DISSENTING OPINION OF JUDGE SØRENSEN

To my great regret I find myself unable to concur in the decision of the Court, and I wish to avail myself of the right under Article 57 of the Statute to state the reasons for my dissent.

On certain points I agree with the Court. I do not think that the equidistance principle—even subject to modification in special circumstances—is inherent in the legal concept of the continental shelf or part of that concept by necessary implication.

I also agree that the Federal Republic of Germany has not by her conduct assumed the obligations under the Geneva Convention on the Continental Shelf. As I shall indicate later, the conduct of the Federal Republic may be considered relevant in another context, but I agree that the Convention is not opposable to her on a contractual or quasi-contractual basis.

I do find, however, that the Convention, and in particular Article 6 thereof, is binding upon the Federal Republic on a different basis. In order to substantiate this opinion I wish first to make some observations on the Convention in general, and then afterwards to examine whether the conclusions reached hold good with respect to Article 6 in particular.

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It is generally recognized that the rules set forth in a treaty or convention may become binding upon a non-contracting State as customary rules of international law or as rules which have otherwise been generally accepted as legally binding international norms. It is against this particular background that regard should be had to the history of the drafting and adoption of the Convention, to the subsequent attitudes of States, and to the relation of its provisions to the rules of international law in other, but connected, fields.

In that respect, however, I take a less narrow view than the Court as to the conditions for attributing such effect to the rules set forth in a convention. I agree, of course, that one should not lightly reach the conclusion that a convention is binding upon a non-contracting State. But I find it necessary to take account of the fact—to which the Court does not give specific weight—that the Geneva Convention belongs to a particular category of multilateral conventions, namely those which result from the work of the United Nations in the field of codification

and progressive development of international law, under Article 13 of the Charter.

Over a number of years, and following the procedure laid down in its Statute, the International Law Commission had elaborated a comprehensive set of draft articles on the law of the sea, including some on the continental shelf. The Commission submitted the draft articles to the General Assembly in the report of its eighth session in 1956. By resolution 1105 (XI) the General Assembly decided to convene a conference of plenipotentiaries to examine the law of the sea on the basis of this draft, and all States Members of the United Nations or the specialized agencies were invited to participate. The conference met in Geneva in the early months of 1958 and adopted four conventions on the law of the sea, one of them being the Convention on the Continental Shelf, which were opened for signature on 28 April 1958.

In assessing the legal effects of a convention adopted in such circumstances, the distinction between the two notions of "codification" and "progressive development" of international law may be taken as the point of departure. According to Article 15 of the Statute of the International Law Commission, the term "codification" is used in that Statute to mean "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". The term "progressive development", on the other hand, is used to mean "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".

There is no doubt that the distinction between these two categories is sound in theory and relevant in practice. There are treaty provisions which simply formulate rules of international law which have already been generally accepted as part of international customary law, and it is beyond dispute that the rules embodied and formulated in such provisions are applicable to all States, whether or not they are parties to the treaty. On the other hand, it is equally clear that there are treaty provisions which are intended to modify the existing legal situation, whether they change the content of existing rules or regulate matters which have not previously been regulated by international law. Rules set forth in such treaty provisions are neither binding upon nor can be invoked by non-contracting States.

It has come to be generally recognized, however, that this distinction between codification and progressive development may be difficult to apply rigorously to the facts of international legal relations. Although theoretically clear and distinguishable, the two notions tend in practice to overlap or to leave between them an intermediate area in which it is not possible to indicate precisely where codification ends and progressive development begins. The very act of formulating or restating

an existing customary rule may have the effect of defining its contents more precisely and removing such doubts as may have existed as to its exact scope or the modalities of its application. The opportunity may also be taken of adapting the rule to contemporary conditions, whether factual or legal, in the international community. On the other hand, a treaty purporting to create new law may be based on a certain amount of State practice and doctrinal opinion which has not yet crystallized into customary law. It may start, not from *tabula rasa*, but from a customary rule *in statu nascendi*.

The International Law Commission itself has recognized that the distinction between the process of codification and that of progressive development, as defined in its Statute, gives rise to practical and theoretical difficulties. The report of its eighth (1956) session contains, in the introduction to the chapter on the law of the sea—which includes the draft articles on the continental shelf—, the following statement:

> "In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already 'sufficiently developed in practice', but also several of the provisions adopted by the Commission, based on a 'recognized principle of international law', have been framed in such a way as to place them in the 'progressive development' category. Although it tried at first to specify which Articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either." (I.L.C., VIII, *Report*, para. 26).

Considerations such as these are borne out by an examination of the process by which rules of customary international law are created. Article 38 of the Statute of the Court refers to international custom "as evidence of a general practice accepted as law". According to classic doctrine such practice must have been pursued over a certain length of time. There have even been those who have maintained the necessity of "immemorial usage". In its previous jurisprudence, however, the Court does not seem to have laid down strict requirements as to the duration of the usage or practice which may be accepted as law. In particular, it does not seem to have drawn any conclusion in this respect from the ordinary meaning of the word "custom" when used in other contexts. In the *Asylum* case the Court only required of the Colombian Government that it should prove—

> "that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State". (*I.C.J. Reports 1950*, p. 276; also quoted in the case concerning *U.S. Nationals in Morocco, I.C.J. Reports 1952*, p. 200).

The possibility has thus been reserved of recognizing the rapid emergence of a new rule of customary law based on the recent practice of States. This is particularly important in view of the extremely dynamic process of evolution in which the international community is engaged at the present stage of history. Whether the mainspring of this evolution is to be found in the development of ideas, in social and economic factors, or in new technology, it is characteristic of our time that new problems and circumstances incessantly arise and imperatively call for legal regulation. In situations of this nature, a convention adopted as part of the combined process of codification and progressive development of international law may well constitute, or come to constitute the decisive evidence of generally accepted new rules of international law. The fact that it does not purport simply to be declaratory of existing customary law is immaterial in this context. The convention may serve as an authoritative guide for the practice of States faced with the relevant new legal problems, and its provisions thus become the nucleus around which a new set of generally recognized legal rules may crystallize. The word "custom", with its traditional time connotation, may not even be an adequate expression for the purpose of describing this particular source of law.

This is not merely a question of terminology. If the provisions of a given convention are recognized as generally accepted rules of law, this is likely to have an important bearing upon any problem of interpretation which may arise. In the absence of a convention of this nature, any question as to the exact scope and implications of a customary rule must be answered on the basis of a detailed analysis of the State practice out of which the customary rule has emerged. If, on the other hand, the provisions of the convention serve as evidence of generally accepted rules of law, it is legitimate, or even necessary, to have recourse to ordinary principles of treaty interpretation, including, if the circumstances so require, an examination of *travaux préparatoires*.

Turning now to the Convention on the Continental Shelf, it is hardly necessary to recall that the legal problems with which it deals have arisen out of the rapidly increasing demand for sources of energy and the development of new techniques permitting the extraction of resources from the subsoil of submarine areas. As problems of international law, the problems relating to the exploitation of the natural resources of the

continental shelf are of recent origin. Although the seeds of the contemporary doctrine of the continental shelf may be found in earlier legal writings, it is only during the last quarter of a century that technical developments have added practical significance to the problems. The point of departure for the evolution of the legal doctrine relating to the continental shelf was the proclamation issued by the President of the United States on 28 September 1945.

On the basis of early State practice and the comments made by governments, the International Law Commission hammered out the doctrine of the continental shelf in legal provisions which were subsequently discussed and adopted, with certain modifications, by the Geneva Conference in 1958. As far as the main elements are concerned, the provisions of the Convention circumscribed the doctrine on a number of points. The outer limits of the continental shelf were defined, although according to alternative criteria, one of which was the indeterminate criterion of exploitability. The rights of the coastal State over the shelf area were characterized as "sovereign" rights—which means that they include the ordinary legislative, executive and judicial competence of the State on a territorial basis—but only for limited purposes, namely the exploration and exploitation of natural resources. These rights were declared to be exclusive, and it was further laid down that they did not depend on occupation or any express proclamation. The term "natural resources" was defined in great detail. In addition, the Convention imposed certain duties on the coastal State for the purpose of safeguarding the interest of other States in the use of the high seas, and provisions were included for delimitation vis-à-vis neighbouring States [1].

It is difficult to express any definite opinion as to the exact legal status of the continental shelf in general international law prior to the Geneva Conference. It may be argued that customary international law had by then already developed to the point of authorizing a coastal State to exercise some measure of sovereign rights over the adjacent area of the continental shelf. But it can hardly be asserted that the doctrine of the continental shelf, as formulated and circumscribed in considerable detail, first by the International Law Commission in its draft of 1956, and then by the Geneva Conference in 1958, was nothing more than a restatement of then existing rules of customary international law. The provisions of the Convention were not simply declaratory of already accepted international law in the matter.

This being so, the question remains whether the Convention may nevertheless now be taken as evidence of generally accepted rules of international law. In the Judgment, the Court has applied certain minimum conditions for recognizing that a treaty provision attains the

[1] I use the expression "neighbouring States" in a wide and general sense, covering all States adjacent to the same continental shelf, whether or not they have a common land frontier.

character of a generally accepted rule of customary law. In a general way I agree that these conditions reflect the elements or factors to be considered, except that I also believe, as indicated above, that it should be considered as a relevant element that a convention has been adopted in the process of codification and development of international law under the United Nations Charter. I do not, however, find the rather schematic approach adopted by the Court entirely satisfactory. The conditions should not, in my view, be considered as alternative conditions which could be examined and rejected one by one. The proper approach, in my opinion, is to examine the relevant elements as interlocking and mutually interdependent parts of a general process.

Approaching the problems of the present cases in this manner, I think that the decisive considerations may be summarized as follows. The adoption of the Geneva Convention on the Continental Shelf was a very significant element in the process of creating new rules of international law in a field which urgently required legal regulation. The Convention has been ratified or acceded to by a quite considerable number of States, and there is no reason to believe that the flow of ratifications has ceased. It is significant that the States which have become parties to the Convention are fairly representative of all geographical regions of the world and of different economic and social systems. Not only the contracting parties, but also other States, have adapted their action and attitudes so as to conform to the Convention. No State which has exercised sovereign rights over its continental shelf in conformity with the provisions of the Convention has been met with protests by other States. True, there have been certain controversies on such questions as the understanding of the term "natural resources" and the delimitation of shelf areas between the States concerned, a problem which will be examined further below. In general, however, such controversies have revolved on the interpretation and application of the provisions of the Convention, rather than the question whether those provisions embody generally applicable rules of international law.

I do not find it necessary to go into the question of the *opinio juris*. This is a problem of legal doctrine which may cause great difficulties in international adjudication. In view of the manner in which international relations are conducted, there may be numerous cases in which it is practically impossible for one government to produce conclusive evidence of the motives which have prompted the action and policy of other governments. Without going into all aspects of the doctrinal debate on this issue, I wish only to cite the following passage by one of the most qualified commentators on the jurisprudence of the Court. Examining the conditions of the *opinio necessitatis juris* Sir Hersch Lauterpacht writes:

> "Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely, the conduct of States, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention." (Sir Hersch Lauterpacht: *The Development of International Law by the International Court*, London 1958, p. 380.)

Applying these considerations to the circumstances of the present cases, I think that the practice of States referred to above may be taken as sufficient evidence of the existence of any necessary *opinio juris*.

In my opinion, the conclusion may therefore safely be drawn that as a result of a continuous process over a quarter of a century, the rules embodied in the Geneva Convention on the Continental Shelf have now attained the status of generally accepted rules of international law.

That being so, it is nevertheless necessary to examine in particular the attitude of the Federal Republic of Germany with regard to the Convention. In the *Fisheries* case the Court said that the ten-mile rule would in any event "appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast" (*I.C.J. Reports 1951*, p. 131). Similarly, it might be argued in the present cases that the Convention on the Continental Shelf would be inapplicable as against the Federal Republic, if she had consistently refused to recognize it as an expression of generally accepted rules of international law and had objected to its applicability as against her. But far from adopting such an attitude, the Federal Republic has gone quite a long way towards recognizing the Convention. It is part of the whole picture, though not decisive in itself, that the Federal Republic signed the Convention in 1958, immediately before the time-limit for signature under Article 8. More significant is the fact that the Federal Republic has relied on the Convention for the purpose of asserting her own rights in the continental shelf. The Proclamation of the Federal Government, dated 20 January 1964, contained the following passage:

> "In order to eliminate legal uncertainties that might arise during the present situation until the Geneva Convention on the Continental Shelf comes into operation and is ratified by the Federal Republic of Germany, the Federal Government deems it desirable already now to make the following statement:
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> 1. In view of the development of general international law as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf, the Federal

> Government regards the exploration and exploitation of the natural resources of the seabed and subsoil . . . as the exclusive sovereign right of the Federal Republic of Germany . . ."

Leaving aside for the moment the particular question of the delimitation of the German area of the continental shelf vis-à-vis other States, to which I shall revert later, this proclamation may be taken as conclusive evidence of the attitude adopted by the Federal Republic towards the Convention. This attitude is relevant, not so much in the context of the traditional legal concepts of recognition, acquiescence or estoppel, as in the context of the general process of creating international legal rules of universal applicability. At a decisive stage of this formative process, an interested State, which was not a party to the Convention, formally recorded its view that the Convention was an expression of generally applicable international law. This view being perfectly well founded, that State is not now in a position to escape the authority of the Convention.

It has been asserted that the possibility, made available by Article 12, of entering reservations to certain articles of the Convention, makes it difficult to understand the articles in question as embodying generally accepted rules of international law. I intend to revert to this question below, with particular regard to Article 6. As a more general point I wish to state that, in my view, the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law. To substantiate this opinion it may be sufficient to point out that a number of reservations have been made to provisions of the Convention on the High Seas, although this Convention, according to its preamble, is "generally declaratory of established principles of international law". Some of these reservations have been objected to by other contracting States, while other reservations have been tacitly accepted. The acceptance, whether tacit or express, of a reservation made by a contracting party does not have the effect of depriving the Convention as a whole, or the relevant article in particular, of its declaratory character. It only has the effect of establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention. Provided the customary rule does not belong to the category of *jus cogens*, a special contractual relationship of this nature is not invalid as such. Consequently, there is no incompatibility between the faculty of making reservations to certain articles of the Convention on the Continental Shelf and the recognition of that Convention or the particular articles as an expression of generally accepted rules of international law.

As a special proviso to the preceding general observations I only wish

to add that the recognition of the Convention as an expression of generally accepted international law should not prejudge an issue which has arisen since the convention was adopted in 1958. The test of exploitability for determining the outer limits of the continental shelf should not be taken to imply that the status of the seabed and subsoil of the ocean depths could be governed by the Convention. The legal concept of the continental shelf cannot reasonably be understood, even in its widest connotation, as extending far beyond the geological concept. The problem does not arise in the present cases, and I therefore do not find it necessary to pursue it further.

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Once it has been concluded that the provisions of the Convention on the Continental Shelf must be considered as generally accepted rules of international law and that they are therefore applicable to the Federal Republic even as a non-contracting State, it is necessary to look more particularly at Article 6, which is the relevant article for the purpose of the present cases. Although the provisions of the Convention in general are considered to be binding on the Federal Republic, there might be special grounds for holding that this general conclusion does not apply to a particular article.

In examining this question, it must surely be held, by way of a starting-point, that Article 6 can hardly be separated from the rest of the Convention without upsetting the balance of the legal régime instituted by the Convention, or breaking the unity and coherence of that régime. For once it is recognized that the coastal State has sovereign rights for certain purposes over the continental shelf adjacent to its coasts, a question of delimitation in relation to the shelf areas of neighbouring States necessarily arises—save only in the rare instances of island States which do not share their continental shelf with other States. A convention on the legal régime of the continental shelf would be incomplete if it left this question of delimitation open. Consequently, there would have to be strong reasons for not considering Article 6 as generally binding along with the rest of the Convention. To put it otherwise, there is a strong presumption in favour of considering the rules on the delimitation of the shelf areas as having a similar legal effect to that of the rules on the extent and nature of the rights of the coastal State.

Far from being invalidated, this presumption is upheld and confirmed by other elements. The rules set forth in Article 6 conform to the rules which are generally applied for the delimitation of maritime areas between neighbouring States. The 1958 Geneva Conference faced this problem in three different contexts, in addition to that of the continental shelf, namely the territorial sea, the contiguous zone and the special fishery conservation areas. For all three situations it adopted identical solutions,

as formulated in Article 12 of the Convention on the Territorial Sea and the Contiguous Zone. These solutions are substantially the same as that of Article 6 of the Continental Shelf Convention. The European Fisheries Convention of 9 March 1964 adopted the same solution for the delimitation of exclusive fishing zones as between neighbouring States.

Furthermore, the practice of States since 1958 in matters concerning the delimitation of shelf areas conforms to the rules of Article 6, and there is no difference between the practice of States parties to the Convention and that of non-contracting States. The main rule of the Article, the principle of equidistance or the median line, has been followed in several bilateral agreements between neighbouring States. It is true that some of these bilateral agreements deviate from the geometrically exact line of equidistance. In some cases the agreement has the effect of "straightening out" the line. In other cases it has taken account of "special circumstances" within the meaning of Article 6. However that may be, such agreements are perfectly compatible with the provisions of Article 6. Likewise, unilateral delimitations proclaimed by States, even before becoming parties to the Convention, have been based on the equidistance principle in conformity with Article 6. Although there are areas in certain parts of the world where the delimitation is still the subject of controversy, there seems to be no case where the delimitation, whether undertaken bilaterally or unilaterally, cannot be considered as having taken place within the framework of Article 6.

It has been argued by the Federal Government—and the Court has accepted that line of argument—that certain instances of State practice are irrelevant for the purpose of the present cases, since they relate only to paragraph 1 of Article 6, namely the delimitation of shelf areas between opposite coasts, and not to the delimitation as between adjacent States under paragraph 2 of Article 6. In my opinion, this argument is not decisive. In order to substantiate this opinion a closer analysis of the provisions of Article 6 is called for.

The geographical terms used in the two paragraphs of Article 6 are not quite precise. Paragraph 1 refers to two or more States "whose coasts are opposite each other" while paragraph 2 refers to "adjacent States". These two provisions thus seem to envisage two distinct types or models of geographical configuration. The realities of geography, however, do not always conform to such abstract models. The coastlines of adjacent States (i.e., States having a common land frontier) may confront each other as opposite coasts in their further course from the point where the common land frontier meets the sea. Thus the same coastline may fall under the provisions of both paragraphs. Neither expressly nor implicitly does Article 6 provide any exact and rational criterion for deciding when, and to what extent, two coastlines are adjacent and when they are opposite.

The difficulties of drawing a clear-cut distinction between the two types

of geographical situations were, in my opinion, well illustrated during the oral proceedings by the production of a sketch map (marked D) showing the area between Denmark and Germany in the westernmost part of the Baltic Sea.

As a matter of legal principle, the distinction between "median line" (paragraph 1) and "equidistance" (paragraph 2) seems to me to be fictitious, and the juridico-technical terminology of the two paragraphs therefore inadequate. In both paragraphs the decisive element is that the line in question shall be drawn in such a manner that each point of it is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. The geometrical technique which is used for the drawing of the line is likewise identical in the two cases.

The proceedings of the Geneva Conference seem to confirm that the legal principle is the same in the two cases. In its draft articles the International Law Commission had applied the distinction between "opposite coasts" and "adjacent States" to the delimitation of the continental shelf as well as of the territorial sea. Article 12 of the draft dealt with the delimitation of the territorial sea in straits and off other opposite coasts, while Article 14 dealt with the delimitation of the territorial sea of two adjacent States. At the Conference, however, it was proposed by Norway that the two rules be merged into one, and a new consolidated rule was eventually adopted as Article 12 of the Convention on the Territorial Sea and the Contiguous Zone. In support of the proposal it was argued that—

> "the problems dealt with in the two articles [*scil.* Articles 12 and 14 of the I.L.C. draft] were so closely interrelated as in some cases to be practically indistinguishable—for instance where two States had a common land frontier which met the sea at the head of a deep bay" (*Official Records*, Vol. III, p. 188),

and also that—

> "The merging of Articles 12 and 14 was merely a matter of drafting; the substance of the two articles was so similar that they would be better combined" (*ibid.*, p. 190).

These arguments met with the general approval of the First Committee of the Conference, dealing with the territorial sea and contiguous zone. In the Fourth Committee, discussing the continental shelf, the delegate of Norway drew attention to the fact that the problems dealt with in Article 72 of the draft (which later became Article 6 of the Convention) were very similar to those covered by other articles, particularly Articles 12 and 14, with regard to which the Norwegian delegation had submitted proposals. Any drafting changes in the texts of Articles 12, 14 and 66

(concerning the contiguous zone, eventually Article 24 of the Convention on the Territorial Sea and the Contiguous Zone) should therefore be taken into consideration by the drafting committee (*Official Records*, Vol. VI, p. 92). This suggestion, however, was not followed up, although nobody spoke against it. Consequently, the differences which now exist between the provisions of the two Conventions on this point seem to be due to insufficient co-ordination in the drafting, rather than different views on the principles involved. So far as Article 6 of the Convention on the Continental Shelf is concerned, there is no difference of principle between paragraphs 1 and 2. A more adequate formulation of that principle would have been a negative formulation, on the model of Article 12 of the Convention on the Territorial Sea, to the effect that "no State is entitled to extend its area of the continental shelf beyond a line, every point of which is equidistant from [etc.]" (it may be pointed out in passing that the aforesaid Article 12 employs the term "median line" with respect to both opposite and adjacent coasts).

A formula such as the one just quoted would also be the only adequate formula for dealing with complex situations, for instance where three or more States are facing each other as opposite States. It seems obvious that under the median line principle no State should be authorized to extend its area into the area to be divided by two other States, and that the median line between States A and B must stop where it intersects with the median line between B and C, although this does not follow from the actual wording of Article 6.

Although an international judge cannot rewrite the Convention on the Continental Shelf, the preceding explanations seem to warrant the conclusion that paragraphs 1 and 2 of Article 6 should be interpreted as expressions of a single legal principle, and that no clear-cut distinction can be made between the practice of States under one or the other of the two paragraphs.

In order to cover all aspects of the practice of States relating to Article 6, it is also necessary to consider the reservations which some States have made to that Article. Such reservations are not inadmissible under Article 12 of the Convention, and their legal effects must therefore be determined on the merits of each particular case. Some of the reservations have been objected to by other States, but it is not for the Court in the present cases to express an opinion on the legal effects of such objections. The reservations made, and the objections entered against them, are relevant only in so far as their total effect might be to disprove the thesis that Article 6, as part of the Convention, has been accepted as generally binding international law. In my opinion, however, this is not the case. First, only four out of 39 States parties to the Convention have entered reservations to Article 6. Secondly, having examined each of the reservations in detail, I find it safe to consider them not as aiming at excluding the régime of Article 6 as such, but at placing on record

that the existence or non-existence of special circumstances is claimed within the meaning of the express terms of that Article.

In general, the reservations made to Article 6 do not seem to invalidate the conclusion that the practice of States is in conformity with the provisions of Article 6.

Now if the Federal Republic, in her relations with other North Sea States, had consistently denied the applicability of Article 6, paragraph 2, to the delimitation of her shelf area, the question might have arisen of whether the provisions of that paragraph were opposable to the Federal Republic in spite of her objections. Like the more general problem examined above relating to her attitude to the Convention in general, this is a problem concerning the attitude of the Federal Republic at the formative stage of a new rule of generally applicable international law. Far from having denied the applicability of Article 6, however, the Federal Republic has on one occasion actually referred to it as being applicable. In the Joint Minutes, signed in Bonn on 4 August 1964 by the respective leaders of a German and of a Netherlands delegation (Memorial, Federal Republic/Netherlands, p. 104), it is stated that the treaty which the two delegations would propose to their Governments to conclude concerning the lateral delimitation of the continental shelf near the coast would constitute "an agreement in accordance with the first sentence of paragraph 2 of Article 6 of the Geneva Convention". The same Joint Minutes embodied a statement to the effect that the Federal Government was seeking to bring about a conference of North Sea States—

> "with a view to arriving at an appropriate division of the continental shelf situated in the middle of 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".

Consequently, there is nothing to substantiate a conclusion that Article 6, and in particular paragraph 2 thereof, has not become part of generally accepted international law on an equal footing with the other provisions of the Convention.

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If, then, Article 6, paragraph 2, is held to be applicable, the next question is: which of the specific rules set forth in that paragraph should be applied in the present case?

The first sentence provides that the boundary shall be determined by agreement between the States concerned. In the present cases, the Parties have negotiated with a view to reaching agreement. These negotiations have not been entirely unsuccessful, since partial agreements

concerning the delimitation near the coast were concluded. No agreement could be reached on delimitation farther out to sea. Each of the two Special Agreements states in the preamble that the existing disagreement "could not be settled by detailed negotiations". On the other hand, Article 1, paragraph 2, or each Special Agreement provides that the Governments concerned "shall delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice". In their pleadings before the Court the Parties have confirmed that at present the possibilities of negotiation have been exhausted, and that no agreement will be possible for so long as the Court has not decided what principles and rules are applicable. In my opinion, the Court cannot but take cognizance of this declaration.

Consequently, the next question is whether the principle of equidistance should be applied, or whether there are special circumstances which justify another boundary line. A natural construction of the wording of the provision, in particular the words "unless another boundary line is justified . . .", seems to indicate that the principle of equidistance is intended to be the main rule, and the drawing of another boundary line an exception to this main rule. This general understanding of the provision seems to be confirmed by the *travaux préparatoires*, including in particular the 1953 report of the Committee of Experts and the reports of the International Law Commission in 1953 and 1956. The problem, however, of the degree to which the "special circumstances rule" should be considered as an exception to the main rule, and of exactly how "exceptional" it should be, is largely identical with the problem as to whether the words "special circumstances" should be given a wide or a narrow construction, and as to the nature of the "special circumstances" which could justify a departure from the principle of equidistance.

This question is not only crucial to the settlement of the dispute between the Parties, if, as I believe, Article 6 is applicable, but also the most difficult question to answer. The ordinary and natural meaning of the words in the context of Article 6 does not give any guidance. If one then turns to the *travaux préparatoires*, some guidance is found in the debates and in the reports of the International Law Commission. Mention is made of "any exceptional configuration of the coast, as well as the presence of islands or of navigable channels" (*I.L.C. Report*, 1953, Commentary on Article 82, and *Report*, 1956, Commentary on Article 72). At the Geneva Conference, one of the members of the 1953 Committee of Experts, Commander Kennedy, speaking this time as a representative of the United Kingdom, mentioned as examples of special circumstances "the presence of a small or large island in the area to be apportioned", such islands to be "treated on their merits", of "the possession by one of the two States concerned of special mineral exploitation rights or fishery rights, or the presence of a navigable channel" (*Official Records*,

Vol. VI, p. 93). As an element of the *travaux préparatoires* the explanations of votes given by delegates at the Conference when the Article was adopted may also be taken into consideration. The representative of the Federal Republic stated that he had voted in favour of the Article "subject to an interpretation of the words 'special circumstances' as meaning that any exceptional delimitation of territorial waters would affect the delimitation of the continental shelf" (*ibid.*, p. 98). Although a declaration of this kind cannot be held against the Federal Republic as justifying inferences *a contrario*, the statement is, nevertheless, significant as evidence of the types of special circumstance which were in the minds of delegates to the Conference. Incidentally, the statement made by the German delegate takes account of the situations obtaining in the Germano-Netherlands and Germano-Danish border areas, and the two subsequent partial agreements of 1964 and 1965 may be taken to recognize the existence of "special circumstances" in these two situations. Nowhere in the *travaux préparatoires*, however, is any reference to be found to geographical situations resembling the bend in the general direction of the German North Sea coast.

It is true that the special circumstances clause was meant to apply in cases where the equidistance principle would lead to inequitable or unreasonable results. To indicate what is inequitable or unreasonable, however, is hardly possible in the absence of any standard of evaluation. The Convention itself does not offer any such standard, nor do the *travaux préparatoires*. There is no basis in international law for maintaining that two or three neighbouring States should have shelf areas of approximately the same size measured in square kilometres. The idea of *justitia distributiva*, however meritorious it may be as a moral or political principle, has not become part of international law, as will be seen from a cursory glance at the established international order with its patent factual inequalities between States. Nor is there any basis for maintaining that the respective areas of the continental shelf should be proportionate to the length of the coasts of the States concerned, or to any such uncertain and hitherto unknown concept as their "coastal fronts". In itself, the continental shelf area which appertains to the Federal Republic under the equidistance principle is not insignificant: it covers an area of 23,000 square kilometres (more than two-thirds of the total land area of the Netherlands, and more than half of that of Denmark), and its farthest point out to sea is at a distance of some 170 kilometres, or nearly 100 nautical miles, from the nearest points of the German coast.

The fact that this area would have been larger, had it not been for the combined effect of the Netherlands-German and Germano-Danish equidistance lines, is immaterial in this context. This combined effect is the product of the bend of the German coast as a geographical factor, and of the location of the Federal Republic's land frontiers with her neighbours, as a legal and political factor. Had the Netherlands-German

frontier lain farther to the west, and the Germano-Danish frontier farther to the north, the two equidistance lines would have met farther out to sea, or might not have met at all, so that the "cutting-off" effect would have been reduced or entirely removed. But the Court has to base its findings on the geographical and political factors as they are, and not upon comparisons with hypothetical situations. The politico-geographical circumstances of coastal States all over the world, including those around the North Sea, are extremely different and have the effect of producing great inequalities as to the areas of continental shelf which each State could claim under the principle of equidistance. The special circumstances clauses of Article 6 cannot reasonably be understood as being designed to rectify any such inequalities caused by elementary geographical factors in combination with the location of political frontiers.

If anything, it might conceivably be argued that the areas to which sovereign rights attach for the purpose of exploring and exploiting the natural resources of the continental shelf should be delimited in such a way as to apportion these resources equitably among the States concerned, taking into account the structure and trends of their respective national economies. The Convention, however, does not give any support for a solution based on such considerations, and the Parties to the present cases have not been able to provide relevant information as to the location of the natural resources, if any, of the areas in question.

One final consideration appears to be relevant. The delimitation of maritime areas between neighbouring States is a matter which may quite often cause disagreement and give rise to international disputes. In accordance with the function of law in the international community, the rules of international law should be so framed and construed as to reduce such causes of disagreement and dispute to a minimum. The clearer the rule, and the more automatic its application, the less the seed of discord is sown. This is particularly important in the absence of provision for the compulsory adjudication of disputes between the parties. The Convention on the Continental Shelf does not include any clause concerning the adjudication of boundary disputes, as envisaged at a certain stage of the work of the International Law Commission. Several of the States parties to the Convention are not parties to the Optional Protocol concerning the Compulsory Settlement of Disputes, adopted by the Geneva Conference, or to any other instrument providing for compulsory adjudication. In such circumstances, if the Court is faced with alternative ways of interpreting a treaty provision, it would seem not only legitimate but also advisable to give preference to the interpretation which will have the effect of circumscribing more narrowly the possible area of dispute. As far as Article 6 of the Convention on the Continental Shelf is concerned, there is no doubt that the principle of equidistance is one whose application is simple and almost mechanical,

while the special circumstances clause, because of its very vagueness, it fraught with potential conflict. Consequently, a narrow interpretation of the term "special circumstances" should be preferred.

Similar considerations are even more pertinent to the fundamental question, whether or not the provisions of the Convention, and in particular Article 6, should be recognized as generally accepted international law. If this question is answered in the negative, and the delimitation is to be governed by a principle of equity only, considerable legal uncertainty will ensue, and that in a field where legal certainty is in the interest not only of the international community in general, but also—on balance—of the States directly concerned.

For the reasons stated above, my opinion is that the question set forth in the Special Agreements should have been answered as follows:

1. Article 6, paragraph 2, of the Convention on the Continental Shelf of 29 April 1958 is applicable to the delimitation, as between the Parties, of the areas of the continental shelf in the North Sea which appertain to each of them, beyond the partial boundary lines already agreed upon.
2. Within the meaning of Article 6, paragraph 2, no special circumstances exist which justify another boundary than that resulting from the application of the principle of equidistance.

(Signed) Max SØRENSEN.