupations always present during the framing of Article 6, in order to make possible a large measure of acceptance by governments.

The right to make reservations to Article 6 was another safety valve against a rigid application or interpretation of the equidistance concept in a manner which would alter its real nature as a technical norm to be used constructively in instances where there was no agreement or special circumstances did not exist.

When, during the negotiations, one of the parties alleges the existence of special circumstances, there is only one way out of the impasse: *compromise* and *further negotiations*. There is no possibility of arriving at an acceptable, fair and peaceful solution, and one which will therefore endure, if it is not searched for by the ways and means stated in Article 33 of the Charter of the United Nations Organization.

The obligation to negotiate is an obligation of *tracto continuo*; it never ends and is potentially present in all relations and dealings between States.

The purpose of the continental shelf doctrine and of the Convention is to *contribute* to a world order, in the foreseeable rush for oil and mineral resources, to avoid dangerous confrontation among States and to protect smaller nations from the pressure of force, economic or political, from greater or stronger States.

The pacific settlement of disputes in this field should promote friendly relations and enduring co-operation especially among neighbouring States. Solutions likely to be considered by one of the parties as *inequitable* would be difficult to enforce, they would in time be evaded and *would breed new disputes*.

The question arises: do geographical realities justify a deviation from the rigid application of the equidistance rule? I believe they do justify such deviation.

The distorting effect caused by the application of the lateral equidistance line, *when it cannot be accounted for by the length of the coastline*, justifies the application of the special circumstances principle.

If the application of the equidistance rule would result in *harsh inequities* in a given specific case, this result may be considered as a special circumstance justifying another boundary line, in the absence of agreement between the parties concerned.

I think it is correct to say that the discussion on the reservation of "special circumstances" showed that this clause was understood not so much as a limited exception to a generally applicable rule, but more in the sense of an alternative of equal rank to the equidistance method.

The configuration of the North Sea coasts of Denmark, of the Federal Republic and of the Netherlands and the *effects* produced by such geographical *configuration* on the boundaries of the continental shelves of these three States, as they result from the application of equidistance, *constitute a circumstance* entitling the Federal Republic to claim from Denmark and the Netherlands a *revision* in its favour of the boundaries of its continental shelf.

I agree with the contention that "the history and documents of the Geneva Conference on . . . the Continental Shelf show that the origin of the 'special circumstances' clause was the fact that coastal features or irregularities fairly frequently exercise a harmful influence on the equidistance line, resulting in considerable inflexions or deviations, the effect of which is inequitably to reduce the . . . shelf area that would normally go to a party. It was consequently in order to provide a safeguard for the rights of the losing party, in a spirit of *equity* that the 'special circumstances' provision was introduced, allowing 'another boundary line' to be drawn instead of the equidistance line or in combination with it."

This is also confirmed by the commentary which the International Law Commission added to Article 72 of its draft (subsequently Article 6 of the Continental Shelf Convention):

> ". . . provision must be made for departures [i.e., from the equidistance line] necessitated by any exceptional configuration of the coast, as well as by the presence of islands or of navigable channels. This case may arise fairly often, so that the rule adopted is fairly elastic." (*Yearbook of the International Law Commission*, 1956, II, p. 300.)

Attempts made at the Geneva Conference on the Law of the Sea to strike out the alternative of "special circumstances" and to make the equidistance method the only rule were rejected by a large majority.

In addition to special situations of a technical nature—navigable channels, cables, safety or defence requirements, protection of fisheries (fish banks), indivisible deposits of mineral oil or natural gas, etc.—special geographical situations such as special coastal configurations have been regarded as special circumstances.

M. W. Mouton, "The Continental Shelf", *Recueil des Cours*, Volume 85 (1954, I), page 420:

> "It is stipulated that this rule is applicable in the absence of agreement between the States concerned and unless another boundary line is justified by special circumstances. The modifications to the general rule are allowed either because the exceptional configuration of the coasts, the presence of islands or navigable channels necessitate departure from these rules, or because of the existence of common deposits situated across the mathematical boundary."

Colombos, *The International Law of the Sea*, 1959, page 70:

> "The rule, however, admits of some elasticity in the case of

islands or navigable channels as well as in the case of an exceptional configuration of the coast."

Olivier de Ferron, *Le droit de la mer*, Vol. II, page 202:

"Article 6 of the Geneva Convention in fact provides that these (sc., the median line and the lateral equidistance line) may be modifed by agreement between the States concerned, when 'another boundary line is justified by special circumstances', for example when the exceptional configuration of the coast or the presence of islands or of navigable channels necessitates this. The rules adopted by the Geneva Conference are thus sufficiently flexible to permit of an equitable solution in all cases." *[Translation by the Registry.]*

Consequently, the Parties should search for another method of delimitation which would produce a just and equitable result and, following the guidance given by the Court, *should start new negotiations* in compliance with their obligation laid on them by a principle of general international law. The Parties will then, as stated in Article 1, paragraph 2, of the Special Agreement, fix the boundaries by *agreement* among them.

I might say in conclusion that my opinion is that in this specific case the *equidistance rule is not applicable*, that *there is no general customary law* binding the Federal Republic to abide by the delimitation of its continental shelf as results from the lines drawn as a consequence of the *ad hoc* agreement made between its neighbours Denmark and the Netherlands; that *the Parties should search for and employ another method, in conformity with equity and justice*, and that *the Parties should undertake new negotiations* to delimit the continental shelf in the North Sea as between their countries *by agreement*, in pursuance of the decision given by the Court.

The arguments in favour of the applicability of the *equidistance* method in Article 6 of the Convention are as follows:

(a) that the Federal Republic of Germany took part in the deliberation of the Geneva Conference and signed the Convention without reservations to Article 6;

(b) that the Federal Republic informed the two Governments that its Government was preparing to ratify the Convention;

(c) that the Federal Republic in its Proclamation of 20 January 1964 invoked the Convention to assert sovereign rights to its continental shelf regarding the exploration and exploitation of its natural resources;

(d) that the principle of estoppel applies and the Federal Republic should not be allowed to deny the valid legal force of the Convention.

The equidistance method cannot be considered as a rule derived from fundamental principles of general acceptance.

The new concept of the continental shelf expressed in the Truman Proclamation and in subsequent governmental proclamations; the existence of opinions that jurisdiction of the coastal State over the adjacent continental shelf was already part of customary international law; and finally the definition of the continental shelf as contained in Articles 1 to 3 of the Convention, are all points which count against the assertion that the equidistance method in Article 6 is a rule of customary international law.

The acceptance, recognition or invocation of the rights defined in the first three articles of the Convention (to which reservations are prohibited) by a State not party to the Convention, does not signify or imply an obligation to abide by the method of equidistance. It is not logical or right to affirm that if a party to the Convention may make reservations to Article 6, a State which is not bound by the Convention in a contractual manner could be in a worse situation than a party in respect to the rigid application of Article 6.

(a) The argument that the Federal Republic took part in the deliberations at the Geneva Conference is not a valid one, nor is it prima facie an indication of consent or acceptance to be bound by the conventions concluded at such Conference. If mere attendance at an international conference could produce binding effects, no State would be willing to take part in any conference, the concrete results and implications of which are unknown.

It is not denied that the Federal Republic did sign the Convention on the Continental Shelf and did not make reservations to Article 6; but this signature is a preliminary step made *ad referendum*, subject to the express approval of the appropriate organ of a State by its own constitutional procedures. The Federal Republic did not ratify the Convention, is not a party to it and therefore cannot be contractually bound by its provisions.

(b) The fact that the Federal Republic informed the two Kingdoms that it was preparing to ratify the Convention cannot be considered as a legal and binding promise to do so.

Such information may be a manifestation of intention to perform in the future a certain act; the intention existing at a given moment might be changed later on and the party is free to change its mind.

As long as the act (in this case, ratification) is not actually performed, there cannot be a binding obligation; the consent cannot be implied or deduced from such information of intention.

(c) The fact that the Federal Republic in its Proclamation of 20 January 1964 invoked the Convention to assert sovereign rights to its continental shelf cannot be taken as an expression of consent to be bound by the Convention as a whole, nor does it mean that the Federal Republic accepted the method of equidistance. The Federal Republic by such

Proclamation claimed a right to its continental shelf as being a prolongation into the sea of its land territory, but it could have made that claim regardless of the Convention in the manner of the Truman Proclamation. Invoking the definition of the first three articles of the Convention, the Federal Republic of Germany asserted a right already in existence, recognized internationally before the framing of the Continental Shelf Convention and inherent in the accepted doctrine of the continental shelf.

Claiming such a right and quoting its definition in the Convention does not imply an acceptance of the whole Convention as such, nor an acceptance of the rigid application of the principle of equidistance.

(d) The principle of estoppel cannot in this case be applied against the Federal Republic. It cannot be proved that the two Kingdoms changed their position for the worse relying on such acts of the Federal Republic as its 1964 Proclamation or its manifestation of its intention to ratify the Convention.

The first three articles of the Convention were intended to be broadly declaratory of existing customary international law, but it is essential not to extend the character of these articles to the rest of the articles in the same Convention, which are not at all declaratory of contemporary customary law, and which in general are of a pure technical character, which could be the subject of express reservations as is, especially, the method of equidistance. Whatever publicists have said regarding the doctrine of the continental shelf and its definition in the first three articles of the Convention, does not apply to the whole Convention, and by no legal reasoning could it be said that the method of equidistance in Article 6 embodies a rule of customary international law.

The number of ratifications and the instances where States by agreement have made use of the equidistance method do not give to that method the character of customary law. There is *agreement* between the Parties to the effect that the Convention is not applicable to the Federal Republic as a contracting party; nor is Article 6 applicable to it as a principle of general international law. Even the States parties to the Convention are not bound to apply the equidistance method since—by the very terms of Article 6—they are free to agree to another method or manner of delimitation of their continental shelves.

A treaty does not create rights or obligations for a third State without its consent, but the rules set forth in a treaty may become binding upon a non-contracting State as customary rules of international law.

Article 6 of the Convention and particularly the method of equidistance does not constitute a rule which has been generally accepted as a legally binding international norm.

The acts of the Federal Republic which are invoked as evidence that it has gone quite a long way towards recognizing the Convention, cannot override the fact that it has consistently refused to recognize Article 6 and the equidistance method as an expression of a generally accepted rule of international law and has objected to its applicability as against itself.

The Federal Republic, like any other State, could assert its rights over the continental shelf without relying on the Convention. States have made such assertions long before the Geneva Conference took place (Truman Proclamation; Mexican Declaration of 29 October 1945 [1]) and may do so now and in the future regardless of the Convention. The right of a coastal State to its continental shelf exists independently of the express recognition thereof in the first three articles of the Convention, and is based on the consideration that the continental shelf is the natural prolongation under the sea of the land territory pertaining to the coastal State.

A treaty may contain a clause allowing or prohibiting reservations to some of its provisions. A party making permitted reservations to a particular article is not bound by its text. The very purpose of a reservation is to allow parties to escape from the rigid application of a particular provision. No right is conferred to make unilateral reservations to articles which are declaratory of established principles of international law. Customary rules belonging to the category of *jus cogens* cannot be subjected to unilateral reservations. It follows that if the Convention by express provision permits reservations to certain articles this is due to

[1] Presidential Declaration with respect to continental shelf, 29 October 1945: "[The continental shelf] clearly forms an integral part of the continental countries and it is not wise, prudent or possible for Mexico to renounce jurisdiction and control over and utilization of that part of the shelf which adjoins its territory in both oceans.

. . . . . .

For these reasons the Government of the Republic lays claim to the whole of the continental platform or shelf adjoining its coast line and to each and all of the natural resources existing there, whether known or unknown, and is taking steps to supervise, utilize and control the closed fishing zones necessary for the conservation of this source of well-being.

The foregoing does not mean that the Mexican Government seeks to disregard the lawful rights of third parties, based on reciprocity, or that the rights of free navigation on the high seas are affected, as the sole purpose is to conserve these resources for the well-being of the nation, the continent and the world." *[Translation by the U.N. Secretariat.]*

See also Articles 27, 42 and 48 of the Mexican Constitution, as amended by Decree of 20 January 1960 (*Diario Oficial*, Vol. CCXXXVII, No. 16) "The national territory comprises . . . *[inter alia]* the continental shelf and the submarine shelf of the islands, keys and reefs" (Art. 42). *[Translation by the U.N. Secretariat.]*

recognition of the fact that such articles are not the codification or expression of existing mandatory principles or established binding rules of general international law, which as such are opposable not only to the contracting parties but also to third States.

Article 6, among others, of the Continental Shelf Convention is of a technical nature; it is not the expression of a customary norm and is not opposable to the Federal Republic which has consistently refused to accept the application, without its consent, of the equidistance method.

The history of the Convention through the International Law Commission, the General Assembly and the Geneva Conference shows that the equidistance concept is not and was never intended to be the expression of an international legal rule of universal applicability. The fact that the Convention has not made compulsory the rigid application of the equidistance method does not mean that the Convention is incomplete or that it left the question of delimitation open. This question certainly arises but delimitation cannot be enforced by peaceful means except by *agreement*, arbitration or judicial decision.

The only principle of general international law implicit in Article 6 is the *obligation to negotiate*, since the delimitation between the continental shelves of adjacent States "shall be determined by agreement between them".

The fact that the equidistance method has been followed in several bilateral agreements between neighbouring States does not mean at all that those States were compelled by the Convention to use the equidistance method. It only means that there was *agreement* between them because they considered such method satisfactory, fair, equitable and convenient. They also departed from the equidistance method when they agreed to do that.

The bilateral agreement of 31 March 1966, made before the last part of the tripartite talks in Bonn in May, was founded on the assumption that the failure of the talks up to that time was conclusive and that in the absence of agreement they could proceed on the application of the equidistance method. The Federal Republic not being a party to such agreement refused to abide by it and consider it as *res inter alios acta*.

The lack of agreement in the negotiation was, nevertheless, not conclusive in the opinion of the Parties, as was shown by the fact that they decided to present the matter to the Court.

* * *

In my opinion, paragraphs 71 to 75 of the Court's considerations *contain*—in their application to the present case—*the statement of the*

requirements which must be satisfied in order that a rule which in its origin is only a contractual one may become a rule of customary international law.

These requirements, which may be regarded as of general application, could be summed up as follows:

> "It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law." (Paragraph 72, first sentence.)
>
> "With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of any States whose interests were specially affected." (Paragraph 73, first sentence.)
>
> "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of any States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition to the effect that a rule of law or legal obligation is involved." (Paragraph 74.)

* * *

I believe that the Judgment of the Court will guide and help the Parties in the further negotiations that they will undertake, in compliance with paragraph (2) of Article 1 of the Special Agreement, for the purpose of delimiting the continental shelf in the North Sea as between their countries.

The agreement among themselves made in accordance with the findings of the Court and conducted in fulfilment of the principles prescribed by the Charter of the United Nations, will result in the recognition of their respective legitimate interests in the continental shelves appertaining to each of them.

I believe furthermore that the Judgment of the Court in the North Sea Continental Shelf cases *will also be* a guide in other similar controversies, to help States settle by negotiation or other peaceful means of their own choice, their eventual differences in this respect.

(Signed) Luis PADILLA NERVO.