North Sea

Student Materials

- Decided by the International Court of Justice in February 1969
- Key topics: making international law (treaty law, customary international law); law of the sea (resolving maritime boundary disputes)

Learning Objectives

- Understand and apply:
  - requirements for a treaty to directly bind a state
  - elements of customary international law
  - how judges use criteria to assess state practice

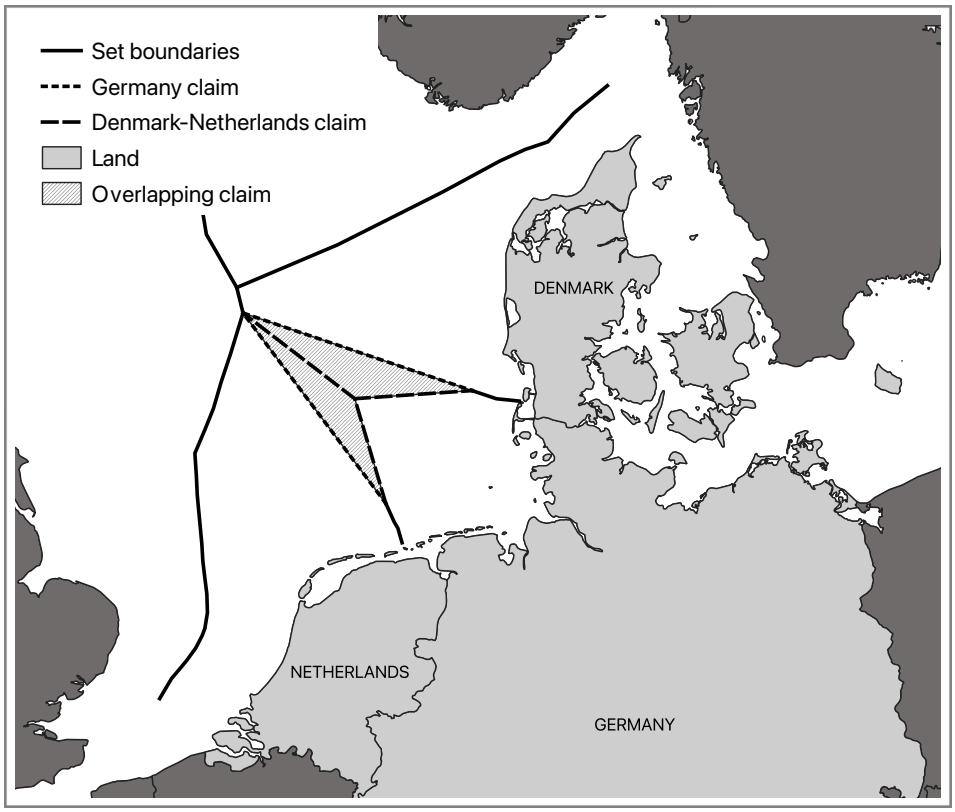
- Analyze and evaluate:
  - how judges assess acceptance of law (*opinio juris*)
  - how treaties influence customary international law
  - factors that affect maritime delimitation

Background Information

After World War II, many states claimed larger areas of the sea so that they could begin offshore drilling and mining in the continental shelf. This process often required neighboring states to negotiate new maritime borders. In 1967, Denmark, the Netherlands, and the Federal Republic of Germany (West Germany) asked the ICJ to resolve a dispute over their maritime delimitations in the North Sea. As shown in the map below, the three states had previously negotiated agreements that set boundaries along the solid lines. All three states wanted to project these boundaries further out into the North Sea, but they disagreed about how these existing boundaries should be extended.

Denmark and the Netherlands favored a border-drawing technique called the equidistance method. Because of the shape of Germany's coastline, this method would have resulted in the boundary shown by the dashed line.[1] To support its argument, Denmark and the Netherlands invoked Article 6 of the 1958 Geneva Convention on the Continental Shelf, which mentions the equidistance method, and customary international law. Denmark and the Netherlands asked the Court to rule that international law required states to use the equidistance method.

Figure: Equidistance Method and the *North Sea* Dispute



Note: Map drawn by author using QGIS. Data from Natural Earth and ICJ documents.

[1] The details of how the equidistance method works are not important for our purposes.

In contrast, Germany believed that international law did not require the equidistance method. Germany's coastline was quite long relative to the coastlines of its neighbors, yet the equidistance method would have given Germany a very small share of territory because its coastline bent inwards. Germany instead proposed that the boundary be set along the dotted lines. More specifically, Germany asked the Court to rule that states were not required to use the equidistance method. Germany argued that it had not ratified the relevant treaty, and that customary international law did not require the equidistance method.

Although this case addresses a relatively arcane boundary dispute, the *North Sea* majority judgment is one of the most important rulings in the ICJ's history. Part I of the majority ruling focuses on how state make international law, particularly the elements of customary law. Additionally, the Court addressed how treaty law influences custom—namely, can a state be bound under customary law by a rule in a treaty that the state did not ratify? If so, how does such a rule change from being a conventional rule—a rule created by a convention/treaty—into customary law? The dissenting opinion of Judge Lachs offers a powerful and insightful counterpoint to Part I of the majority judgment and includes many critiques of customary international law as both a theoretical concept and a practical solution to international disputes. Part II of the majority ruling examines important concepts from the law of maritime delimitations. The majority's discussion—which focuses on the equity of outcomes, rather than procedures—guided most maritime delimitations until 1993.[2]

Relevant Legal Text

Geneva Convention on the Continental Shelf (1958)

Article 6, para. 2

> Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance …

Article 12, para. 1

[2] See the *Jan Mayen* case.

> At the time of signature, ratification or accession, any state may make reservations to articles of the Convention other than to Articles 1 to 3 inclusive.

Majority Judgment

Part I: Making International Law

The majority began by asking: did the 1958 Geneva Convention on the Continental Shelf apply directly as treaty law? Germany had not ratified the Convention, yet Denmark and the Netherlands argued that Germany had created a binding legal obligation by signing the Convention. The majority disagreed with this claim:

> The first question to be considered is whether the 1958 Geneva Convention on the Continental Shelf is binding for all the parties in this case … The Convention received 46 signatures and, up-to-date, there have been 39 ratifications or accessions. It came into force on 10 June 1964 ... [but] it is in force for any individual state only in so far as, having signed it within the time-limit provided for that purpose, that state has also subsequently ratified it; or, not having signed within that time-limit, has subsequently acceded to the Convention. Denmark and the Netherlands have both signed and ratified the Convention, and are parties to it ... The Federal Republic was one of the signatories of the Convention, but has never ratified it, and is consequently not a party ...
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> Denmark and the Netherlands [admit] that in these circumstances the Convention cannot, as such, be binding on the Federal Republic, in the sense of the Republic being contractually bound by it. But it is contended that the Convention … has become binding on the Federal Republic in another way,—namely because, by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional regime; or has recognized it as being generally applicable to the delimitation of continental shelf areas ...
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> Only a very definite, very consistent course of conduct on the part of a state in the situation of the Federal Republic could justify the Court in upholding them; and, if this had existed—that is to say if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional regime—then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In principle, when a number of states ... have drawn up a convention specifically providing for a

> particular method by which the intention to become bound by the regime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a state which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way ...

The majority then asked: did customary international law require that state use the equidistance rule? The majority began by describing the history of continental shelf delimitations, placing special emphasis on the Truman Proclamation.

> It is maintained by Denmark and the Netherlands that the Federal Republic ... is in any event bound to accept delimitation on an equidistance-special circumstances basis, because the use of this method is not in the nature of a merely conventional obligation, but is, or must now be regarded as involving, a rule that is part of the *corpus* of general international law;—and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent ... This contention ... is based on the work done in this field by international legal bodies, on state practice and on the influence attributed to the Geneva Convention itself,—the claim being that these various factors have cumulatively evidenced or been creative of the *opinio juris sive necessitatis*, requisite for the formation of new rules of customary international law ...
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> A review of the genesis and development of the equidistance method … may appropriately start with the instrument, generally known as the "Truman Proclamation", issued by the Government of the United States on 28 September 1945. Although this instrument was not the first or only one to have appeared, it has in the opinion of the Court a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation however, soon came to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal state as having an original, natural, and exclusive … right to the continental shelf off its shores, came to prevail over all others … With regard to the delimitation of lateral boundaries between the continental shelves of adjacent states, … the Truman Proclamation stated that 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, have underlain all the

> subsequent history of the subject. They were reflected in various other state proclamations of the period, and after, and in the later work on the subject …

Denmark and the Netherlands acknowledged that the equidistance rule was not required by customary international law before the 1958 Geneva Convention. However, they argued that the Geneva Convention transformed—or "crystallized"—the equidistance rule into customary international law:

> [In] the oral hearing, [Denmark and the Netherlands] stated that they had not in fact contended that the delimitation article (Article 6) of the Convention "embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules". Their contention was, rather, that although prior to the Conference, continental shelf law was only in the formative stage, and state practice lacked uniformity, yet "the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference"; and this emerging customary law became "crystallized in the adoption of the Continental Shelf Convention by the Conference" …

The majority laid out several reasons why they disagreed with the argument of Denmark and the Netherlands:

> The principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, ... and not at all ... as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule.
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> The foregoing conclusion receives significant confirmation from the fact that Article 6 is one of those in respect of which, under the reservations article of the Convention (Article 12) reservations may be made by any state on signing, ratifying or acceding—for, speaking generally, it is a characteristic of purely conventional rules and obligations that ... some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, [when] rules or obligations of this order are embodied [in] a convention, such provisions will figure

> amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention "other than to Articles 1 to 3 inclusive"—these three Articles being the ones which ... were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law ...
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> In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent states must, unless the parties otherwise agree, be carried out on an equidistance-special circumstances basis ...

Denmark and the Netherlands also argued that even if the Geneva Convention did not transform the equidistance rule into customary international law, customary international law was created after the drafting of the Geneva Convention but before they filed their case in 1967:

> Denmark and the Netherlands [also argue] that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent state practice,—and that this rule, being now a rule of customary international law binding on all states, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the parties' respective continental shelf areas in the North Sea.
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> [This argument] involves treating [Article 6] as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

While the majority acknowledged that a treaty can contribute to the later formation of customary international law, they questioned whether this had occurred in the *North Sea* case for many reasons.

They began by noting that details of the Geneva Convention did not suggest that Article 6 had a "norm-creating character":

> It would in the first place be necessary that the provision concerned should ... be of a fundamentally norm-creating character ... Considered *in abstracto* the equidistance principle might be said to fulfill this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law ... Secondly the part played by the notion of special circumstances ... and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as in the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, ... the Convention itself [seems] to deny to the provisions of Article 6 [a] norm-creating character ...

The majority then examined state practice after the drafting of the Geneva Convention:

> 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 ... In the present case however, the Court notes that ... the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied ...
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> As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years ... Although the passage of only a short period of time is not necessarily ... a bar to the formation of a new rule of customary international law ... an indispensable requirement would be that within the period in question ... state practice, including that of states whose interests are specially affected, should have been both

> extensive and virtually uniform … and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.
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> The Court must now consider whether state practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement ... Some fifteen cases have been cited ... in which continental shelf boundaries have been delimited according to the equidistance principle—in the majority of the cases by agreement, in a few others unilaterally ... But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, … there are ... several grounds which deprive them of weight as precedents in the present context.

The majority noted that many of the states that used the equidistance rule were members of the Geneva Convention and were following treaty law. Therefore, the majority argued, this state practice could not serve as evidence of customary international law:

> To begin with, over half the states concerned ... were or shortly became parties to the Geneva Convention, and were therefore presumably ... acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law ...

The majority then discussed the requirement of acceptance as law (*opinio juris*). The majority distinguished between acts performed from "courtesy, convenience or tradition" and those that are based on a "sense of legal duty":

> Those states ... which were not, and have not become parties to the Convention, [clearly] were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did ... Acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature ...
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> Even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in

> such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief … is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts … which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

The majority concluded that there was not sufficient evidence of acceptance as law:

> In certain cases—not a great number—the states concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so—especially considering that they might have been motivated by other obvious factors ...

The majority therefore concluded that customary international law did not require the equidistance rule:

> The Court accordingly concludes that if 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 ... neither has its subsequent effect been constitutive of such a rule; and that state practice up-to-date has equally been insufficient for the purpose …

Part II: Law of the Sea—Continental Shelf Delimitation

The majority then asked: which rules should Denmark, Germany, and the Netherlands use when delimiting the continental shelf? The majority argued that two principles from the Truman Proclamation had become binding law: agreement and equity.

> As between states faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied … The Court has to indicate to the parties the principles and rules of law in the light of which the methods for eventually effecting the delimitation will have to be chosen. The Court will discharge this task in such a way as to provide the parties with the requisite directions, without substituting itself for them by means of a

> detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the parties have expressly reserved to themselves …
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> The essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which … have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the states concerned, and that such agreement must be arrived at in accordance with equitable principles …
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> So far as the first rule is concerned, the Court would recall not only that the obligation to negotiate which … arises out of the Truman Proclamation, which … must be considered as having propounded the rules of law in this field, but also that this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes …
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> The Court comes next to the rule of equity. The legal basis of that rule in the particular case of the delimitation of the continental shelf as between adjoining states has already been stated.[3] It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable …

The majority then discussed the difference between equity and equality. They then explained why they believed that using the equidistance rule would be inequitable in this case: because states with "equal treatment by nature" would receive unequal shares of the continental shelf.

> Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a state without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a state with an extensive coastline similar to that of a state with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these

[3] Editor's note: The Court is referring here to its earlier discussion of the Truman Proclamation.

> that equity could remedy. But in the present case there are three states whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a state should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of states, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result …
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> It is necessary to seek not one method of delimitation but one goal. It is in this spirit that the Court must examine the question of how the continental shelf can be delimited when it is in fact the case that the equidistance principle does not provide an equitable solution … Although the parties have made it known that they intend to reserve for themselves the application of the principles and rules laid down by the Court, it would, even so, be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case …

Finally, the majority discussed criteria that states could consider when assessing whether a particular delimitation yielded an equitable outcome.

> There is no legal limit to the considerations which states may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.
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> In balancing the factors in question it would appear that various aspects must be taken into account. Some are related to the geological. others to the geographical aspect of the situation, others again to the idea of the unity of any deposits. These criteria, though not entirely precise, can provide adequate bases for decision adapted to the factual situation.

The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal states into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists … The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation …

The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a state may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions …

Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent states is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two states, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the states concerned. To look no farther than the North Sea, the practice of states shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted … The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it.

> A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the states concerned and the lengths of their respective coastlines,—these being measured according to their general direction in order to establish the necessary balance between states with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions …

Dissenting Judgment of Judge Lachs

Judge Lachs began by arguing that treaties can affect customary international law. He then asked: did the Geneva Convention help to create customary international law?

> It is generally recognized that provisions of international instruments may acquire the status of general rules of international law. Even unratified treaties may constitute a point of departure for a legal practice. Treaties binding many states are ... capable of producing this effect, a phenomenon not unknown in international relations. I shall therefore now endeavour to ascertain whether the transformation of the provisions of Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf, and in particular the equidistance rule, into generally accepted law has in fact taken place. This calls for an analysis of state practice, of the time factor, and of what is traditionally understood to constitute *opinio juris*.

Judge Lachs argued that states often delay treaty ratification. However, he believed that such delays did not necessarily prevent treaties from shaping customary international law:

> Ten years have elapsed since the Convention on the Continental Shelf was signed, and 39 states are today parties to it. Delay in the ratification of and accession to multilateral treaties is a well-known phenomenon in contemporary treaty practice ... It is self-evident that in many cases substantive reasons are at the root of these delays. However, experience indicates that in most cases they are caused by factors extraneous to the substance and objective of the instrument in question. Often the slowness and inherent complication of constitutional procedures, the need for interdepartmental consultations and co-ordination, are responsible ... Frequently, again, there is procrastination, due to the lack of any sense of urgency, or of immediate interest in the problems dealt with by the treaty ... These overlong delays in ratification and their causes, not related to the substance of the instruments concerned, are factors for which due allowance has to be made ... The number of

> ratifications and accessions cannot, in itself, be considered conclusive with regard to the general acceptance of a given instrument.

Judge Lachs noted that many states in the late 1960s were newly independent and focused on other priorities than ratifying treaties. He also noted that many states were land-locked and hence weren't affected by the Geneva Convention. In contrast, most states that wanted to explore the continental shelf for oil and minerals had joined the treaty:

> In the case of the Convention on the Continental Shelf, … 31 states came into existence during the period between its signature (28 June 1958) and its entry into force (10 June 1964), while 13 other nations have since acceded to independence. Thus the time during which these 44 states could have completed the necessary procedure enabling them to become parties to the Convention has been rather limited, in some cases very limited. Taking into account the great and urgent problems each of them had to face, one cannot be surprised that many of them did not consider it a matter of priority. This notwithstanding, nine of those states have acceded to the Convention. Twenty-six of the total number of states in existence are moreover land-locked and cannot be considered as having a special and immediate interest in speedy accession to the Convention ...
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> It is the above analysis which is relevant, not the straight comparison between the total number of states in existence and the number of parties to the Convention. It reveals in fact that the number of parties to the Convention on the Continental Shelf is very impressive, including as it does the majority of states actively engaged in the exploration of continental shelves …

Judge Lachs then emphasized the importance of representativeness for assessing state practice:

> This mathematical computation, important as it is in itself, should be supplemented by, so to speak, a spectral analysis of the representativity of the states parties to the Convention.
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> For in the world today an essential factor in the formation of a new rule of general international law is to be taken into account: namely that states with different political, economic and legal systems, states of all continents, participate in the process. No more can a general rule of international law be established by the fiat of one or of a few, or—as it was once claimed—by the consensus of European states only.

> This development was broadly reflected in the composition of the Geneva Conference on the Law of the Sea; it is now similarly reflected within the number of states which are parties to the Convention on the Continental Shelf. These include states of all continents, among them states of various political systems, with both new and old states representing the main legal systems of the world. It may therefore be said that, from the viewpoints both of number and of representativity, the participation in the Convention constitutes a solid basis for the formation of a general rule of law ...

Judge Lachs next argued that the practice of states that had ratified the Convention was important for the formation of customary international law:

> All this leads to the conclusion that the principles and rules enshrined in the Convention, and in particular the equidistance rule, have been accepted not only by those states which are parties to the Convention on the Continental Shelf, but also by those which have subsequently followed it in agreements, or in their legislation, or have acquiesced in it ... This can be viewed as evidence of a practice widespread enough to satisfy the criteria for a general rule of law.

Judge Lachs noted that customary international law does not require universal acceptance, and that maritime delimitations were relatively infrequent acts:

> For to become binding, a rule or principle of international law need not pass the test of universal acceptance ... Not all states have ... an opportunity or possibility of applying a given rule ... Thus this test cannot be, nor is it, one endowed with any absolute character: it is of its very nature relative. Criteria of frequency, continuity and uniformity are involved. However, not all potential rules are susceptible to verification by all these criteria. Frequency may be invoked only in situations where there are many and successive opportunities to apply a rule. This is not the case with delimitation, which is a one-time act. Furthermore, as it produces lasting consequences, it invariably implies an intention to satisfy the criterion of continuity ...

Judge Lachs argued that some states may decide not to follow a customary international rule. He viewed such behavior as a "permitted derogation" from a rule, rather than as evidence against a possible rule:

> A general rule which is not of the nature of *jus cogens* [cannot] prevent some states from adopting an attitude apart. They may have opposed the rule from its inception and may, unilaterally, or in

> agreement with others, decide upon different solutions of the problem involved. Article 6, paragraph 2, of the Convention on the Continental Shelf, by virtue of the built-in exceptions, actually opens the way to occasional departures from the equidistance rule wherever special circumstances arise. Thus the fact that some states ... concluded agreements at variance with the equidistance rule ... represents a mere permitted derogation and cannot be held to have disturbed the formation of a general rule of law on delimitation.

Judge Lachs argued that customary international law must sometimes be formed quickly, without a long duration of state practice. He believed that law-making must occur more quickly when states have more need for legal regulation:

> With regard to the time factor, the formation of law by state practice has in the past frequently been associated with the passage of a long period of time ... However, the great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge: one it must meet, lest it lag even farther behind events than it has been wont to do. To give a concrete example: the first instruments that man sent into outer space traversed the airspace of states and circled above them in outer space, yet the launching states sought no permission, nor did the other states protest. This is how the freedom of movement into outer space, and in it, came to be established and recognized as law within a remarkably short period of time. Similar developments are affecting, or may affect, other branches of international law.
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> Given the necessity of obviating serious differences between states, which might lead to disputes, the new chapter of human activity concerning the continental shelf could not have been left outside the framework of law for very long. Thus, under the pressure of events, a new institution has come into being. By traditional standards this was no doubt a speedy development. But then the dimension of time in law, being relative, must be commensurate with the rate of movement of events which require legal regulation. A consequential response is required. And so the short period within which the law on the continental shelf has developed and matured does not constitute an obstacle to recognizing its principles and rules, including the equidistance rule, as part of general law.

Judge Lachs then discussed acceptance of law. Namely, he criticized the majority's emphasis on belief:

> Can the practice above summarized be considered as having been accepted as law, having regard to the subjective element required? The process leading to this effect is necessarily complex. There are certain areas of state activity and international law which by their very character may only with great difficulty engender general law, but there are others, both old and new, which may do so with greater ease. Where continental shelf law is concerned, some states have at first probably accepted the rules in question, as states usually do, because they found them convenient and useful, the best possible solution for the problems involved. Others may also have been convinced that the instrument elaborated within the framework of the United Nations was intended to become and would in due course become general law ... Many states have followed suit under the conviction that it was law.
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> Thus at the successive stages in the development of the rule the motives which have prompted states to accept it have varied from case to case. It could not be otherwise. At all events, to postulate that all states, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction—and in fact to deny the possibility of developing such rules. For the path may indeed start from voluntary, unilateral acts relying on the confident expectation that they will find acquiescence or be emulated; alternatively, the starting point may consist of a treaty to which more and more states accede and which is followed by unilateral acceptance. It is only at a later stage that, by the combined effect of individual or joint action, ... there develops the chain-reaction productive of international consensus.

Judge Lachs argued that state practice should count as "*prima facie* evidence" of acceptance as law. That is, he believed that state practice was sufficient to generate customary international law unless there was evidence that states did not accept a rule as a legal obligation:

> In view of the complexity of this formative process and the differing motivations possible at its various stages, it is surely over-exacting to require proof that every state having applied a given rule did so because it was conscious of an *obligation* to do so. What can be required is that the party relying on an alleged general rule must prove that the rule invoked is part of a general practice accepted as law by the states in question. No further or more rigid form of evidence could or should be required. In sum, the general practice of states should be recognized as *prima facie* evidence that it is accepted as law ...

Judge Lachs suggested that the majority's approach hindered the development of international law:

> With the ever-increasing activities of states in international relations, some rules of conduct begin to be accepted even before reaching that state of precision which is normally required for a rule of law. If their binding force is contested, courts operating within the traditional framework of certitude may apply tests of perfection and clarity they could not possibly pass … This may not be conducive to strengthening the edifice of international law, which is so important for present-day international relations …

Judge Lachs concluded that states had accepted the Geneva Convention as law. Accordingly, he believed that customary international law required the equidistance rule:

> As to the cases before the Court, the situation leaves little room for doubt. The conclusion by states of agreements in the field of continental shelf delimitation has self-evidently expressed their willingness to accept the rules of the Convention "as law" ... Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf, and more especially the equidistance rule, have attained the identifiable status of a general law.