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# *North Sea Continental Shelf (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)* (1969)

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## I. INTRODUCTION

THE NORTH SEA, a marginal sea lying between the eastern coast of Great Britain and the north-western part of continental Europe, has featured prominently in European history as the source of crucial battles fought not only with Viking longships but also with law books since the days of Grotius.[1] It should therefore be of no surprise that the North Sea provided the setting for the first judicial decision by the International Court of Justice (ICJ) concerning the delimitation of maritime zones beyond the territorial sea.[2] Somewhat ironically, the judgment was not particularly illuminating on matters of maritime delimitation, even though it has had some (nominal) impact on this front. It is a *cause célèbre*, however, for its articulation of important principles relating to the sources of international law and their interaction. Indeed, most students of international law will come across the case not because of whatever it said about the continental shelf and its delimitation, but for its analysis of the elements of custom, its description of the relationship between treaty and custom, and perhaps for its resort to a rule or principle of law requiring the application of largely undefined equitable principles. This chapter will first provide an overview of the historical and legal context in which the legal dispute arose (Part II). It will then focus on the issues on which the ICJ pronounced (Part III), and discuss subsequent developments (Part IV).

[1] On the so-called 'battle of the books' see D Bederman, 'The Sea' in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford, OUP, 2012) 364–69. See also H Grotius, *The Free Sea* (D Armitage ed and intro, R Hakluyt tr) (Indianapolis, Liberty Fund, 2004) xi.

[2] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* [1969] ICJ Rep 3 (hereinafter *NSCS*).

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## II. THE SETTING OF THE DISPUTE

### A. Developing the Legal Concept of the Continental Shelf

In geological terms, the continental shelf is the part of the seabed on which the continent rests; it is adjacent to the coast and it slopes down gradually from the shore. Usually at an average depth of 130 metres the downward slope of the seabed becomes steeper, and at this point the continental shelf is followed by another section of the seabed, the continental slope.[3] While the coastal state enjoys sovereignty over the section of the continental shelf lying under its territorial sea, until the Second World War claims of jurisdiction over the seabed beyond the territorial sea were rather scarce.[4] Upon the discovery that the continental shelf is particularly rich in natural resources (it contains almost 90 per cent of the total value of minerals extracted from the seabed),[5] the legal concept of the continental shelf was 'discovered' as well.[6] A 1942 bilateral treaty between the UK and Venezuela relating to the submarine areas of the Gulf of Paria[7] and the 1945 Proclamation by US President Truman[8] are only two notable examples of a rapidly emerging trend since the 1940s, whereby coastal states claimed jurisdiction over the resources found in the continental shelf adjacent to their coast.[9]

The International Law Commission (ILC) considered the topic as part of its work on the law of the sea between 1949 and 1956, and its Articles[10] served as the basis for the adoption, among three other treaties, of the 1958 Convention on the Continental Shelf.[11] This was the first international treaty to outline the regime applicable to the continental shelf. According to the (legal) definition of the concept, the seaward limit of the continental shelf was placed at the point where the waters reach a depth of 200 metres or, beyond that limit, where the depth of the waters permits exploitation of the natural resources of the seabed and subsoil.[12] Notably, neither depth nor exploitability reflected any scientific (geological) benchmarks, and in this sense this first legal definition of the continental shelf was different from the scientific (geological) definition.[13]

Further, the 1958 Convention provided for the delimitation of a continental shelf that is adjacent to the territories of two or more states, distinguishing cases where the said states have 'opposite' coasts from cases where the coasts of the relevant

[3] UNESCO Secretariat, 'Scientific Considerations Relating to the Continental Shelf' (Document A/CONF.13/2 and Add.1 in UNCLOS Official Records vol I, 1958) [6] and [14].

[4] See, for example, the UK claims in C Hurst, 'Whose is the Bed of the Sea? Sedentary Fisheries outside the Three-Mile Limit' (1923) 4 *BYIL* 34, esp 39–42.

[5] RR Churchill and AV Lowe, *The Law of the Sea*, 3rd edn (Manchester, MUP, 1999) 141.

[6] René-Jean Dupuy, *L'océan partagé* (Paris, Pedone, 1979) 104–05.

[7] British Treaty Series No 10 (1942) (British Command Paper 6400); 1 UN Leg Series 44.

[8] Presidential Proclamation No 2667, (1945) 10 Federal Register 12303; 1 UN Leg Series 38.

[9] For a compilation of state practice until 1951 see (1951) 1 UN Leg Series 3–44.

[10] Articles concerning the Law of the Sea with commentaries [1956]-II ILC Ybk 256.

[11] Convention on the Continental Shelf (signed 29 April 1958, entered into force 10 June 1964) 499 UNTS 311 (hereinafter 1958 Convention).

[12] 1958 Convention, Art 1.

[13] BB Jia, 'The Notion of Natural Prolongation in the Current Regime of the Continental Shelf: An Afterlife?' (2013) 12 *Chin JIL* 79, 84–85.

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states are 'adjacent' to each other.[14] Interestingly, the method of delimitation is essentially identical in both cases:[15] priority is given to delimitation by agreement between the states and, if agreement cannot be reached, the boundary will be a line equidistant from the nearest points of the baselines of the parties, unless special circumstances warrant drawing a different delimitation line.[16] Both in the case of states with 'opposite' and in the case of states with 'adjacent' coasts, the equidistant line (called 'median' and 'lateral' line, respectively) results in leaving to each of the states concerned all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other party.[17]

## B. The Attempts to Delimit the North Sea Continental Shelf

The North Sea, surrounded by the shores of Norway, Denmark, the Federal Republic of Germany, the Netherlands, Belgium, France and the United Kingdom (Great Britain, Orkney and Shetlands), has the general look of an enclosed (or semi-enclosed) sea.[18] The seabed of the North Sea essentially consists of a single continental shelf at a depth of less than 200 metres (except for a somewhat deeper narrow belt of water off the south-western coast of Norway).[19] The discovery of oil and natural gas in its seabed in the 1960s[20] motivated the states surrounding it to seek to delimit their respective continental shelves. Given the legal definition of the continental shelf in the 1958 Convention, the coastal states held overlapping claims over the same North Sea continental shelf. Within a few years, Denmark, the United Kingdom and the Netherlands became parties to the 1958 Convention, and a series of bilateral continental shelf delimitation agreements were concluded between Denmark, the Netherlands, Norway (which became a party rather later, in 1971) and the United Kingdom, on the basis of the equidistance principle provided for in Article 6 of the Convention.[21] By way of contrast, Germany signed but never ratified the 1958 Convention, although it had declared in a public Proclamation of 1964 its intention to do so, acknowledging that the Convention expressed the development of general international law.[22]

[14] The 1958 Convention provided no definition for the two concepts; indeed, this distinction has been heavily criticised: M Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford, Clarendon, 1989) 124; P Weil, *The Law of Maritime Delimitation—Reflections* (M MacGlashan tr) (Cambridge, Grotius Publications, 1989) 246.

[15] *Delimitation of the Continental Shelf (UK and France)* (1979) 54 ILR 6, [238] (hereinafter *Anglo–French Continental Shelf*); Weil, *Maritime Delimitation* (n 14) 247.

[16] Art 6(1) and (2).

[17] *NSCS* (n 2) [6].

[18] Note that this term is used here in the legal sense reflected in Part IX of the UN Convention on the Law of the Sea 1982; in oceanographic terms the North Sea, like the South China Sea, is a 'semi-open' sea: see generally JCJ Nihoul, 'Oceanography of Semi-Enclosed Seas' in JCJ Nihoul (ed), *Hydrodynamics of Semi-Enclosed Seas* (Liège, Elsevier, 1982) 1.

[19] *NSCS* (n 2) [4].

[20] F Eustache, 'L'affaire du Plateau continental de la mer du Nord devant la Cour internationale de justice' (1970) 74 *RGDIP* 590, 591, with further references.

[21] F Monconduit, 'Affaire du Plateau continental de la mer du Nord' (1969) 15 *AFDI* 213, 215–16.

[22] Promulgation of the Proclamation of the Federal Government concerning the Exploration and Exploitation of the German Continental Shelf of 22 January 1964, reproduced in Counter-memorial submitted by the Government of the Kingdom of Denmark (ICJ Pleadings vol I 157, 244).

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Unsurprisingly, the delimitation of the continental shelf between Germany and its adjacent states (Denmark and the Netherlands) was more problematic. Germany accepted the principle of equidistance for the establishment of a partial boundary between each of its neighbours but it refused to draw an equidistance line throughout the course of the continental shelf boundary.[23] In fact, Germany did not consider itself bound by the delimitation method enshrined in Article 6 of the 1958 Convention, as it was not party to the latter, and argued that the principle of equidistance should be departed from when it would yield an 'inequitable result'. As the German North Sea coast forms a concave near the Elbe estuary, the German continental shelf would be 'boxed in'[24] by the shelves of Denmark and the Netherlands, preventing Germany from accessing the seabed in the centre of the North Sea (up to the median line with the United Kingdom).[25] Instead, Germany argued that delimitation in such instances should be governed by the principle that each coastal state is entitled to a 'just and equitable share'.[26] Denmark and the Netherlands, on the other hand, contended that Germany was obligated to abide by the delimitation method provided for in Article 6 of the 1958 Convention and that, in the absence of any special circumstances, an equidistance line ought to be drawn between the continental shelf of Germany and that of each of the two states.[27]

Following new rounds of trilateral negotiations, the three states agreed to submit the dispute to the ICJ on the basis of two essentially identical special agreements between Germany and Denmark, and between Germany and the Netherlands, respectively.[28] Pursuant to a request by the parties, the Court joined the two cases, as it found that Denmark and the Netherlands were in the same interest.[29] In neither case was the Court tasked with delimiting the continental shelf boundary; rather, it was requested merely to declare the principles and rules of international law applicable to the delimitation of the continental shelf, while the three states undertook the obligation to effect the delimitation pursuant to the Court's decision subsequently.[30]

## III. THE JUDGMENT AND ITS AFTERMATH

### A. The Issue Before the Court

The Court was faced with two 'fundamentally different' positions:[31] Denmark and the Netherlands argued that the delimitation method provided for in Article 6 of

[23] See generally I Foigel, 'The North Sea Continental Shelf case' (1969) 39 *NJIL* 109, 111–12.
[24] The illustrative expression is borrowed from JG Merrills, 'Images and Models in the World Court: The Individual Opinions in the North Sea Continental Shelf Cases' (1978) 41 *MLR* 638, 639.
[25] *NSCS* (n 2) [8].
[26] ibid, [11].
[27] ibid, [12].
[28] Appearing in [1968] ICJ Pleadings vol I 6 and 8.
[29] *North Sea Continental Shelf cases* (Order) [1968] ICJ Rep 9, 10. Acting in concert, the two states appointed the same ad hoc judge (Sørensen).
[30] Art 1 of the Special Agreement(s); *NSCS* (n 2) [2].
[31] *NSCS* (n 2) [13].

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the 1958 Convention expressed a legal rule that was binding on Germany, either by virtue of the Convention itself, or by virtue of general (ie customary) international law. The rule would thus require adopting equidistance lines for the continental shelf boundaries of Germany with both states, because the configuration of the German coast did not constitute 'special circumstances' allowing deviation from the principle of equidistance. Similarly, the continental shelf boundaries drawn between Denmark and the Netherlands were opposable to Germany, precisely because they were drawn pursuant to a rule (the rule in Article 6) binding on that state too.[32]

Germany, for its part, did not consider itself bound by the rule contained in Article 6 of the 1958 Convention, whether as a matter of treaty or as a matter of customary international law. While recognising the utility of equidistance as a method of delimitation, Germany argued that this method should be used only if it would achieve a just and equitable apportionment of the continental shelf among the states concerned. According to Germany, the principle that each state be accorded a 'just and equitable share' was not a principle of equity, which would be applicable by the Court only if expressly so requested by the parties,[33] but rather a general principle of law. Alternatively, Germany contended that even if the rule of Article 6 were applicable in this case, the configuration of the German coast would constitute 'special circumstances' excluding the use of an equidistance line.[34]

Clearly, the Court was in no way required to uphold one of the two opposing arguments,[35] and in fact it eventually rejected both of them.

## B. The Legal Nature of the Continental Shelf

Three paragraphs were all it took for the Court to dismiss the German contentions. By referring to an 'apportionment' of the continental shelf in a way that awards a just and equitable 'share' to all states concerned, Germany seemed to suggest that the continental shelf in areas like that of the North Sea consisted of an integral or even undivided whole, which ought to be 'shared' or 'apportioned' between the littoral states through the performance of particular legal acts. As the Court held, this conception ran contrary to the rule

> that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.[36]

In other words, the sovereign rights of the coastal state over the continental shelf were an attribute that the state already possessed by virtue of merely having

[32] ibid, [13]–[14].
[33] Art 38(2) ICJ Statute.
[34] *NSCS* (n 2) [15]–[17].
[35] See *Free Zones of Upper Savoy and the District of Gex* (1929) PCIJ Series A No 22, 15; *Diversion of Water from the Meuse* (1937) PCIJ Series A/B No 70, 123.
[36] *NSCS* (n 2) [19].

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a coast; they need not be constituted through a particular procedure, and even less so be awarded through some process of apportionment—they were 'inherent'. This rule, stressed the Court, was 'the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it'.[37]

On the basis of this definition, the Court also dismissed the Danish and Dutch argument that equidistance was a 'juristic inevitability', a delimitation method inherent in the concept of continental shelf rights itself. The Court began by acknowledging that delimitation on the basis of equidistance combines unparalleled practical convenience and certainty of application, but this did not mean that it was the only method of delimitation conceivable.[38] As the Court explained, the principle of equidistance is based on the notion of proximity, namely the notion that to a coastal state appertain all those parts of the shelf that are (but only if they are) closer to it than they are to any point on the coast of another state.[39] Proximity, however, was not fundamental to the concept of continental shelf; rather, what defined the continental shelf was its continuity with the land territory of the coastal state in a way that classified the shelf as a 'natural prolongation' of the latter.[40] The Court accepted that the continental shelf area of states with coasts lying opposite each other can be claimed by each state as a natural prolongation of its territory, and that therefore an equidistance (median) line was the only means to divide equally the area in question.[41] The same, however, was not necessarily true for states with adjacent coasts: in such cases the continental shelf of a state might extend to an area lying closer to another state; therefore drawing an equidistance (lateral) line would deprive the former state of its inherent rights to its shelf.[42] Consequently, the principle of equidistance could not be regarded as the only principle thinkable, as if logically necessary, for the delimitation of overlapping continental shelf areas, at least for states with adjacent coasts.[43]

## C. Estoppel

The question that would have to be answered then was whether this principle, although not inescapably applicable, had become obligatory through the operation of legal rules. The first point for the Court to examine was whether Germany had consented to be bound by the relevant provision of the 1958 Convention, as Denmark and the Netherlands contended. If the treaty rule was binding on all parties to the dispute, it would prevail over any contrary rules of general customary international law (save, of course, for peremptory norms).[44] The Court accepted

[37] ibid, [19].
[38] ibid, [23]–[24].
[39] ibid, [39].
[40] ibid, [43].
[41] ibid, [57].
[42] ibid, [44] and [58].
[43] ibid, [46].
[44] ibid, [25]; *cf* [72].

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the principle on which the argument by Denmark and the Netherlands was based, namely that the conduct of a state could evidence that the state accepted a rule in a treaty despite not having ratified the treaty in question. At the same time, the Court noted that such an intention of the state to be bound should not be presumed lightly. A very definite, very consistent course of conduct to this effect was required, precisely because the fact that a state refrains from carrying out the prescribed formalities strongly indicates lack of consent.[45] This was corroborated in the instance by the fact that the treaty itself permitted states to tailor their obligations through making reservations to the provision in question, yet Germany had preferred to refrain from ratifying the treaty altogether.[46] The Court rejected that Germany was estopped from denying the applicability of the treaty. Giving the 'most precise definition of the conditions for invoking the doctrine of estoppel',[47] the Court held that clearly and consistently evinced acceptance of the treaty rule by Germany was a necessary but not sufficient element. Denmark and the Netherlands would have to show that they were induced to detrimentally change their position or suffer some prejudice, which in this case they had failed to do.[48]

## D. Customary International Law

The Court then sought to ascertain whether the provision of Article 6 of the 1958 Convention reflected a rule of customary international law. In the Court's opinion, there were three ways in which the treaty provision could have come to reflect custom. First, a rule of customary international law of the same content might have pre-dated the 1958 Convention, and the states merely wrote the rule down in the Convention (codification). Second, the rule might have emerged by and through the process of drawing up the 1958 Convention. In other words, the process of drawing up the Convention might have crystallised a customary rule (crystallisation). Third, a customary rule might have emerged in the light of state practice subsequent to the Convention, ie the Convention rule might have served as a basis for the development of a new customary rule in the image of the Convention rule (development).[49] The first option (which was not actively supported by Denmark and the Netherlands) was summarily dismissed by the Court.[50] The Court then found that a customary rule had not emerged through the drafting process of the 1958 Convention,

[45] ibid, [28]; see also H Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *BYIL* 65, 89.

[46] *NSCS* (n 2) [29].

[47] *Delimitation of the Maritime Boundary in the Gulf of Maine* [1984] ICJ Rep 246, [145].

[48] *NSCS* (n 2) [30]. The restrictive approach to estoppel established here was followed in subsequent cases: see I Sinclair, 'Estoppel and Acquiescence' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge, CUP, 1996) 111–15.

[49] *NSCS* (n 2) [60]. *cf* ILC, 'Identification of Customary International Law' (2015) UN Doc A/CN.4/L.869, Draft Conclusion 11 [12], [1]. E Jiménez de Aréchaga, 'The Work and the Jurisprudence of the International Court of Justice 1947–1986' (1987) 58 *BYIL* 1, 32–33 notes thus that treaties have respectively either a 'declaratory', a 'crystallising', or a 'generating' effect on customary international law.

[50] *NSCS* (n 2) [61].

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being consolidated through the works of the Geneva Conference and the reaction of states to the drafting proposals of the ILC. The delimitation method in question was rather included on an experimental and certainly on an optional basis (the Convention permitted states to opt-out from that method through reservations), which indicated that there could not be a mandatory equivalent rule of customary international law.[51]

Finally, the Court inquired whether the provision of Article 6 had passed into customary international law since the adoption of the Convention. In order for this to be possible, the conventional rule in question would have to be 'of a fundamentally norm-creating character'.[52] But the principle of equidistance as couched in Article 6 did not possess this feature: the fact that its use was subordinated to the option of a different agreement by the parties concerned, the fact that it was coupled with the obscure notion of 'special circumstances', and the fact that it could be avoided by states through reservations all pointed to that conclusion.[53] More importantly, the Court was not satisfied that the two elements for the formation of custom were present. With respect to practice, the Court considered that it could not draw inferences from the practice of states that were or shortly became parties to the 1958 Convention, since their practice was justified by the operation of the conventional rule.[54] Similarly, the delimitation of continental shelves between opposite states (ie through the use of median lines) was considered irrelevant for the purposes of establishing the legal status of (lateral) equidistance lines between adjacent states.[55] Regarding the 'subjective element' for the determination of rules of customary law, the Court unsuccessfully sought evidence that states, when agreeing to draw boundaries on the basis of equidistance, 'felt' compelled to do so pursuant to some legal obligation, rather than being motivated by other factors.[56]

The Court held that the parties were not obligated to use any particular method, including equidistance, for the delimitation of the continental shelf areas concerned.[57] Rather, they were obligated to enter into negotiations with a view to reaching an agreement based on equitable principles.[58] In the Court's view, what mattered was that the result achieved be equitable[59] and for this purpose the principle of equidistance might or might not be suitable, depending on the circumstances.[60] Indeed, several factors ought to be taken into account in the process of delimitation, including the geographical configuration of the coasts, physical and geological features, the unity of any deposits of natural resources, as well as a degree of proportionality between the length of the coastline and the extent of the continental shelf.[61]

[51] ibid, [61]–[63].
[52] ibid, [72].
[53] ibid.
[54] ibid, [76].
[55] ibid, [79].
[56] ibid, [77]–[78].
[57] ibid, [83].
[58] ibid, [85].
[59] ibid, [88]; *cf Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, [70].
[60] *NSCS* (n 2) [89]–[90].
[61] ibid, [92]–[99].

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The Court referred to a 'rule' requiring the application of equitable principles, and even to '*opinio juris*' of states in that regard,[62] so that it may be presumed that this rule, vague as it is, is one of customary international law—though its references also to 'principles' of law may cause some confusion as to whether we are dealing here with general principles under Article 38(1)(c) of the ICJ Statute.[63]

## E. Aftermath of the Case

Although the Court rejected the arguments of both parties to the dispute, the judgment was arguably a victory for Germany, to the extent that it obligated the other parties to the dispute to negotiate with view to reaching an agreement. In fact, the parties sat at the negotiating table no fewer than nine times.[64] Denmark emphasised the need to establish elaborately the geological criteria alluded to in the judgment,[65] while the Netherlands, like Germany, was interested in reaching a speedy conclusion in optional terms, even if this meant ignoring the judgment[66] or breaking ties with Denmark.[67] On the opposite front, Germany clearly arrived with an upper hand, sometimes claiming a share between 38,000 and 50,000km$^2$, ie an area significantly larger than the 36,7000km$^2$ claimed before the Court.[68] Ultimately, however, it refrained from maintaining a very assertive stance against its counterparts, for fear of raising the spectres of some not-too-distant claims of *Lebensraum*.[69]

The negotiations culminated in a set of two bilateral agreements:[70] Germany contracted to an area of 35,600km$^2$,[71] but was given access to the centre line of the North Sea, ie the continental shelf boundary with the United Kingdom, while Denmark and the Netherlands made equivalent concessions to Germany as compared to the areas that would have been drawn on the basis of equidistance.[72] The outcome reached through the so-called Copenhagen Agreements has been

[62] ibid, [85]–[86].
[63] ibid, [84]–[85].
[64] S Fietta and R Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford, OUP, 2016) 172.
[65] AG Oude Elferink, *The Delimitation of the Continental Shelf between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?* (Cambridge, CUP, 2013) 359–64 *cf* 379.
[66] ibid, 396–97.
[67] ibid, 373–74.
[68] ibid, 414.
[69] ibid, 445.
[70] Treaty between the Kingdom of Denmark and the Federal Republic of Germany concerning the delimitation of the continental shelf under the North Sea (with annexes and exchange of letters) (signed 28 January 1971, entered into force 7 December 1972) 857 UNTS 119; Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the delimitation of the continental shelf under the North Sea (with annexes and exchange of letters) (signed 28 January 1971, entered into force 7 December 1972) 857 UNTS 142.
[71] This was still an area larger than the one that would have appertained to Germany on the basis of equidistance, namely 24,600km$^2$; see C Gloria, 'Seegebiete mit küstenstaatlichen Nutzungsvorrechten' in Knut Ipsen (ed), *Völkerrecht*, 4th edn (München, CH Beck, 1999) 759–60, [55].
[72] Fietta and Cleverly, *Maritime Boundary Delimitation* (n 64) 172.

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characterised as a 'pragmatic solution'.[73] Despite purportedly being based on the ICJ judgment, the Agreements rest on considerations unconnected with the legal guidelines provided by the Court, in particular the obscure concept of 'natural prolongation'.[74]

## IV. LANDMARK OR HIGH WATERMARK?

The most significant part of the Court's inquiry in *NSCS* in terms of general international law is undoubtedly the one focusing on the sources of international law and the way in which rules stemming from different sources emerge and relate to one another (see A below). The part of the judgment that relates to the nature of the continental shelf and the principles of its delimitation is somewhat underwhelming and has not stood the test of time, except by habitual incantation (see B below).

### A. The Sources of International Law and Their Relations

The nature of the question posed before the Court invited it to engage with the sources of international law and their relationship, and to produce a judgment which was considered at the time unprecedented in terms of its analytical rigour.[75] The issues discussed by the Court had already been raised both in academic doctrine and in legal practice. Still, this was an opportunity for the Court to elaborate on them in a coherent and systematic manner, and so it did.

#### *i. The Building Blocks of Custom: A Matter of Principle*

The *NSCS* judgment is considered to contain one of the classic statements of the Court on the processes of formation and the evidence of rules of customary international law.[76] Reference to it is made by domestic[77] and international[78] courts

[73] D Anderson, 'Denmark–Federal Republic of Germany: Report Number 9–8' in J Charney and L Alexander (eds), *International Maritime Boundaries*, vol I (Dordrecht, Martinus Nijhoff, 1993) 1805; *cf* D Anderson, 'Federal Republic of Germany–The Netherlands: Report Number 9–11' in Charney and Alexander, 1839.

[74] Weil (n 14) 112–13.

[75] K Marek, 'Problème des sources du droit international dans l'arrêt sur le plateau continental de la Mer du Nord' (1970) 6 *RBDI* 44, 45.

[76] M Wood, 'First Report on formation and evidence of customary international law' (2013) UN Doc A/CN.4/663, [57]; similarly, it has been characterised 'unquestionably the leading case relating to proof of the existence of a customary rule' (A Pellet, 'Article 38' in A Zimmerman, C Tomuschat, K Oellers-Farm and C Tams (eds), *The Statute of the International Court of Justice: A Commentary*, 2nd edn (Oxford, OUP, 2012) [229]).

[77] *Flores and ors v Southern Peru Copper Corporation* (29 August 2003) ILDC 303 (US 2003) (Court of Appeals) [39]; *Bayan v Romulo, Muna v Romulo and Ople* (1 February 2011) ILDC 2059 (PH 2011) (Supreme Court) [90]–[91]; *War Crimes Act case, Polyukhovich v Australia and Commonwealth Director of Public Prosecutions* (14 August 1991) ILDC 2726 (AU 1991) (High Court) (Judge Brennan) [28].

[78] *Baena Ricardo and ors v Panama*, Competence (28 November 2003), IACHR Series C no 104, IHRL 1487 (IACHR 2003) (Inter-American Court of Human Rights), [102]–[104]; *Article 55 of the American Convention on Human Rights* (29 September 2009), IACHR Series A no 20, OC–20/09, [48];

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and tribunals alike—not least so by the ICJ itself[79]—when they seek to ascertain the establishment of a rule of customary international law. This is because, besides reaffirming the two constituent elements of custom (general practice and *opinio juris*), the judgment articulates specific criteria for the assessment of evidence regarding the existence of each of the two elements.

### a. General Practice

With respect to the element of practice, the Court affirmed the principle already alluded to by its predecessor[80] that a short time span of practice could suffice for the formation of custom. Very few years had elapsed since the first references to the concept of the continental shelf under international law, still fewer since the adoption of the 1958 Convention; but this would not preclude the creation of customary rules on the continental shelf.[81] Several judges writing individually also insisted that the formation of customary law should not be impeded by time requirements, especially in the light of the exigencies of contemporary reality.[82] If circumstances called for speedy legal regulation and states engaged in the relevant practice, the short duration of that practice should not bar the formulation of a legal rule.[83] This is eminently sensible; as is to consider that no *longa usus* is required when states have expressed clear *opinio juris* with respect to a particular rule.[84]

What is crucial according to the Court is not the passage of considerable time, but rather that the practice be 'extensive and virtually uniform'.[85] This standard has

*Prosecutor v Rwamakuba (André)*, Decision on appropriate remedy (31 January 2007) Case no ICTR–98–44C–T, ICL 81 (ICTR 2007) (International Criminal Tribunal for Rwanda), [22]; *Erdemović,* Judgment (7 October 1997) Case no IT–96–22–Tbis, ICL 47 (ICTY 1997) (International Criminal Tribunal for the former Yugoslavia), Separate Opinion McDonald and Vohrah, [49]; *Galić,* Judgment (30 November 2006) Case no IT–98–29–A, ICL 510 (ICTY 2006) (International Criminal Tribunal for the former Yugoslavia), Separate and Partially Dissenting Opinion of Judge Schomburg, [10n24]; *Prosecutor v. Fofana and Kondewa*, Judgment (28 May 2008) Case no SCSL–04–14–A–829 (Special Court for Sierra Leone), [405]; *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (16 February 2011) STL–11–01/I (Special Tribunal for Lebanon), [102].

[79] See, most recently, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99, [55]. On this case, see further this volume, ch 23.

[80] *Free City of Danzig and International Labour Organization* (Advisory Opinion) (1930) PCIJ Ser B No 18, at 12–13, on practice of less than 10 years.

[81] *NSCS* (n 2) [73]. The fact that the element of time is not necessary does not mean that it is completely irrelevant as a factor evidencing the generality of practice; thus, the ICJ has occasionally relied on the element of time to establish rules of customary law: *Right of Passage* [1960] ICJ Rep 6, 40, on practice 'having continued over a period extending beyond a century and a quarter unaffected' by other factors; *cf Anglo–Norwegian Fisheries* [1951] ICJ Rep 116, 138, where a practice was followed 'consistently and uninterruptedly' for roughly eighty years, although what was sought there was the objection of a state to the formation of a customary rule.

[82] *NSCS* (n 2) 177 (dissenting opinion Tanaka); 230 (dissenting opinion Lachs).

[83] G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law' (1953) 30 *BYIL* 1, 31; JL Brierly, *The Law of Nations*, 4th edn (Oxford, Clarendon, 1949) 63; see also H Lauterpacht, 'Sovereignty over Submarine Areas' (1950) 27 *BYIL* 376, 393.

[84] See V Lowe, *International Law* (Oxford, OUP, 2007) 42.

[85] *NSCS* (n 2) [74].

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been characterised as very demanding,[86] even though the Court had already stressed in the past that practice must be 'constant and uniform' for customary rules to be formed.[87] Nonetheless, the demand appears less stringent when interpreted against the background of the case. In particular, it would make sense for more extensive and uniform practice to be required in circumstances where the length of time is shorter (except in cases where there is clearly expressed *opinio juris*). By contrast, the Court has found in other cases that absolute consistency in the practice of states is not required, as long as contrary practice can be explained away or has been treated as being in breach of the customary rule.[88]

The Court insisted that practice leading to the emergence of a customary rule must include that of states 'whose interests are specially affected'.[89] It has thus been asserted that, for the purposes of customary law formation, some states are 'more equal' than others by virtue of their size, volume of international relations and—by way of rather circular reasoning—the 'contribution that [they make] to the development of international law'.[90] The Court's finding, however, can be seen as merely restating the obvious point that, although not all states need to uphold the rule in their practice,[91] certain states are in a position concretely to contribute to the creation of different customary rules,[92] depending on their content. The practice of states which engage intensively with the subject matter of the putative rule will thus be important.[93] Other tribunals[94] and the ICJ itself[95] in later practice dropped the reference to 'specially affected states', seeking instead to establish a consensus among states with varying or conflicting interests as to the existence of a putative rule of customary law. The ILC Special Rapporteur on the matter also noted that the identification of states specially affected with respect to each putative rule might be difficult, or even irrelevant,[96] but has maintained the importance of the practice to be reflective of a wide and representative group of states.[97] Put differently, although

[86] J Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford, OUP, 2012) 25; *cf* LDM Nelson, 'The North Sea Continental Shelf cases and Law-Making Conventions' (1972) 35 *MLR* 52, 54.

[87] *Asylum case (Colombia/Peru)* [1950] ICJ Rep 266, 276.

[88] See *Anglo–Norwegian Fisheries* (n 81) 138; more clearly in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, [186].

[89] *NSCS* (n 2) [74]; also [73].

[90] RR Baxter, 'Treaties and custom' (1970) 129 *RdC* 27, 66.

[91] *NSCS* (n 2) 104 (separate opinion Ammoun); 229 (dissenting opinion Lachs); J Kunz, 'The Nature of Customary International Law' (1953) 47 *AJIL* 662, 666; *South West Africa (2nd phase)* [1966] ICJ Rep 6, 291 (dissenting opinion Tanaka).

[92] M Sørensen, 'Principes de droit international public: cours général' (1960) 101 *RdC* 1, 40; A Verdross, 'Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts' (1969) 29 *ZaöRV* 635, 650; P Daillier, M Forteau and A Pellet, *Droit international public*, 8th edn (Paris, LGDJ, 2009) 360, [211].

[93] P de Visscher, 'Cours général de droit international public' (1972) 136 *RdC* 1, 67; J-P Quéneudec, 'La notion d'État intéressé en droit international' (1995) 255 *RdC* 339, 408.

[94] *Texaco v Libya* (1978) 53 ILR 389, [84] and [86]–[87].

[95] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [67]–[71]; see P Tomka, 'Custom and the International Court of Justice' (2013) 12 *LPICT* 195, 211–12.

[96] M Wood, 'Second Report on identification of customary international law' (2014) UN Doc A/CN.4/672, [54].

[97] ibid, [52]–[53].

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no customary rule may be formed without general practice, no customary law may be 'vetoed' by a particular state, even if its interests are 'specially affected' by the putative rule.[98]

### b. Accepted as Law

The Court also discussed the 'subjective element' of customary rules, ie what it called state 'belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[99] In insisting that the conduct of states must be of such quality as to manifest a particular legal view of these states, the Court stressed the distinction between legal rules and other rules of habitual conduct.[100] At the same time, it set a particularly rigorous test for the creation of custom.[101] Aside from the fact that states as fictional (legal) entities should not be anthropomorphised so as to be said to harbour 'beliefs' or 'opinions',[102] they rarely express the motivations or intentions behind their conduct.[103] The creation of custom really rests on a rebuttable presumption whereby practice is to be regarded as evidencing *opinio juris*, at least with respect to permissive (and, less so, prescriptive) rules.[104] It is impracticable to demand positive proof of legal conviction in such cases, while it is feasible and desirable to demand proof for the lack of a legal conviction enveloping the practice.[105] The practice is presumed to go hand in hand with a legal claim that what is being done is at least allowed (permissive rules) or may even be required, as indicated by context (prescriptive rules). On the other hand, proscriptive rules would require practice to reflect the 'not doing of something', ie doing nothing, and as has been rightly noted, 'states often do nothing, and for a wide variety of reasons'.[106] In those cases it is the existence of *opinio juris* that will highlight the importance of the not doing of something, that will in other words shed light on the relevant practice of omitting that which is seen as prohibited by international law.[107]

The Court itself has rarely followed such a rigorous approach as indicated in *NSCS* regarding proof of *opinio juris* for permissive or prescriptive rules in its own practice. Often the Court infers the requisite *opinio juris* from other material (such as general practice itself,[108] or from scholarly opinion, most notably that

[98] Y Dinstein, 'The interaction between customary international law and treaties' (2007) 322 *RdC* 243, 289.

[99] *NSCS* (n 2) [77].

[100] J Verhoeven, *Droit international public* (Bruxelles, Larcier, 2000) 330–31.

[101] Nelson, 'North Sea Continental Shelf' (n 86) 56; Crawford, *Brownlie's Principles* (n 86) 26.

[102] See Lowe, *International Law* (n 84) 51.

[103] Baxter, 'Treaties and custom' (n 90) 68.

[104] See Lowe (n 84) 51–53. *cf* S Séfériades, 'Aperçus sur la coutume juridique internationale notamment sur son fondement' (1936) 43 *RGDIP* 129, 144.

[105] H Lauterpacht, *The Development of International Law by the International Court* (London, Stevens and Sons, 1958) 380; similarly Crawford (n 86) 27.

[106] Lowe (n 84) 41.

[107] See also ch 15 in this volume, fn 71, which refers to J Verhoeven, 'Le droit, le juge et la violence: les arrêts Nicaragua c Etats-Unis' (1987) 91 *RGDIP* 1159, 1205.

[108] FL Kirgis, 'Custom on a Sliding Scale' (1987) 81 *AJIL* 146, 149.

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of the ILC),[109] or—according to more sceptical views—simply asserts its existence.[110] What was important in this case was not so much the reaffirmation, in the abstract, that a sense of legal conviction is in principle necessary for the establishment of custom. Rather, the matter was here one of evidence, namely what evidentiary weight ought to be attached to treaty rules and to the practice of states bound by those rules in the process of ascertaining whether equivalent rules exist under customary international law.[111] It is to this matter that we now turn.

### *ii. The Interplay Between Custom and Treaty: A Matter of Evidence*

Before *NSCS* it was not disputed in principle that a treaty may embody existing rules of customary law,[112] and it was also widely assumed that a treaty rule may contribute to the subsequent formation of a customary rule in its image.[113] As the ILC had noted a few years before the judgment, 'the role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States [was] well recognised'.[114] The ICJ itself, as well as its predecessor, had in several cases examined treaties that were not binding on (at least one of) the parties before it, with a view to inferring the existence of general rules of international law binding on those parties.[115] What was novel about *NSCS* was the elaborate articulation by the Court of factors that would determine the evidentiary value of treaties for the identification of rules of customary international law.[116] Some of the factors put forward by the Court were not wholly uncontroversial. Still they have been highly influential in subsequent international legal practice.

[109] An emerging trend was already noticed in S Schwebel, 'The Inter-active Influence of the International Court of Justice and the International Law Commission' in CA Armas Barea, JA Barberis, J Barboza, H Caminos, E Candioti, E de La Guardia, HDT Gutiérez Posse, G Moncayo, EJ Rey Caro, RE Vinuesa (eds), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (London, Kluwer, 2000) 485–86; see also Pellet, 'Article 38' (n 76) [230].

[110] S Talmon, 'Determining Customary International Law: the ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *EJIL* 417, 434–40.

[111] Similarly, T Meron, 'The Geneva Conventions as Customary Law' (1987) 88 *AJIL* 348, 367.

[112] International Military Tribunal Judgment and Sentences (*France and ors v Göring and ors)* (1946) 41 *AJIL* 172, 219 and 248–49; H Lauterpacht, 'Règles générales du droit de la paix' (1937) 62 *RdC* 100, 156; RY Jennings, 'The Progressive Development of International Law and Its Codification' (1947) 24 *BYIL* 301, 304; GG Fitzmaurice, 'Some Problems regarding the Formal Sources of International Law' in *Symbolae Verzijl* (La Haye, Martinus Nijhoff, 1958) 159.

[113] See already J Kosters, 'Les fondements du droit des gens: contribution à la théorie générale du droit des gens' (1925) 4 *Bibliotheca Visseriana* (Lugduni Batavorum, Brill) 221; Lauterpacht, 'Règles générales du droit de la paix' (n 112) 156–57; A Ulloa, *Derecho Internacional Publico*, vol I, 4th edn (Madrid, Ediciones Iberoamericanas, 1957) 52 [49c]; *cf NSCS* (n 2) 225 (dissenting opinion Lachs).

[114] ILC, 'Draft Articles on the Law of Treaties with commentaries' in ILC 'Report of the International Law Commission on the work of its eighteenth session' [1966]-II ILC Ybk 187, commentary to draft Art 34 (230), [1].

[115] See already *SS Wimbledon* (1923) PCIJ Rep Series A No 1, 25; *Factory at Chorzow (Claim for Indemnity) (Jurisdiction)* (1927) PCIJ Rep Series A No 9, 22; *Territorial Jurisdiction of the International Commission of the River Oder* (1929) PCIJ Rep Series A No 23, 27; *Asylum case* (n 87) 277; *Nottebohm* [1955] ICJ Rep 4, 22–23.

[116] See to that effect *Perinçek v Switzerland* (2016) 63 EHRR 6, [266]; *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport and Another (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [23] (Lord Bingham).

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For example, the fact that the treaty provision in question was open to reservations by parties to the 1958 Convention was heavily relied on by the Court as strong evidence against the conclusion that this provision codified or crystallised or was 'potentially possible' (sic) to develop identical rules of customary rules.[117] This reasoning, however, is problematic, at least to the extent that it refers to codification of existing or crystallisation of emerging customary rules. As was pointed out both by dissenting judges and by scholarly opinion, the faculty of reservations (and even the submission of reservations, as long as they are not so numerous as to negate the customary character of the rule) by states on the contractual plane has no effect on the plane of customary law.[118] While states may exempt themselves from the application of a particular rule in their relations with other parties to a treaty, they may not exempt themselves from the application of an identical rule under customary law in situations where that treaty is not applicable (ie essentially in their relations with states not parties to that treaty). In fact, the Court itself accepted this proposition in *NSCS*, when it held that any reservations in the 1958 Convention would not release states from obligations existing 'outside and independently of the Convention'.[119]

Consequently, the fact that states are permitted to exempt themselves from the treaty provision cannot in itself serve as proof that there does (not) exist an identical rule under customary law.[120] Or conversely, in the words of the ILC, 'The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision'.[121] This after all makes sense, since treaties also constitute the instrument *par excellence* for contracting out of customary international law.[122] In this latter context, the *Diallo* case is instructive: even if states have contracted out of the general rules of diplomatic protection by way of many treaties, this has not necessarily affected the status of the relevant customary rules.[123]

The Court also noted that a treaty provision should possess a 'fundamentally norm-creating character' in order to develop a customary counterpart.[124] Taken at face value, the Court's remark alludes to the old distinction between 'law-making' and 'purely contractual' treaties (and accordingly provisions), a distinction which

[117] See above, text to nn 51–53.

[118] *NSCS* (n 2) 198 (dissenting opinion Morelli); 224 (dissenting opinion Lachs); 248 (dissenting opinion Sørensen); K Skubiszewski, 'Elements of Custom and The Hague Court' (1971) 31 *ZaöRV* 810, 848.

[119] ibid, [65]; as it has been noted, the Court might thus be considered as contradicting itself: K Zemanek, 'Bedeutung der Kodifizierung des Völkerrechts' in R Marcic, H Mosler, E Suy, and K Zemanek (eds), *Internationale Festschrift für Alfred Verdross zum 80. Geburtstag* (München, Wilhelm Fink, 1971) 584.

[120] GM Danilenko, *Law-Making in the International Community* (Dordrecht, Martinus Nijhoff, 1993) 154; M Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, 2nd edn (The Hague, Kluwer, 1997) 258, [406].

[121] ILC, 'Guide to Practice on Reservations to Treaties' (2011) UN Doc A/66/10/Add.1, guideline 3.1.5.3; see also commentary thereto, esp [3]–[7].

[122] Dinstein, 'Interaction' (n 98) 406.

[123] *Ahmadou Sadio Diallo (Guinea v DR Congo)* (Preliminary Objections) [2007] ICJ Rep 582, [90].

[124] See above, text to n 53.

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had long been dismissed as legally irrelevant.[125] Indeed, whether a rule enshrined in a treaty subsequently passes into customary law is a question of fact, namely a question of the attitude of states vis-à-vis the legal status of that rule,[126] and there is no reason of principle why a very specific, technical, or sophisticated provision should not be able to attain the status of customary law.[127] That said, such a provision may be more unlikely to pass into customary international law.[128] Therefore, the 'norm-creating' character of certain treaty provisions might be useful from a methodological perspective,[129] as a further piece of evidence regarding the likelihood of customary status. Indeed, the Special Rapporteur on identification of customary international law has also noted that some treaty provisions are 'unlikely', rather than unable, to form the basis of customary rules.[130]

The Court further indicated that the evidence potentially relevant to confirming the putative rule as one of customary law lies outside the treaty. With respect to pre-existing rules, the declaration in the treaty itself that it codifies pre-existing custom is relevant only to the extent that it expresses the *opinio juris* of the ratifying states,[131] and ought to be assessed together with evidence preceding the entry into force of the treaty—most importantly, the (lack of) practice and *opinio juris* of other states.

When it comes to treaty rules purportedly forming the basis for subsequent customary law, on the other hand, the conduct of states parties to the treaty between themselves constitutes conduct in compliance to the treaty rule, therefore evidence must be sought in the practice of parties with third states, or of third states between themselves.[132] In what appears as somewhat of a paradox, then, lack of participation of states in a multilateral treaty might indicate that states do not consider the rules enshrined therein as part of customary law,[133] whereas wide participation of states in a treaty diminishes the instances of practice and *opinio juris* where the

[125] H Lauterpacht, 'Report on the Law of Treaties' UN Doc A/CN.4/63 [1953]-II ILC Ybk 90, 99; GG Fitzmaurice, 'Report on the Law of Treaties' UN Doc A/CN.4/101 [1956]-II ILC Ybk 104, 108 (draft Art 8).

[126] M Akehurst, 'Custom as a Source of International Law' (1975) 47 *BYIL* 1, 50; MH Mendelson, 'The Formation of Customary International Law' (1998) 272 *RdC* 155, 320–21.

[127] See H Waldock, 'Third Report on the Law of Treaties' UN Doc A/CN.4/167 and Add.1–3 [1964]-II ILC Ybk 5, 34 (commentary to draft Art 64); similarly R Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 *NILR* 119, 148; J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *RdC* 9, 97.

[128] Kolb, 'Selected Problems' (n 127) 148.

[129] For the descriptive or methodological, as opposed to the legal, value of the distinction between 'law-making' and 'purely contractual' treaties and provisions see C Rousseau, *Principes généraux du droit international public*, vol I (Paris, Pedone, 1944) 136 [66].

[130] M Wood, 'Third Report on identification of customary international law' (2015) UN Doc A/CN.4/682, [39].

[131] I Shihata, 'The Treaty as a Law-Declaring and Custom-Making Instrument' (1966) 22 *Revue égyptienne de droit international* 51, 65.

[132] Dinstein (n 98) 376–77; C Rozakis, 'Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law' (1975) 35 *ZaöRV* 1, 33.

[133] See to that effect *NSCS* (n 2) [73]; Baxter (n 90) 95–96.

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application of rules of custom (rather than the treaty) might be affirmed.[134] This has also been called the 'Baxter Paradox'.[135]

These questions of evidence raised by *NSCS* have generated more trouble in theory than they have in practice. At the same time, the judgment illustrated a relationship 'replete with paradoxes' between treaties and custom.[136] The Court subsequently held that non-binding instruments, such as Resolutions by the General Assembly of the United Nations, might be relevant evidence for the identification of customary law.[137] Perhaps more importantly, the earlier trend of the ILC encouraging the adoption of treaties on the basis of its completed projects has been reduced. Instead, the ILC (and the UN General Assembly as its supervisory body) has opted for more flexible avenues, that would avoid the 'decodifying effect' to which unsuccessful (or even very successful) treaties are susceptible.[138] The example of the Articles on the Responsibility of States for Internationally Wrongful Acts[139] showcases how *the lack* of binding force of written rules may be catalytic for the formation of identical rules under customary international law[140]—another aspect of the paradoxical relationship between treaty and custom.

## B. The Regime of the Continental Shelf

### *i. The Continental Shelf Defined*

By emphasising that the continental shelf delimitation was a process of drawing boundaries between areas already appertaining to the states involved, the Court primarily addressed the German contention that the North Sea continental shelf should be shared equitably among the disputing parties. The Court's proposition, however, had several wider implications. To begin with, the Court held that the rights of coastal states over the continental shelf existed 'quite independent[ly]' of the 1958 Convention', ie under customary international law. This finding was arguably not controversial in the context of that particular case, because all three states accepted the binding nature of the provisions of the 1958 Convention relating to the content of the rights over the continental shelf. Denmark and the Netherlands were parties to the Convention, and Germany had essentially reproduced its Article 2 in a 1964

[134] See to that effect *NSCS* (n 2) [76]; A D'Amato, 'Treaties as a Source of General Rules of International Law' (1962) 3 *Harvard International Law Club Bulletin* 1, 8; Baxter (n 90) 64.

[135] See Crawford, 'Chance, Order, Change' (n 127) 90ff, and his proposed solution at 109ff.

[136] Kolb (n 127) 145.

[137] *Military and Paramilitary Activities* (n 88) [188]; *Nuclear Weapons* (n 95) [70].

[138] See most notably J Crawford, 'Fourth Report on State Responsibility' (2001) UN Doc A/CN.4/517 and Add.1, [23], with respect to the (Draft) Articles on the Responsibility of States for Internationally Wrongful Acts.

[139] UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83.

[140] The resulting rules have been considered 'customary international law by stealth': Crawford (n 127) 108. See also D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 *AJIL* 857, 867–68.

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governmental proclamation.[141] This, however, does not seem to justify the absence of scrutiny, on the part of the Court, regarding the existence of such rights under customary international law.[142] As the Court observed several years later, 'the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice'.[143]

When placed in a broader context, this statement proves to be even bolder than it first appears. The existence of continental shelf rights under customary international law had been affirmed in academic literature before the adoption of the 1958 Convention,[144] but they had been equally (if not more strongly) denied.[145] Further, the umpire of the *Abu Dhabi* arbitration in the early 1950s opined that the purported 'doctrine' (ie the claim) regarding the continental shelf had not yet solidified into an established rule of international law,[146] while the ILC in its 1956 Report to the UN General Assembly had been rather equivocal as to the legal basis of the sovereign rights that were later enshrined in the 1958 Convention,[147] reflecting, as it were, the 'immaturity of the legal regime'.[148] The relatively scarce academic literature since the adoption of the Convention had been rather sceptical (or at least inconclusive) about the existence of such a rule under customary international law.[149] Seen in this light, the pronouncement of the Court might not have intended to rewrite legal history,[150] but it appears less elementary than it is sometimes presented.[151]

What was arguably more innovative in the Court's approach was the conceptualisation of the continental shelf as the 'natural prolongation' of the coastal state's land territory. This proposition was central both to the finding that the rights of

[141] Monconduit, 'Affaire du plateau continental' (n 21) 222.

[142] In a subsequent part of the judgment, the ICJ noted that 'it [was] clear' that the first three Articles of the 1958 Convention (stipulating the nature of the rights exercisable, the limits of the continental shelf etc) were 'regarded [at the 1958 Geneva Conference] as reflecting, or as crystallizing, received or at least emergent rules of customary international law', but it did not elaborate this assertion further: *NSCS* (n 2) [63].

[143] *Military and Paramilitary Activities* (n 88) [184].

[144] Lauterpacht, 'Sovereignty' (n 83) 393–98.

[145] MW Mouton, 'The Continental Shelf' (1954) 85 *RdC* 343, 430–32; H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Part Five' (1993) 64 *BYIL* 1, 8 fn 23; *cf* J Symonides, 'Geographically disadvantaged states under the 1982 Convention on the Law of the Sea' (1988) 208 *RdC* 283, 340.

[146] *Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (1951) 18 ILR 144, 155.

[147] Articles concerning the Law of the Sea with commentaries (n 10) 298 (commentary to Art 68, para 8).

[148] I Brownlie, *Principles of Public International Law*, 7th edn (Oxford, OUP, 2008) 207.

[149] BBL Auguste, *The Continental Shelf: The Practice and Policy of the Latin American States with Special Reference to Chile, Ecuador and Peru* (Genève, Droz, 1960) 101–03; ZJ Slouka, *International Custom and the Continental Shelf: A Study in the Dynamics of Customary Rules of International Law* (The Hague, Martinus Nijhoff, 1968) 165; *cf* UNGA Res 2574 A (XXIV) (15 December 1969); see however W Burke, 'Law and the New Technologies' in L Alexander (ed), *The Law of the Sea: Offshore Boundaries and Zones* (Columbus, Ohio State University Press, 1967) 209.

[150] Churchill and Lowe, *The Law of the Sea* (n 5) 144–45.

[151] RY Jennings, 'The Limits of the Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment' (1969) 18 *ICLQ* 819, 819.

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the continental shelf existed 'inherently' under customary international law, and to the treatment of continental shelf delimitation. The basis of the coastal state's entitlement over the continental shelf, according to the Court, is its entitlement—its title of sovereignty—over the territory lying above the sea. To the extent that the state enjoys sovereignty over land territory, it enjoys title over the areas which, although covered by seawater, 'may be deemed to be actually part of [that] territory', in the sense that they are an extension—a prolongation—of that territory under the sea.[152] The rights to the continental shelf are a mere application of the principle that the land dominates the sea.[153] This in turn suggests that the rights are not contingent on the establishment of a particular legal framework. The sole determinant factors for their establishment are the sovereignty over land territory and the geomorphological continuity between that territory and the submarine area in question, irrespective of the fact that the nature and extent of such rights had been perceived in the light of then recent technological developments.[154]

Such a clear emphasis by the Court on geomorphology for the definition—and, consequently, for the delimitation—of the continental shelf was not unheard of. It echoed the Truman Proclamation, whose preamble characterised the continental shelf as 'an extension of the land-mass of the coastal nation and thus naturally appurtenant to it'.[155] At the same time, it stood in stark contrast with the definition of the continental shelf provided for in Article 1 of the 1958 Convention. There it was preferred to uncouple the legal definition of the continental shelf from geological criteria in order to avoid discrimination among coastal states.[156] The Court can thus be seen as accepting the general concept of the continental shelf reflected in the 1958 Convention,[157] but at the same time reintroducing geological factors.[158]

The judgment has greatly influenced our thinking about the nature and definition of the continental shelf.[159] It still serves as a point of reference for the conceptualisation of the source and nature of the rights enjoyed by the coastal state over its continental shelf.[160] A Chamber of the ICJ did not hesitate to comment later that the

[152] *NSCS* (n 2) [43].

[153] ibid, [96]; see also subsequent references in the case law (n 160). This is one of the most ancient principles of the law of the sea; see H Grotius, *De jure belli et pacis libri tres*, vol I (originally published 1625, W Whewell tr) (Cambridge, John Parker, 1853) ch III, para VIII.

[154] DP O'Connell, *The International Law of the Sea*, vol I (Oxford, Clarendon, 1982) 483–84.

[155] Truman Proclamation (n 8).

[156] R-J Dupuy and D Vignes, *A Handbook on the Law of the Sea*, vol I (Leiden, Brill, 1991) 336.

[157] It is worth noting that the Court's language does not unequivocally support that Arts 1–3 of the 1958 Convention reflect customary international law: see O'Connell, *International Law* (n 154) 475; Dupuy and Vignes, *Handbook* (n 156) 338–39.

[158] See generally Jennings, 'The Limits of the Continental Shelf Jurisdiction' (n 151) 828–29; Dupuy and Vignes, *Handbook* (n 156) 130. For a different explanation see *Continental shelf (Tunisia/Libya)* (n 59) [46] (separate opinion Jiménez de Aréchaga). See further SC Chaturvedi, 'The North Sea Continental Shelf cases analysed' (1973) 13 *IndianJIL* 481, 492.

[159] RY Jennings and Arthur Watts, *Oppenheim's International Law*, vol I, 9th edn (Oxford, OUP, 1996) 771.

[160] See, among others, *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3, [86]; *Maritime Delimitation and Territorial Questions (Qatar v Bahrain) (Merits)* [2001] ICJ Rep 40, [185]; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659, [113]; *Maritime Delimitation in the Black Sea (Romania v Ukraine)*

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*NSCS* judgment 'has made the greatest contribution to the formation of customary law' in the field of the continental shelf.[161] While this statement might have been true at the time when it was made, it probably does not hold water nowadays.

The propositions of the Court with respect to the nature of the continental shelf did lend support to the process of revision of the continental shelf definition during the Third UN Conference on the Law of the Sea.[162] And yet, the definition in the 1958 Convention was in many respects problematic anyway.[163] The *NSCS* judgment merely catalysed a process which was already underway. According to the new definition, the continental shelf extends throughout the natural prolongation of the coastal state's land territory to the outer edge of the continental margin, or to a distance of 200nm from the baselines.[164] In other words, while the concept of 'natural prolongation' was eventually inserted in the new definition of the continental shelf, it was coupled with a distance criterion, which provided a new legal basis for the entitlement to continental shelf rights.[165] Soon after the adoption of UNCLOS in 1982 (and before its entry into force) the ICJ acknowledged that title over areas of the continental shelf situated at a distance of under 200nm from the coast depend solely on distance. The geomorphological characteristics of such areas are completely immaterial. The geophysical factors on which the *NSCS* judgment relied 'now [belong] to the past, in so far as sea-bed areas less than 200 miles from the coast are concerned'.[166] Natural prolongation, at least for narrow-margined states or states whose coasts are fewer than 400nm apart, was dead.[167]

It has been suggested that the geological criteria stemming from the concept of natural prolongation as propounded by the ICJ in *NSCS* might still be relevant for the determination of the so-called 'outer continental shelf',[168] ie the area of the continental shelf extending beyond 200nm.[169] Ironically, while the concept of 'natural prolongation' was initially employed to extend the coastal state's jurisdiction over areas beyond its territorial waters, it could thus be relied on to deny claims over

[2009] ICJ Rep 61, [77] and [99]; *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2012] ICJ Rep 624, [140]; C–37/00 *Weber v Universal Ogden Services Ltd* ECLI:EU:C:2002:122, 27 February 2002, [34]; C–347/10 *Salemink v Raad* ECLI:EU:C:2012:17, 17 January 2012, [32].

[161] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Rep 246, [91].

[162] For the invocation of the judgment by several states (starting with China) see MH Nordquist, SN Nandan and S Rosenne (eds), *United Nations Convention on the Law of the Sea 1982—A Commentary*, vol II (The Hague, Martinus Nijhoff, 1993) [76.4]–[76.5].

[163] For the general problems of the 1958 Convention definition see O'Connell, *International Law* (n 154) 492–96.

[164] Article 76 UNCLOS (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

[165] *Continental Shelf (Tunisia/Libya)* (n 59) [48].

[166] *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, [39]–[40].

[167] I Brownlie, *The Rule of Law in International Affairs* (The Hague, Martinus Nijhoff, 1998) 169–70; DA Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (2003) 97 *AJIL* 91, 101.

[168] This term is nowhere to be found in UNCLOS, but it is often used for reasons of simplification; see B Már Magnússon, 'Outer Continental Shelf Boundary Agreements' (2013) 62 *ICLQ* 345, 345 fn 2.

[169] D Anderson, 'Some Recent Developments in the Law Relating to the Continental Shelf' (1988) 6 *Journal of Energy and Natural Resources Law* 95, 96–97; Brownlie, *The Rule of Law* (n 167) 170; Colson, 'Delimitation' (n 167) 107.

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the seabed beyond 200nm from the coast, if these are not justified by geological criteria.[170] However, this does not seem to have been the case. The International Tribunal for the Law of the Sea has rejected that natural prolongation constitutes a separate and independent criterion that a coastal state must satisfy in order to be entitled to a continental shelf beyond 200nm.[171] After noting that the concept of natural prolongation has not been defined since *NSCS*,[172] the Tribunal opined that it ought to be read in the light of the other provisions of the (quite complex) definition in Article 76 of UNCLOS.[173] These provisions essentially flesh out a legal, rather than a geological, concept of the continental shelf, providing artificial formulae for its demarcation.[174] In short, despite having been heralded by the ICJ in the *NSCS* case, the concept of 'natural prolongation' is, for all practical purposes, irrelevant.[175]

### *ii. The Continental Shelf Delimited*

The definition of the continental shelf provided by the Court in *NSCS* had an impact on the method of its delimitation when neighbouring states made claims over the same submarine area. The delimitation line was conceptualised as a physical line separating the overlapping natural prolongations into the sea, a line somehow already 'engraved' in the seabed[176] to be discovered not through the application of equidistance but by the operation of 'equitable principles'. The judgment's proposition as to continental shelf delimitation exerted significant influence in the drafting process of UNCLOS. Unlike its 1958 predecessor, the 1982 Convention is silent as to the use of particular delimitation methods, emphasising instead the obligation of neighbouring states to reach an 'equitable solution' when delimiting their continental shelves.[177] As such, UNCLOS comes close to requiring delimitation based on 'equitable principles'.[178] The difficult question, of course, is the identification of such 'equitable principles', a matter on which the Court gave little guidance in *NSCS*. The classification of equitable principles as part of general international law was an important finding on principle—and it has repeatedly been recognised as such.[179]

[170] Dupuy and Vignes, *Handbook* (n 156) 339–40; Y Huang and X Liao, 'Natural Prolongation and Delimitation of the Continental Shelf Beyond 200 nm: Implications of the Bangladesh/Myanmar Case' (2014) 4 *Asian JIL* 281, 305.

[171] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* [2012] ITLOS Rep 4, [435].

[172] ibid, [432].

[173] ibid, [437].

[174] S Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Berlin, Springer, 2008) 241.

[175] H Jung Kim, 'Natural Prolongation: A Living Myth in the Regime of the Continental Shelf?' (2012) 45 *ODIL* 374, 381; *cf* Colson, 'Delimitation' (n 167) 101 (with reference to the 'inner' continental shelf).

[176] J Lilje-Jensen and M Thamsborg, 'The Role of Natural Prolongation in Relation to Shelf Delimitation beyond 200 Nautical Miles' (1995) 64 *Nordic JIL* 619, 621.

[177] Article 83 UNCLOS; see also Art 76 on the exclusive economic zone.

[178] Nordquist, Nandan and Rosenne, *United Nations Convention* (n 162) [83.3]; DP O'Connell, *The International Law of the Sea*, vol II (Oxford, OUP, 1988) 689.

[179] Jennings and Watts, *Oppenheim* (n 159) 44; Daillier, Forteau and Pellet, *Droit international public* (n 92) 389–90, [232]–[233]; A Verdross and B Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd

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However, it is not clear how the application of such principles would lead to delimitation which is not *ex aequo et bono*.[180] Further, the identification of principles by reference to the result they yield[181] is a truism,[182] or simply suggests that the process of delimitation involves a direct balancing act on a case-by-case basis, either by the states themselves or by the court seised.[183] The risks of this approach were pointed out by several dissenting judges in *NSCS*. These stressed that such an approach was at once susceptible to arbitrariness[184] and unhelpful for the resolution of disputes between neighbouring states who disagreed precisely on what an equitable delimitation would or should look like.[185]

Several members of the bench also criticised the Court for limiting its analysis on the customary status of the rule of equidistance. Instead, the appropriate rule whose customary status ought to be ascertained (and affirmed, according to these judges) was the rule combining the elements of equidistance and special circumstances, precisely as provided for in Article 6 of the 1958 Convention. That rule, according to dissenting judges, lived up to the standards of equity and reflected customary law.[186]

The latter approach was apparently adopted by the arbitral tribunal in the *Anglo–French Continental Shelf* case. While endorsing the finding in *NSCS* that equidistance was not obligatory under customary international law, it observed that the combined operation of the principle of equidistance and the provision for special circumstances (as enshrined in Article 6 of the 1958 Convention) amounted to a delimitation of the continental shelf on the basis of equitable principles: in other words, the rule 'equidistance–special circumstances' had the same effect as the rule on 'equitable principles'.[187] This ruling was, in turn, endorsed by the ICJ itself, which applied the rule of Article 6 as a matter of customary international law first in relation to states with opposite[188] and then with adjacent[189] coasts. It is now settled practice of the Court to adopt the equidistance–special circumstances method as the presumptive method of delimitation, then refining corrective principles in order

edn (Berlin, Duncker & Humbolt, 1984) 422–23, [658]; P-M Dupuy and Y Kerbrat, *Droit international public*, 10th edn (Paris, Dalloz, 2010) 394, [362].

[180] See to that effect *Continental Shelf (Tunisia/Libya)* (n 59) [1] (dissenting opinion Oda); JI Charney, 'Is International Law Threatened by Multiple Tribunals?' (1998) 271 *RdC* 101, 321–22.

[181] *Continental Shelf (Tunisia/Libya)* (n 59) [70].

[182] ibid, [155] (dissenting opinion Oda).

[183] *Continental Shelf (Libya/Malta)* (n 166) [28]; see also Y Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Oxford, Hart, 2006) 123–25.

[184] *NSCS* (n 2) 166 (dissenting opinion Koretsky); *cf* 257 (dissenting opinion Sørensen).

[185] ibid, 195–96 (dissenting opinion Tanaka).

[186] See ibid, 186 (dissenting opinion Tanaka); 162–63 (dissenting opinion Koretsky); *cf* 151 [56] (separate opinion Ammoun).

[187] *Anglo–French Continental Shelf* (n 15) [70]; *cf* [75].

[188] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38, [46].

[189] *Maritime Delimitation and Territorial Questions (Qatar/Bahrain)* (n 160) [230].

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to achieve an equitable result,[190] including the lack of disproportionality between the ratio of the coastal lengths and that of the maritime areas divided.[191] This is the so-called 'three-stage approach' or 'test'.

While it has been noted that recent delimitation cases before international courts and tribunals seem to signal a return to 'equitable principles' by wavering on the so-called 'three-stage test' that has been dominating delimitation decisions for the last decades,[192] this may be a bit overstated. There is nothing binding about the practice of the ICJ and other tribunals in the aftermath of *NSCS* in elaborating and adopting the 'three-stage test'. Given the relevant provisions of UNCLOS which codify the meaningless dictum of the Court in *NSCS*, the 'three-stage test' is merely a practice that offers some predictability, indeed some content, to the exercise of achieving an equitable result.[193] As we noted above, describing an exercise by reference to its ultimate goal is circular, and in fact does not describe the exercise at all. This does not mean that the 'three-stage test' cannot be diverged from (as indeed it had been also during its supposed heyday).[194] Rather, the test provides a settled method for reaching an equitable result,[195] and any departure from it will require 'compelling reasons',[196] or at least some justification. Whether that justification is convincing or not is another matter altogether. As is the question of whether maritime delimitation can ever be subject to mechanistic application of rigid rules without some possibility of flexible adjustment.[197] Be that as it may, *NSCS* is now remembered precisely because it contains little worth remembering under the contemporary international law of the sea.

## V. CONCLUSION

The *NSCS* cases will invariably be cited in textbooks, as they have been, for years to come. And rightly so, but mainly for the principled elaboration of the sources of

[190] See V Lowe and A Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice' in CJ Tams and J Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford, OUP, 2013) 177, 189.

[191] *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (n 160) [115]–[122].

[192] See generally MD Evans, 'Maritime Boundary Delimitation: Whatever Next?' in J Barrett and R Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (London, BIICL, 2016) 41ff.

[193] Y Tanaka, *The International Law of the* Sea, 2nd edn (Cambridge, CUP, 2015) 207–08.

[194] See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (n 160), [280]–[281].

[195] DH Anderson, 'Recent Judicial Decisions Concerning Maritime Delimitation' in L del Castillo (ed), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Leiden, Brill, 2015) 500–01.

[196] *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (n 160), [116]; *Territorial and Maritime Dispute (Nicaragua v Colombia)* (n 160) [191]; *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3, [180].

[197] For a critical take on the judicial leeway afforded by the three-stage test see generally F Olorundami, 'Objectivity versus Subjectivity in the Context of the ICJ's Three-stage Methodology of Maritime Boundary Delimitation' (2017) 32 *IJMCL* 36, 49–51.

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international law and their relationship, rather than for any significant contribution they may have made with respect to the law of the sea. Habitual incantation of natural prolongation and equitable principles will no doubt also retain their positions in textbooks and judicial decisions, but the law has progressed so as to render them practically irrelevant. As such, the *NSCS* cases are definitely a landmark rather than a high watermark; or they are indeed a high watermark for the geomorphological approaches to the continental shelf and for principles of equity whose vagueness prevent them from having any meaningful practical application.

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