

THE LEGAL STATUS OF ARTICLES 1-3 OF THE CONTINENTAL SHELF CONVENTION ACCORDING TO THE NORTH SEA CASES

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The United States Government submitted a Draft Convention on the International Sea-Bed Area at the August 1970 meeting of the United Nations Committee on the Deep Sea-Bed.¹ The Draft Convention reflected a dramatic policy decision by President Nixon and translated into action his belief that the "stark fact is that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community."²

This initiative by the United States presented the Sea-Beds Committee with concrete treaty terms and certainly added substantial impetus towards convening a new law of the sea conference in the near future. At the same time, it raised a number of important issues, among them the relationship between certain provisions in the Draft Convention and Articles 1-3 of the 1958 Convention on the Continental Shelf.³ For example, Article 2 of the

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1. Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Twenty-Fifth Session, Supplement No. 21, document A/8021, Annex V at 130-176.

2. Statement by the President on U.S. Oceans Policy, White House Press Release, May 23, 1970.

3. The complete text of the Continental Shelf Convention is contained in U.N. Doc. A/CONF. 13/L.55, T.I.A.S. 5578 and 15 U.S.T. 471. Articles 1-3 read as follows:

Article 1

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 2

1. The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal state.

3. The rights of the coastal state over the continental shelf do not

United States working draft would preclude State claims of sovereignty or sovereign rights over any part of the sea-bed area or its resources beyond the 200 meter isobath adjacent to the coast of continents and islands. In addition, each Contracting Party would agree not to recognize any such claim or exercise of sovereignty or sovereign rights. The rights, titles, or interests in the International Sea-Bed Area or its resources would be defined and acquired through provisions in the Convention.⁴

One effect if the United States Draft were accepted would be to inhibit claims to the Continental Shelf which might be based on the much criticized "exploitability criterion" contained in Article 1 of the Continental Shelf Convention. As a practical matter, the United States proposal was quite timely in that, as of late 1970, no State had apparently claimed to have perfected sovereign rights over the natural resources located beyond 200 meters under the exploitability clause of Article 1.⁵

Insofar as legal theory is concerned, the effect of adopting the Draft Convention (or one with similar terms) on existing custo-

depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Article 3

The rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

4. The United States delegation was aware of the potential conflict between Draft provisions and the Continental Shelf Convention. The following note was inserted after Article 2 of the Draft Convention:

The preceding Article is not intended to imply that States do not currently have rights under, or consistent with, the 1958 Geneva Convention on the Continental Shelf.

5. However, time may be running short. Global Marine, Inc., has recently announced the development of an advanced drill hole re-entry system. This is a major technological breakthrough as drill bits can now be replaced even where the water is several miles deep. Many experts believe there are more economic roadblocks confronting deep sea petroleum extraction than there are technological problems. From a legal perspective, opinions are divided over whether "admits of exploitation" in Article 1 of the Convention might require petroleum wells merely to be technologically possible or actually to be commercially feasible before Continental Shelf rights might be acquired under the Convention. Presumably some tangible manifestation of production capacity would be expected. Deepsea Ventures, Inc., successfully mined manganese nodules in 2,500 feet of water on the Blake Plateau about 200 miles off the coast of Florida in August 1970. This project was "scientific" exploration but commercial operations are contemplated before 1975 according to the president of the company.

mary law of the Continental Shelf is not clear. Obviously, the specific terms of the Convention as finally agreed, would be crucial to such a comparative examination. And the precise terminology in question will not be known until the signatory States have reached agreement at an up-coming law of the sea or sea-bed conference. In that regard, the comprehensive Draft Convention proposed by the United States will undoubtedly provide an excellent basis for initiating negotiations.

At this point in time, however, the current legal status of Articles 1-3 of the 1958 Geneva Convention on the Continental Shelf can be examined without reference to the terms of any future law of the sea or sea-bed treaty. Therefore, this inquiry will focus on the relevant opinions expressed on this subject in the most authoritative forum on the legal standing of international rules—The International Court of Justice. But as judicial expressions should be evaluated in context, it will be necessary first to review the only decision of the Court which directly bears on the question of the customary law status of Articles 1-3.

THE JUDGMENT IN THE NORTH SEA CONTINENTAL SHELF CASES

A number of significant insights relating to the overall legal status of the Continental Shelf were enunciated in the judgment delivered by the International Court of Justice on February 20, 1969.⁶ The *North Sea Continental Shelf Cases* were primarily concerned with the delimitation of continental shelf areas among coastal States bordering the North Sea. The dispute existed between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other. By request of the Parties the Court joined the two proceedings, though the cases remained separate in the sense that they related to different areas under the North Sea.⁷ The Parties agreed that, for the purpose of appointing a

6. North Sea Continental Shelf, Judgment, I.C.J. Reports 1969 [hereinafter cited as [1969] I.C.J.]. It should be kept in mind from the outset that the entire North Sea area in question was overlain by waters less than 200 meters deep.

7. *Id.* para. 11. The legal arguments for Denmark and the Netherlands were nearly identical. In retrospect, Denmark may have fared badly from the joinder in that Denmark's equitable position was much stronger than the Netherlands'. See 2 I.C.J. Pleadings, North Sea Continental Shelf, 270-278 [hereinafter cited as Pleadings].

Judge *ad hoc*, the Governments of Denmark and the Netherlands were in the same interest.⁸

The Parties undertook to carry out delimitations in the disputed shelf areas according to the court's decision on the following question:

What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertains to each of them beyond the partial boundary determined by the above mentioned Convention of 9 June 1965? [Convention of 1 December 1964 in the case of Denmark.]⁹

The Court was not asked to delimit the areas of continental shelf appertaining to the respective Parties nor was it bound to prescribe the methods or factors to be employed for such delimitation. The Court's task was to indicate the principles and rules of law in the light of which the methods for eventually effecting the delimitation would be chosen.¹⁰ In other words, the Court was to provide general directions but not specific details, as the final delimitation of the areas was expressly reserved by the Parties for subsequent negotiations pursuant to the guidance in the Court's decision.¹¹

By eleven votes to six,¹² the Court held that the equidistance method represented in Article 6 of the Continental Shelf Convention was not obligatory as between the Parties and that no other single method of delimitation was to be used in all circumstances. The applicable principles and rules of international law were declared to be as follows:

8. Denmark and the Netherlands chose Dr. Max Sorensen to sit upon the Bench pursuant to Article 31, paragraph 3, of the Statute of the International Court of Justice. The Federal Republic selected Dr. Hermann Mosler as its judge *ad hoc*.

9. [1969] I.C.J. 6.

10. *Id.* para. 84.

11. The Parties have since met on several occasions and it has been reported that an agreement has been reached.

12. Judges voting for the majority were President J.L. Bustamante Y Rivero (Separate Opinion at 58), Sir Gerald Fitzmaurice Jessup (Individual Opinion at 66), Sir Muhammad Zafrulla Khan (Declaration at 54), Padilla Nervo (Separate Opinion at 86), Forster, Gros, Ammoun (Separate Opinion at 101), Petreu, Onyeama and Mosler.

Dissenting Judges included Vice President Koretsky (Dissenting Opinion at 155), Tanaka (Dissenting Opinion at 172), Morelli (Dissenting Opinion at 198), Bengzon (Declaration at 56), Lachs (Dissenting Opinion at 218) and Sorensen (Dissenting Opinion at 242).

(1) [D]elimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of land territory of the other;

(2) if, in the application of the preceding subparagraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreements equally, unless they decide on a regime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them¹³

The Court outlined the factors to be taken into account in the course of negotiations.¹⁴ The first factor was the general configuration of the Parties' coasts with allowance for the presence of any special or unusual features.¹⁵ Secondly, the physical and geological structure, and natural resources of the continental shelf areas involved, insofar as ascertainable, were to be considered. Thirdly, an equitable delimitation required a reasonable degree of proportionality between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the shoreline, taking into account other continental shelf delimitations between adjacent States in the same region.¹⁶

The Court attempted to confine the decision to the facts at hand which related to a context of Continental Shelf delimitation.¹⁷ At the same time, the Court expressly affirmed the general legal regime of the continental shelf and explained ". . . it would not be in harmony with this history [of the general legal regime] to over-systematize a pragmatic construct the developments of which

13. [1969] I.C.J. 53.

14. *Id.* at 55.

15. This factor was substantially in line with the West German contention that their concave coast unjustly limited their share of the North Sea Continental Shelf under the equidistance principle. It may also point towards the type of result envisioned by the "special circumstances" exception in Article 6.

16. The Court thereby seemed to accept the West German argument that its coastal front or extent of connection with the North Sea justified a higher percentage of continental shelf sea-bed than equidistance methods permitted. This was the crucial point which had stalled negotiations among the Parties prior to submitting the case to the International Court.

17. [1969] I.C.J. 54.

have occurred within a relatively short space of time.”¹⁸

The Federal Republic of Germany gained a decided advantage by the outcome of the case. By rejecting the “equidistance-special circumstances” method as a mandatory rule governing the dispute, the Court undercut the foundation of the legal arguments put forth on behalf of Denmark and the Netherlands. Squarely basing delimitation on agreement between the Parties in accordance with “equitable principles” was equivalent in application to acceptance of the West German’s argument that the States concerned were entitled to a “just and equitable share” of the available continental shelf.¹⁹ However, the majority opinion made it clear that the decision was reached using general principles of law and was not decided *ex aequo et bono*.²⁰ Further the Court stated it was not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself required the application of equitable principles.²¹

Denmark and the Netherlands argued that Article 6 of the 1958 Continental Shelf Convention was binding on all the Parties in the case. While the Federal Republic had never ratified the Convention, it was contended that the West Germans were bound by Article 6 because, by conduct, public statements and proclamations, and in other ways, the Republic had assumed the obligations of the Convention.

The Court concluded that only the existence of a situation of estoppel could support the contentions advanced by Denmark and the Netherlands.²² The Court found that the Federal Republic’s

18. *Id.* The Court’s concern with “over-systematization” may partially explain its lack of specification as to the content of the “general regime” and as to the exact legal status of Articles 1-3 of the Continental Shelf Convention.

19. But the Court was unable to accept the Federal Republic’s argument, as presented, which urged that the continental shelf was to be “sliced up like a pie.” The court was bound by the Special Agreements submitting the case which assigned the Court a function of delimiting boundaries not apportioning areas. Moreover, while the end result would be the same in the case under consideration, the pure notion of an equitable share was at variance with what was found to be the fundamental concept of natural prolongation. This concept did not encompass the idea of there being anything undivided to share out as the area already must, by definition, appertain to one or other of the bordering States. *See id.* para. 20.

20. *Id.* para. 17.

21. *Id.* para. 85.

22. A legal argument based on estoppel, as such, was never advanced by the representatives for Denmark and the Netherlands. The lack of an estoppel argument *per se* could explain the Court’s statement that there was “no evidence

past conduct had not evinced acceptance of the equidistance principle in a manner which would have entitled Denmark and the Netherlands reasonably to rely to their detriment or prejudice.

Denmark and the Netherlands also advanced the thesis that the "equidistance-special circumstance" principle embodied in Article 6, was a rule of general or customary international law, automatically binding on the Federal Republic. Central to this argument was the notion of what the Court called "absolute proximity," i.e., a shelf area must appertain to the nearest coastal State.

The Court accepted the point that absolute proximity in the sense of distance might be one important test to determine shelf limits, but was not necessarily the most appropriate one in all circumstances. What conferred *ipso jure* title was the fact that the submarine areas might be deemed part of a State's territory in the sense that the areas were a prolongation of the land territory under the sea. The equidistance method was thus rejected as an "inherent" rule in that it might cause areas which were the natural prolongation of the territory of one State, to be attributed to another state.

The question of whether or not the equidistance principle or method might bind the West Germans by being a rule of customary international law brought about through positive law processes was also rejected by the Court. After a careful review of the preparatory work of the International Law Commission, subsequent State practice and evidence concerning the general recognition of legal compulsion behind Article 6, the Court concluded that the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance method. Moreover, the subsequent effect of Article 6 had not been constitutive of such a customary rule and State practice to date had equally been insufficient for that purpose. Finally, the Court found no conclusive evidence that any State had acted in compliance with equidistance principles because it had felt compelled by a rule of customary law to construct boundaries by that method.²³

whatever" presented by Denmark or the Netherlands of a detrimental change in position in reliance on the Federal Republic's conduct. *See Id.* para. 30.

23. The Court seemed strongly influenced by the fact that Article 12 of the Continental Shelf Convention permitted reservations to Article 6. The Court reasoned that Article 6 could not reflect emergent or customary law if reservations were permitted to a supposedly universally binding norm. It is

Once the obligatory nature of Article 6 was rejected there was no necessity for the Court to consider whether or not the concave configuration of the German North Sea coast constituted a "special circumstance" within the meaning of Article 6 of the Continental Shelf Convention.²⁴

OPINIONS IN THE NORTH SEA CASES ON ARTICLES 1-3 OF THE CONTINENTAL SHELF CONVENTION

The Majority Opinion

Having reviewed the *Judgment* in the *North Sea Continental Shelf Cases*, an appropriate stage has now been reached to turn to the question of the status of Articles 1-3 of the Continental Shelf Convention in relation to customary law; and to analyze the views expressed on this topic both in the majority opinion and in the individual opinions. In so doing, it must be kept in mind that each Judge's conclusion was based on an evaluation of the existing evidence of State practice found to have a bearing on the customary law status of Articles 1-3.

The majority opinion referred to Articles 1-3 in the following terms:

. . . Article 12 of the Geneva Continental Shelf Convention, . . . 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, it is clear, were *then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law* relative to the continental shelf, amongst them the question of the seaward extent of the shelf. The juridical character of the coastal State's entitlement; the nature of the rights exerciseable; the kind of natural resources to which these relate; and the preservation intact of

questionable whether or not this is a true effect assignable to the Article 12 reservation clause which may have been included to protect the more fundamental Articles 1-3, without indicating a legal opinion about Article 6's customary law status.

24. A map on page 15 of the *Judgment* illustrates the geometric distortion which results from the magnification of small coastal effects extended far out to sea. The net effect in the case was to confer West German sovereign rights over 23,600 square kilometers of sea-bed under the equidistance method and possibly to sanction up to 36,700 square kilometers if the equidistance rule were not applicable. The problem was accentuated because the disputed area was thought to contain extensive oil and gas reserves. See Judge Jessup's Separate Opinion at 66.

the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space.²⁵

The Court's comparison of Article 6 with Articles 1-3 was central to the crux of the *Judgment*—a rejection of Article 6's status as customary international law. The Court stated in this regard because

Article 6 . . . was not, as were Articles 1 to 3, excluded from the faculty of reservation, it is a legitimate inference that it was considered to have a different and less fundamental status, and not, *like those Articles, to reflect pre-existing or emergent customary law.*²⁶

It should be noted that the majority opinion does not unequivocally state that Articles 1-3 were either fully developed or even emergent norms of customary law in 1958.²⁷ But by contrasting the legal status of Articles 1-3 with that of Article 6, the Court appears to have accepted the proposition that the three Articles reflected pre-existing or, at least emergent, rules of customary international law in 1958.²⁸ The minimum inference from the majority opinion's relevant expressions in the *Judgment* is that Articles 1-3 reflected emergent norms of customary law in 1958.²⁹ Starting from that premise, it would be necessary to establish whether or not State practice, including the practice of States whose interest are especially affected, could be deemed sufficiently uniform and extensive since 1958 to constitute a general practice of State conformity under a sense of legal obligation.³⁰ Again, the

25. [1969] I.C.J. 39 para. 63 (emphasis added).

26. *Id.* at 40 para. 66 (emphasis added).

27. One fairly obvious reason for the Court's failure to rule on this specific point was that such a declaration was unnecessary for resolution of the issues presented by the Parties before the Court. The practice throughout the *Judgment* was to go no further than was required to decide the case at hand.

28. It might be argued that the rules in Articles 1-3 did not attain whatever normative status they might have until the Convention entered into force on 10 June 1964. But that conclusion is incompatible with the Court's reasoning; the inability to enter reservations to Articles 1-3 was created in 1958, thereby taking cognizance of those Article's status at that time. It is unreasonable to believe the Convention draftsmen would speculate about the State practice which would come into existence between 1958 and the time the treaty entered into force.

29. The Court further emphasized the customary law status of Articles 1-2 as originally formulated in the Continental Shelf Convention by declaring, ". . . it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess." [1969] I.C.J. para. 71.

30. *Id.* para. 74. Paragraph 77 essentially reduces the customary law cri-

Court did not comment directly on that issue.

The Court did, however, refer to the general legal regime of the continental shelf in that “[t]his regime furnishes an example of a legal theory derived from a particular source that has secured a general following.”³¹

The precise meaning of terms such as “general legal regime” and “general following” was never made clear by the Court. Presumably, Articles 1-3 would be integral components in any general regime, as State practice in the last decade has been patterned, by and large, after those Articles.³² For example, the very Parties before the Court apparently accepted the customary law nature of Articles 1-3 and regarded them as the foundation for the general doctrine of the continental shelf.³³

Considering each Article in turn, it is difficult to believe that the International Court of Justice would fail to affirm the well-established customary legal status of the high seas and free use of airspace over the continental shelf as these rules are expressed in Article 3 of the Continental Shelf Convention.³⁴ As Article 2 was declared by the Court to “enshrine” the fundamental concept of the Continental Shelf, it would be highly contradictory to find that Article 2 did not possess customary law status.³⁵

teria to acts by States amounting to a “settled practice” under beliefs motivated by a “sense of legal duty.” Thus the standard of proof is more stringent when the rule in question is not an emergent norm formulated in the Convention.

31. *Id.* at 53. The source mentioned in this context was the Truman Proclamation of 28 September 1945. The Court regarded the Truman Proclamation as the “starting point of the positive law” for the doctrine that the coastal State has an “original, natural and exclusive” or “vested” right to the continental shelf off its shores. *Id.* at 32-33.

32. The extent to which State practice has been independent of the influence of the Convention is difficult to state.

33. 1 Pleadings 61, 393, 402 (Federal Republic); *Id.* at 525; 2 Pleadings 92, 242 (Denmark and the Netherlands).

34. See the Preamble to the Convention on the High Seas. The claims asserted by several Latin American States are an aberration from the customary law of the high seas. Several major maritime powers, including the United States and Russia, have officially protested against these assertions of sovereignty out to as far as 200 nautical miles.

35. [1969] I.C.J. 22 para. 19. It is, however, highly questionable whether the definition of natural resources laid out in paragraph 4 of Article 2 could have had more than “emerging norm” status in 1958. The late Dr. Chapman reported,

The Fourth Committee dealt with the continental shelf, and fishery questions looked initially as if they would be very disruptive to this committee's work until the committee skillfully, if barely, got rid of them. A resolution was put to the vote that included bottom fish, shrimp, and so forth, as resources of the continental shelf. Had it passed the

The scope of this inquiry can thus be narrowed to the troublesome definitional provisions contained in Article 1 of the Continental Shelf Convention.

The Court treated Article 1 as an entity and made no differentiation between vague terms such as “[f]or the purpose of these articles . . .,” “adjacent,” “admits of the exploitation,” or “. . . similar submarine areas adjacent to the coasts of islands.” However, there is no compelling legal reason why the indefinite meaning of these terms would necessarily preclude their being crystallized into the customary law. Customary rules are inherently less precise (due to the nature of their formation) than are the more explicit provisions spelled out in a convention. The point is whatever the exact meaning of the terms in Article 1, the Article itself would be eligible for adoption into the customary law, if it were found to have a sufficient acceptance in State practice.³⁶

In the *North Sea Judgment* the Court was presented with conflicting opinions on Article 1’s legal effect. Professor Oda urged in oral argument that Article 1 was definitional in purpose and content with no independent normative function.³⁷ But evidence introduced by Denmark and the Netherlands revealed that the Belgium Council of State believed Belgium’s legal competence to legislate for their continental shelf was based on the customary law status of Articles 1 and 2.³⁸ The Court was thus presented with both sides of the question and could select a view from between the alternatives offered regarding Article 1’s customary

committee would probably still be debating the issue. But it failed. . . . The Committee then limited living resources of the continental shelf to those permanently embedded in, or attached to, the bottom, or in constant physical contact with the bottom during their harvestable stage. The Law of the Sea, Third Annual Proceedings of the Law of the Sea Institute (1968) 49-50.

36. This writer has chosen not to take an approach based on a factual analysis of national practice to determine whether or not Article 1 should be considered part of the general customary law. Nevertheless, it is pertinent to note that approximately 107 nations have recognized the principle of the coastal State’s jurisdiction over adjacent offshore mineral resources. Most States and territories have done so by domestic legislation, by agreement with other nations, or by granting offshore concessions. See *Hearings Before the Special Subcommittee on Outer Continental Shelf of the Committee on Interior and Insular Affairs*, United States Senate, 91st Cong., 1st and 2nd Sess. 61-65 (1970). See also Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT’L L. 275 (1965-66).

37. 2 Pleadings 197. There was apparently a difference of opinion among the Federal Republic’s representatives in this regard. See *Id.* Vol. I at 402.

38. 1 Pleadings 293-4. Belgium has since passed the legislation in question.

law status.

Possible enlightenment on the standpoint adopted in the *Judgment* may be sought from President Bustamante Y Rivero and from Judge Nervo, both of whom voted with the majority. President Rivero apparently based the general concept of the continental shelf on both the Truman Proclamation and Articles 1 and 2 of the Geneva Convention.³⁹ Judge Nervo, in a separate opinion, stated: "The first three articles of the Convention were intended to be broadly declaratory of existing customary international law"⁴⁰ He went on to remark "[t]he right of a coastal State to its continental shelf exists independently of the express recognition thereof in the first three articles of the Convention. . . ."⁴¹

From the expressions of President Rivero and Judge Nervo, it seems fair to infer that Article 1 was, at a minimum, considered compatible with the "general legal doctrine" of the continental shelf which the Court stated to be part of customary international law. Certainly the Court assumed that the parties had legally justifiable rights to the disputed continental shelf areas all of which were under 200 meters or the case could not have been entertained in the first instance.⁴² It would be unreasonable to assume that this exact figure of 200 meters which was cited by the Court did not derive its genesis substantially from the figure formulated in Article 1.⁴³ This conclusion is reinforced by the fact that the other generating possibility, i.e., the Truman Proclamation, made no specific mention of the 200 meter criterion.⁴⁴

39. [1969] I.C.J. 59. President Rivero also stated, ". . . certain basic concepts . . . the acceptance of which corresponds to a well-nigh universally held opinion, or the sense of which necessarily flows from the very concept of the continental shelf, are already sufficiently deeply anchored for such incorporation [into general international law] to be possible." *Id.*

40. *Id.* at 96.

41. *Id.* at 97. This refers to State practice outside the Convention which was initiated by the Truman Proclamation.

42. *See Id.* at 13 where the North Sea is described in accordance with the North Sea Policing of Fisheries Conventions of 6 May 1882 and note is made of the fact that the sea-bed under consideration consisted of less than 200 meters.

43. There is no uniformity in scientific data which would require the Court's acceptance of 200 meters as an exact depth to define the continental shelf proper. The shelf edge does often appear to be close to the 200 meter contour on standard oceanographic charts but the physical continental shelf varies too much to expect geographers to satisfactorily resolve the definitional problems for legal purposes. *See* 4 Whiteman 814-842.

44. The 200 meter criterion was mentioned in an accompanying press release.

The logical and well-documented separate opinion by Judge Ammoun of Lebanon is especially welcome in light of the uncertainty in the majority opinion about the customary law status of Article 1. Judge Ammoun began his analysis with the legal context of the dispute. This entailed an examination of the actual concept of the continental shelf as it was the shelf's delimitation which was in issue.⁴⁵ Judge Ammoun pointed out that in February 1969 only 39 States, out of a total of about 140 making up the international community, had ratified the Convention, and that these numbers alone would be insufficient to constitute a general convention binding non-parties.⁴⁶

Turning his attention to customary law, he observed that . . . the Convention on the High Seas mentions, in its preamble, the intention of the parties to "codify the rules of international law relating to the high seas"; whereas the Convention on the Continental Shelf says nothing of that kind. Furthermore, Article 1 of the latter Convention when giving a definition of the continental shelf, limits it to the purposes of the articles of that Convention. It would not however be possible to use these considerations as an argument for stating that the concept of the continental shelf as opposed to that of the freedom of the high seas, is not yet accepted in customary international law. Proof of the formation of custom is not to be deduced from statements in the text of a convention; it is in the practice of States that it must be sought.⁴⁷

Judge Ammoun then carefully reviewed domestic and international acts by States which evinced an intent to accept the concept of the continental shelf as formulated at the 1958 Geneva Conference.⁴⁸ He determined that the aggregate body of elements amounted "now to a general consensus constituting an international custom sanctioning the concept of the continental shelf."⁴⁹ But Judge Ammoun made further specific inquiry

. . . whether the delimitation of the continental shelf appearing in Article 1 of the Convention has alone passed into customary law, or whether the latter does not imply—as in the case of historic waters—other outer limits of the area of the high seas subjected to the jurisdiction of the coastal State un-

45. [1969] I.C.J. 101.

46. *Id.* at 102, 103. Kenya, Canada and Taiwan have since ratified the convention.

47. *Id.* at 103-104.

48. *Id.* at 104-106.

49. *Id.* at 106.

der the title of continental shelf or of epicontinental platform, or under some other denomination.⁵⁰

After discussing the basis of Latin American proclamations, other recent claims,⁵¹ and surveying numerous governments' positions as manifested at the Geneva Conference,⁵² Judge Ammoun concluded that the epicontinental platform would have to be added, when appropriate, to the area of the shelf.⁵³ More explicitly he stated,

. . . the situation is that the concept of the epicontinental platform does not constitute a derogation from the definition of the continental shelf in Article 1; the shelf and the platform are not mutually exclusive; in the present stage of development of law, they are called upon to supplement each other⁵⁴

Several additional issues to which Judge Ammoun addresses himself are also relevant to an understanding of Article 1. He expressed the view that the use of the term "adjacent" in Article 1 was intended "to confine the continental shelf to a limited part of the high seas, that part which prolongs the coast, to the exclusion of the open sea."⁵⁵

The continental shelf was to be properly conceived as a natural submarine prolongation of territory—a "geological reality."⁵⁶

50. *Id.*

51. Italian-Yugoslav Agreement of 8 January 1968 and Saudi Arabia claim to the Red Sea reported on 30 October 1968. *Id.* at 109-110.

52. *Id.* at 110-111.

53. *Id.* at 114. The epicontinental platform might include the continental slope. It probably would not include the continental rise which geologically occurs on oceanic, not continental crust. To some extent one's position would depend upon how far down into the earth geological structures are considered relevant.

54. *Id.* The following definitions are cited in 4 Whiteman 818:

Continental Shelf. The zone around a continent, extending from the low-tide line to a depth at which there is a marked steepening of slope to greater depths. Conventionally, its outer edge is taken at 100 fathoms (alternatively 200 meters) ["100 fathoms is exactly 600 ft. or 182.88 meters; 200 meters is exactly 109.36 fathoms"], but it may lie between 20 and 300 fathoms (it is believed to average about 72 fathoms or 132 meters).

Continental Slope. The declivity from the outer edge of the continental shelf into deeper water. (Its base is commonly between 2000 and 3000 fathoms.)

Also S. Whitemore Boggs, Special Advisor on Geography, U.S. Department of State, *Delimitation of Seaward Areas Under National Jurisdiction*, 45 AM. J. INT'L L. 240, 245 (1951).

55. [1969] I.C.J. 115. The term "adjacent" could be interpreted as a qualification on depth as well as distance in restricting the potential application of the "exploitability" clause in Article 1.

56. *Id.* at 117. The Court in general seemed to put more faith in

However, a *caveat* was added in that a unity of legal regime was not to be deduced from the unity of territory and of the continental shelf or platform. Judge Ammoun explained that there was no extension of territorial sovereignty but simply a grant of those sovereign or exclusive rights necessary for the exploration, exploitation or protection of the resources of the continental shelf.⁵⁷ These are, he declared, to be recognized as part of customary international law.⁵⁸

Dissenting Opinions

Judge Tanaka, in a dissenting opinion to the *North Sea Cases* enumerated and appraised the factors he considered important in determining the speed of formulating customary international law on the continental shelf.⁵⁹ First, he discussed the impetus given to the formation of customary law by the consolidation and systematization of rules and principles in the 1958 Geneva Convention.⁶⁰ Secondly, he cited the positive influence of the fact that the Geneva Convention owed its birth mainly to the "International Law Commission composed of highly qualified internationally well-known legal scholars representing the main legal systems of the world in collaboration with a group of experts."⁶¹ Thirdly, he pointed out the urgent need to avoid international conflicts because of the rapidly increasing economic necessity of exploiting subsoil resources.⁶² Fourthly, he recognized that

the speedy tempo of present international life promoted by highly developed communication and transportation had minimized the importance of the time factor and has made possible

geology than is justified by the present knowledge. For instance, what State, if any, might have the strongest "natural" claim to a new sedimentary basin discovered in late 1969 on the Rockall Plateau in the North Atlantic? Great Britain previously claimed the tiny Rockall Island, presumably with a view towards establishing rights in the resources on its surrounding banks. But the petroleum promising Rockall Plateau shoal area is separated from the continental shelf around Great Britain by the Rockall Trough, 2,700 meters deep. Apparently the island continental shelf area in question "drifted" away with Greenland from the European Continent. See *Nature*, Vol. 225, No. 5228, January 10, 1970 at 170-172.

57. [1969] I.C.J. 117-119. Judge Ammoun seems to be much clearer on this point than is the majority opinion.

58. *Id.* at 120.

59. *Id.* at 176-179.

60. *Id.* at 176-177.

61. *Id.* at 177.

62. *Id.*

the acceleration of the formation of customary international law. What required a hundred years in former days now may require less than ten years.⁶³

Lastly, Judge Tanaka noted that the Continental Shelf Convention facilitated the realization of customary law by providing a legal system where a legal vacuum had existed.⁶⁴

Judge Tanaka indicated that the required duration and uniformity of State practice varied according to the factors he mentioned. His unequivocal conclusion was that Articles 1-3 of the Continental Shelf Convention were now part of the general *corpus* of international law.⁶⁵

Other comments in dissenting opinions reinforced Judge Tanaka's view that Articles 1-3 specifically embodied part of the legal doctrine of the continental shelf.⁶⁶ By the Geneva Convention of 1958, the "continental shelf definitively acquired the status of a legal institution"; that is, the fundamental concept of the continental shelf as represented by Articles 1-3 had been "established as customary international law."⁶⁷ This was manifested by acceptance not only by those States which were 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 when faced with legislative acts of other States affecting them."⁶⁸

Judge *ad hoc* Sorensen succinctly summarized the decisive considerations 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 Con-

63. *Id.*

64. *Id.* at 177-178.

65. *Id.* at 179.

66. Vice President Koretsky, *Id.* at 155-156.

67. Judge Tanaka, *Id.* at 173. See also Judge Morelli, *Id.* at 198.

68. Judge Lachs, *Id.* at 228-229.

vention. No State which has exercised sovereign rights over its continental shelf in conformity with the provisions of the Convention has met with protests by other States.⁶⁹

Professor Sorensen went on to state that the virtually uniform practice of States was sufficient evidence of the existence of any necessary *opinio juris*.⁷⁰ He concluded 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."⁷¹ But Professor Sorensen added that the exploitability test for determining outer limits cannot be reasonably understood "even in its widest connotation, as extending far beyond the geological concept."⁷²

CONCLUSION

The International Court of Justice clearly considered Articles 1-3 to be either pre-existing or emergent norms of customary international law at the signing of the Continental Shelf Convention. However, the majority opinion did not find it necessary for resolution of the issues presented in the *North Sea Judgment* to characterize individual terms in Articles 1-3 as either pre-existing or emergent norms in 1958. Had such an endeavor been undertaken, it seems likely from statements in the *Judgment* that the Court would have found that Article 3 and paragraphs 1-3 of Article 2 represented customary law at the time they were written into the Convention. The Court probably also would have declared that paragraph 4 of Article 2 and Article 1 were emergent norms of customary law in 1958 primarily as a result of the codifying force of the Convention and the immediate lack of State protest to their early implementation in State practice.

The majority opinion in the *Judgment* stated that the "general legal regime" of the continental shelf had secured a wide following among States. From what can be learned from the in-

69. *Id.* at 246. Lack of official State protest may be due to the fact that no State has relied upon the exploitability clause as a basis for an extensive continental shelf claim.

70. *Id.* at 246-247.

71. *Id.* at 247. It is necessary to note that Judge *ad hoc* Sorensen did not agree with the majority of the Court which treated Article 6 as severable from Articles 1-3 in the Convention.

72. *Id.* at 249. It would have been quite helpful if the scope of the "geological concept" had been explained.

dividual opinions of Judges who addressed themselves to the issue, it emerges that Articles 1-3, as written, were considered integral parts of this "general legal regime" of the continental shelf which was declared to have near uniform consensus and acceptance among States. There is no indication throughout the *Cases* of any Judge, majority or dissenting, who would not have accepted the proposition that Articles 1-3, as presently exercised, now constitute customary law.⁷³ Some support for that conclusion may be taken from the fact that at least four judges explicitly stated that Articles 1-3 represented customary law even though a direct ruling on that issue was not necessary for the decision the Court had to reach.

The change in the attitude and practice of the Federal Republic of Germany illustrates some of the practical reasons for the rapid assimilation of the multilateral treaty terms embodied in Articles 1-3 into the general *corpus* of customary law. Recall that at the 1958 conference on the law of the sea, the West Germans had proposed that a coastal State had "no rights over the continental shelf beyond the outer limits of its territorial sea."⁷⁴

Less than ten years later, the Federal Republic's position had shifted to an express recognition of the customary law character of Articles 1 and 2 of the Continental Shelf Convention.⁷⁵ A partial explanation for the modified West German legal stance must be attributed to the discovery in the intervening decade of mineral deposits on their continental shelf.⁷⁶ To justify a claim to these potential offshore petroleum reservoirs the Federal Republic was obligated in the *North Sea Cases* to support the principle that the rights embodied in Articles 1 and 2 were sanctioned by general customary law.⁷⁷

73. It is essential to remember that when the *Judgment* was written there were no perfected claims based on an expansive interpretation of the exploitability clause in Article 1.

74. U.N. Doc. A/CONF. 13/C. 4/L.1 (memorandum concerning draft Articles 67-73). The proposal was convincingly defeated.

75. 1 Pleadings 61, 393, 402.

76. West Germany is not a party to the Continental Shelf Convention. However, apparently even Denmark and the Netherlands, which are Parties to the Convention, accepted the customary law character of Articles 1-3. *Id.* at 525; 2 Pleadings 92, 242.

77. The forty-two Convention Parties are the following: Albania, Australia, Bulgaria, Byelorussian SSR, Cambodia, Canada, Colombia, Czechoslovakia, Denmark, Dominican Republic, Finland, France, Guatemala, Haiti, Israel, Jamaica, Kenya, Madagascar, Malawi, Malaysia, Malta, Mexico, Netherlands, New Zealand, Poland, Portugal, Romania, Senegal, Sierra Leone, South Africa,

Important consequences follow from States taking the view that Articles 1-3 of the Continental Shelf Convention are part of the general customary law. The forty-two Parties to the Convention now may be held to the treaty terms, both in a contractual and in a customary sense. And, if one accepts the notion that international legislation can bind a dissenting or passive minority, non-parties also would be obligated to comply with the customary norms embodied in Articles 1-3. Thus States will have to carefully weigh the effects which newly negotiated treaties may have on the presently accepted law of the continental shelf.⁷⁸

Fortunately, the United States has introduced a Draft Convention on the International Sea-Bed Area at an appropriate stage. With no perfected claims by States based on the exploitability clause in Article 1, there is still an opportunity for rational development of a legal regime governing sea-bed areas beyond national jurisdiction.⁷⁹ But accelerating advances in marine tech-

Sweden, Switzerland, Taiwan, Thailand, Trinidad and Tobago, Uganda, Ukrainian SSR, USSR, United Kingdom, United States, Venezuela and Yugoslavia. Eight States which are not parties have incorporated the Article 1 definition into municipal enactments: Argentina, Honduras, India, Italy, Morocco, United Arab Republic, Uruguay and West Germany.

Three States have adopted only the exploitability criterion of Article 1: Brazil, Norway, and Philippines. Fourteen States have chosen other definitions than those in Article 1: Chile, Costa Rica, Dahomey, East Germany, Ecuador, El Salvador, Ghana, Indonesia, Ivory Coast, Nicaragua, Panama, Pakistan, Peru and South Korea. Twenty-three States have, in addition, proclaimed or legislated without indicating a position on the definition of continental shelf in Article 1. Nineteen more States or territories have granted offshore concessions in apparent absence of any general enactments. Czechoslovakia, Malawi, Switzerland and Uganda have ratified the Continental Shelf Convention, but most of the remaining twenty-five landlocked States have taken no official action. Interestingly, Taiwan ratified with a reservation to Article 6 favoring the "natural prolongation" theory.

78. Multilateral treaty provisions may modify customary norms after a sufficient number of States satisfactorily demonstrate a preference for the conventional term in lieu of the customary norm. But mere denunciation of a convention term which is part of the customary law would not necessarily absolve a State from its obligation to observe the rules of customary international law, proof of the existence of which is to be found in the treaty. However, the impact of the convention as evidence of custom would be proportionately reduced by the defection of the former party.

79. See Goldie, *The Exploitability Test: Interpretation and Potentialities*, 8 NATURAL RESOURCES JOURNAL 434 (1968). The most comprehensive and scholarly general study of Article 1's *travaux préparatoires*, is found in Oxman, *The Preparation of Article 1 of the Convention on the Continental Shelf*, Clearinghouse for Federal Scientific and Technical Information, PB 182100. See also U.N. Doc. A/AC 135/19 entitled, *A Discussion of the Legislative History and Possible Construction of the Convention on the Continental Shelf*.

nology indicate that time for State inaction may be rapidly running out.⁸⁰ If progress is to be made toward an early sea-bed conference, States should recognize that agreement will be enhanced by beginning negotiating efforts on the basis of Convention rules which are compatible with presently accepted State practice. More extravagant or intransigent positions by States adopting a short term view will cause further delays and will undoubtedly result in a proliferation of unilateral pronouncements extending the seaward jurisdictional reach of coastal states.⁸¹ The disruptive effects on the settled law and the potential for precipitating armed confrontations make it imperative that the existing consensus be appreciated and a law of the sea conference promptly convened on that basis.

80. The United States leads the world in the development of marine science techniques. Thus the proposed Draft Convention on the International Sea-Bed Area seems particularly magnanimous as the Americans probably could benefit greatly from unregulated exploitation of the deep sea-bed.

81. The concern for this trend is indicated in U.N. Res. 2574 (Dec. 15, 1969) which solicited member States views on the desirability of an early law of the sea conference, particularly to define the limits of national jurisdiction over the sea-bed; requested further Secretariat study on international control machinery; and declared that pending establishment of an international regime, "States and persons, physical or juridical, are bound to refrain from all activities of exploitation . . . beyond the limits of national jurisdiction."