THE CONTINENTAL SHELF.*

The limits of the question submitted to the Conference should be precisely defined. The International Law Commission of the United Nations, to which the General Assembly has referred the study of the general question of the régime of the high seas, has recognised the advantages of making a clear distinction between the question of the continental shelf and questions which may be subsumed under the heading of "related subjects." Consequently, it has clearly grouped its discussions under two distinct titles. On the one hand are the seven Articles which it has devoted to the continental shelf, and on the other, four Articles in which it has dealt with "related subjects" such as the resources of the sea, sedentary fisheries, and contiguous zones. The topic of the continental shelf is already so wide as to merit the undivided attention of this Conference.

Hence this topic should be divorced from any discussion of territorial waters; indeed, whatever may be the dimensions and limits of the latter, it is only beyond the outer boundaries of territorial waters that problems concerning the continental shelf arise. Similarly, the Conference must rule out of its deliberations the topic of "The Resources of the Sea", that is, the question of the conservation of the *biological resources* of the sea. It goes without saying that this deals with a problem of urgent interest for humanity and for its well-being; but that topic, important though it is, does not inherently belong to a discussion of the continental shelf even when the latter is dealt with in its geophysical connotation; the problems relating to the resources of the sea arise in connection with the entirety of the area of the seas and are more concerned with the mass or volume of the waters than with the seabed and à fortiori with the subsoil. Just as the American President, on 28th September, 1945, issued two distinct proclamations, one relating to fisheries and the other to the continental shelf and its natural resources, so the International Law Commission, in examining separately the biological resources of the sea, limited the question of the continental shelf to the exploration and exploitation of the natural resources of the seabed and the subsoil. The study proposed for the Madrid Conference therefore relates to the legal status of the seabed and subsoil of the high seas beyond, but adjacent to, territorial waters from the standpoint of their utilization.

* A paper prepared by Professor Gilbert Gidel for the 1952 Madrid Conference of the International Bar Association; translated from the French text by L. F. E. Goldie, Lecturer in Law at Canberra University College, and published by permission of the author.

The discussion of the question presupposes that we have previously made up our minds on a point of principle: Can the seabed and subsoil of the high seas become the object of exclusive and permanent appropriation? As international law stood prior to President Truman's Proclamation on the policy of the United States of America with respect to the continental shelf, the position may be summarised[1] as follows: (1) A number of occupations dating back many years are universally recognised; these include the sedentary fisheries existing in various parts of the world; (2) There is no prohibition against new occupation; hypotheses concerning this type of occupation of the seabed and subsoil relate to the so-called "floating islands" (in which interest now appears to have diminished), to the erection of lighthouses in the open sea, to the construction of submarine tunnels, and to the laying of electric cables and pipelines.

Accordingly it cannot be said that the occupation of the bed of the high sea (and consequently of the subsoil) is barred by the principle of the freedom of the seas. This is not an absolute principle, nor an expression of a transcendental truth, unchangeable, independent of space and time. It is a human rule, operative in relation to human needs. It is adaptable to new uses of *what the sea has to offer* (le milieu maritime), these uses being the outcome of new technological processes.

To the primary uses of the high seas, i.e., navigation and fishing, there have already been added (to speak only of the seabed) the use of the sea bottom for the laying of submarine telegraph cables. This linear but continuing appropriation of the bottom of the sea has not appeared to be contrary to the principle of the freedom of the seas even though it does restrict, near cables, anchoring and trawling; these practices, being possible causes of deterioration of and damage to the cables, were condemned by the Paris Convention of 14th March, 1884. Nor are claims to exploit certain parts of the seabed and subsoil, summed up in the term continental shelf, any more incompatible à priori with the maintenance of the principle of the freedom of the seas.

There is no valid reason why this principle should not be rendered more supple so as to establish the right of user of the seabed and subsoil of certain areas of the high seas in order to exploit its natural resources and particularly its reserves of liquid fuels, since the constant increase in consumption of these fuels requires intensified production. It is the proper task of the law to effect adjustments between uses of

[1] As it is in the memorandum on the régime of the high seas prepared by the General Secretariat of the United Nations: Document A/CN. 4/32 of 14 July, 1950.

the high seas which have recently become possible and are deemed desirable and those which have already, whether of ancient or recent origin, been sanctioned by the principle of the freedom of the seas.

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The concept of the continental shelf is a datum of nature presented as a medium for juridical technique; it tends to justify State jurisdiction over the exploration and exploitation of the natural resources of the bed and the subsoil of certain areas of the high seas. How is law able to take over a concept which in origin was purely geophysical? The International Law Commission concedes the impossibility of confining itself to the geographical connotation of the term. The various natural sciences which have worked it out and utilise it are still far from agreeing on the definition of the continental shelf. A definition which appeared to be adequate some sixty years ago and which was bound up with the 200-metre bathymetric contour line (or the almost corresponding line of 100 fathoms or about 182 metres) is now recognised as scientifically inaccurate. There is no unanimity on the point whether certain regions (and among these there are some containing mineral resources of the first importance, such as the Persian Gulf) should, in the absence of frontal slopes, be deemed to be endowed with the character of the true continental shelf (such as the pseudo-continental shelf or inner shelf). The International Law Commission has therefore, and with good reason, taken the view that, for the purposes of the legal study upon which it has had to embark, it should free itself from the geological conception of the continental shelf. Does this mean that Article 1 of its Draft provides a satisfactory foundation for juridical work in this field? This is open to doubt.

The International Law Commission has adopted, as the criterion of the applicability of the rules which it recommends, the notion of the possible exploitation of the natural resources of the bed and subsoil of the high seas; "As here used", it says, "the term continental shelf refers to the seabed and subsoil of the submarine areas contiguous to the coast but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil" (Art. 1). Para. 5 of the Commentary on Art. 1 adds, " . . . areas in which exploitation is not technically possible by reason of the depth of the waters are excluded from the continental shelf here referred to." The corollary of this is that the extent of the continental shelf would be essentially uncertain and variable. Uncertain, because at one and the same given point in time, and for one and the same given purpose, the possibilities of exploita-

tion vary considerably, the variation depending on the degree of technical development which the country concerned has reached. Furthermore, the question whether this test should refer to the technical development of the coastal State or that of any other State whatsoever is left open. It is variable, because the extent of the continental shelf will be continually modified according to improvements in implements and in methods of exploration and use.

At present it is generally accepted that it is possible only to exploit the natural resources of submarine areas down to a depth of approximately thirty metres. It is perhaps surprising to find the International Law Commission stating that the reason for its not adopting a *fixed* limit for the continental shelf (this limit being determined by the depth of the superjacent waters or, to be more exact, by a depth of two hundred metres which it says (in para. 6) "coincides exactly with that at which the continental shelf, in the geological sense, generally comes to an end") is that "such a limit would have the disadvantage of instability." "Technical developments in the near future," the Commission continued, "might make it possible to exploit the resources of the seabed at a depth of over two hundred metres."

Whatever regard one must have for this estimate of the value of the 200-metre isobath as a geophysical criterion, or for the Commission's very optimistic forecast of technical developments, it is indeed difficult to welcome the concept and the mode of delimitation which that body thought fit to accept. We cannot tell whether we should ascribe this to a policy on the part of the Commission of presently settling the widest possible bounds to the continental shelf, or to a desire to favour its greatest possible extension in the future. This much is sure, that the criterion proposed by the International Law Commission does not furnish the qualities of uniformity, fixity, and certainty which are indispensable in law.

The solution on this point which appears to gain general support is the one by which, for the jurist, the continental shelf should be defined by reference to a determinate depth of water for all cases where that geophysical form exists and where the area is such that the continental shelf extends beyond the outer limits of the territorial waters of the State in question. The depth of two hundred metres (or, if it is preferred, the analogous but not identical measure of one hundred fathoms) commends itself by reason of the fact that the 200-metre (or 100-fathom) bathymetric contour line is now usually to be found in marine charts. There are no good grounds for empowering a coastal State to avail itself of the fact that on its coast the fall-off (la rupture de pente) which characterises the continental shelf occurs at a greater

depth than that which is fixed arbitrarily by the compromise formula.[2] The International Law Commission has rightly rejected the claims put forward by some States, independently of the presence of a continental shelf, whereby they have sought to obtain the benefit of rights possibly ascribable to the existence of a continental shelf—and even of superior rights. These claims extend to a mathematical line on the high seas delineated by datum points fixed by position lines extending horizontally for a given distance from specified points on the coast.

The concept of the continental shelf should be associated with a geophysical formation in which the test of depth plays an essential role. The delimitation of the shelf by the 200-metre bathymetric contour line (or that of 100 fathoms), while generally favourable to the end in view, would leave open certain delicate but secondary problems, the solution of which will be facilitated by the development of the work undertaken by authors like Richard Young and S. Whittemore Boggs in their investigations. The law can never be indifferent to problems of terminology; they take on a special significance at the time of the reception of new concepts.

In its Draft, the International Law Commission has kept the expression continental shelf (bereft, it is true, of its purely geophysical connotation) on the understanding, of course, that the qualifying adjective "continental" is not to be read so as to discriminate against "insular shelves" in the case of islands (Commentary on Art. 1, para. 4). The retention of the expression has the advantage of evoking clearly certain ideas already accepted. It excludes certain upcasts from the seabed of little depth which are not attached to any emerging dry land, such as the Burwood Banks near Tierra del Fuego, and the Saya da Malha in the Indian Ocean. In spite of the authority of writers who recommend or use the expresison "submarine areas" or the even more ambiguous "submarine regions", and in spite of their use in the Anglo-Venezuelan Treaty of 1942, the expressions cannot be recommended. If the plain expression continental shelf or submarine plateau ought to be replaced, it would be profitable to do so only by recourse to expressions offering greater legal precision; but this could only be done to the detriment of desirable brevity.[3]

The expression "epicontinental zone" (proposed by J. Andrassy) is also open to criticism. One may well speak (as in the Argentine

[2] This view is contrary to that expressed by the Committee of the International Law Association in its report for the Conference at Copenhagen, 1950.

[3] For example, "extraterritorial seabed and subsoil up to the 200-metre bathymetric contour line."

documents) of "epicontinental sea" to designate waters superjacent to a continental shelf; but the import of the prefix "epi" appears necessarily to prohibit the application of the expression to the subsoil. Furthermore, the expression does not accomplish the purpose of its author, which is "to choose a special term for designating the legal concept of an area *outside the limits of territorial waters*[4] on the subject of which new developments in international law recognise special rights as belonging to coastal States."[5]

Generally speaking, there are good grounds for avoiding the use of the word "contiguous" in definitions of the continental shelf or developments related thereto. Indeed, the word "contiguous" already forms part of an expression established as a concept of international law, namely, contiguous zone (zone contigue, Anliergezone). Its use, as in Art. 1 of the International Law Commission's Draft, is liable to cause unfortunate confusion which would be avoided by using such synonyms as "adjacent to" or "abutting on."

* * * *

Because the topography of the world's coast lines exemplifies such a wide diversity of types, and because of the great differences in the gradient of their plunge into the sea, the irregularity of this phenomenon of physical nature has always attracted attention in studies of the continental shelf. Sometimes the continental shelf simply does not exist; sometimes its extent is trifling; sometimes it is very extended. Should international law take cognisance of this geographical situation so as to seek to remedy it by correcting the inequalities which it implies; perhaps by the assumption of a legal continental shelf where a geophysical continental shelf does not exist? Or by giving it a fictitious extension which it lacks in fact? Or perhaps, where its physical extent may be deemed excessive, by placing arbitrary limits on its legally viable extent? To state the problem suffices to reveal the arbitrariness which necessarily taints all the solutions which might be propounded.

The definition of the continental shelf by the criterion of exploitability—which is open to criticism on other grounds—has at least the merit of eliminating any reason for introducing the element of "inequality" into the discussion. It is clear that if the legal advantage resulting from the existence of a continental shelf consists of the opportunity which it gives to exploit the natural resources under the high

[4] Italics inserted by Professor Gidel.
[5] See *Epicontinentali pojas* (Zagreb, 1951), 81.

seas and within the limits of the shelf, it is difficult to see what is gained by referring to such opportunities where geophysical and technological conditions do not permit their being used. The International Law Commission, after examining the problem as a whole, did not believe that it should retain, in order to correct inequalities, a system under which certain identical powers would be exercisable by all States in sea areas whose limits are determined by fixing the maximum and minimum limits of the continental shelf, whose juristic definition would be determined by the aid of a uniform distance measured from the coast. And rightly so; such a concept as that suggested should be dealt with under the heading of the extent of territorial waters; it should not find a place in the totally distinct topic of the continental shelf. It would, in effect, entail the creation of a new contiguous zone relative to the exploitation of the subsoil and yet deliberately omit the essential factors relative to that exploitation. More generally, we may ask ourselves if international law has the right and the power, in the present state of world conditions, to attempt to create unity among geophysical diversities.

* * * *

The question of the nature of the rights applicable to the continental shelf, and the designation of the country to which these rights should be attributed, are intimately bound together. These problems are simultaneously solved by the International Law Commission in Art. 2 of the Draft, which constitutes the core of the Commission's thesis: "The continental shelf is subject to the exercise by the coastal state of control and jurisdiction for the purpose of exploring it and of exploiting its natural resources."

* * * *

Let us first examine the question of the destination of the rights. The International Law Commission concedes to the coastal State such rights over the extraterritorial continental shelf as are capable of being exercised. It has rejected (in para. 2 of the Commentary on Art. 2) the suggestion that it should ascribe these rights to the "international community"; supporters of this latter view envisage different conditions of use which, as the Commission has shown, are dependent rather on an attractive ideal than on a sane appreciation of realities. But, that much settled, two conflicting possibilities remain: Should the advantage of its geographical position be reserved to the coastal State, or should the opportunity of acquiring rights for itself on a continental shelf, no matter where it may be situated, be open to States other than the coastal State? The second solution would imply the adoption of

the concept of *occupatio* as the source of rights over the continental shelf; but it is easily seen what political dangers could be generated by such a doctrine. From the juristic standpoint, its flaws are just as clearly apparent; if unappropriated *lands* may be made the object of regular acquisition by complying with the conditions of occupation, might not the same principle operate, it is said, in the case of territories submerged under the high seas, these territories comprising the bed and subsoil of the continental shelf and lying beyond the limits of territorial waters? As the requirement of *effectiveness* is necessary in order to produce the direct effects of occupation and for giving title *erga omnes,* questions as to how this requirement would be satisfied remain unanswered. Would mere exploration of various parts of the continental shelf constitute effective occupation? Could any importance be attached to it for the purpose of acquiring title to other parts of the same continental shelf? Would exploration of negative effect give rise to legal results? What if exploration of positive effect were not followed by exploitation? Should the English doctrine of *inchoate title* apply? In that event, for what period of time would that inchoate title be valid? Would the coastal State, from the point of view of the doctrine of ocupation, be put on the same footing as non-coastal States? Could we allow, in favour of the coastal State, so-called constructive or notional occupation, that is to say, fictitious occupation? There are many questions implicit in every attempt to apply the traditional doctrine of *occupatio* to the continental shelf even if, for the purpose of the discussion, it is assumed that this doctrine, which was developed in relation to the acquisition of tracts of dry land, can be adapted to the acquisition of submarine areas of the continental shelf under the high seas. Hence it is not surprising that the notion of applying the doctrine of occupation to the continental shelf has few supporters; it is equally incomprehensible that the solution to which the International Law Commission has unhesitatingly given preference is that whereby those rights of which the continental shelf under the high seas is susceptible are conceded to the coastal State. That concession is supported by the reasons advanced in its favour in President Truman's Proclamation and in many documents of the same kind which have reproduced or paraphrased those reasons without making any valid additions to them.

From the legal standpoint we should note carefully that concepts such as "contiguity" (or adjacence) and "continuity" (or morphological or geophysical unity) cannot stand up to close analysis when applied to the continental shelf any more than can the concept of occupation. It is only because contiguity and continuity appear to have

practical advantages that they are suggested as criteria for conceding rights over the continental shelf to the coastal State.[6]

President Truman's Proclamation still remains, up to the present time,[7] the most complete collection of practical considerations and statements of fact; but these can hardly be elevated to the status of juristic categories. The concepts of contiguity and continuity have gained a recrudescence of vigour from the important judgment given by the International Court of Justice on 18th December, 1951, in the *Anglo-Norwegian Fisheries Case.* In that judgment the Court emphasised the intimate relation between the land and the sea on the ground that on the Norwegian coast land features extend into the ocean, and that the islands, islets, rocks and reefs are in fact only a continuation of the Norwegian land mass. In emphasising this unity between land and sea the Court also took into account that certain economic interests, peculiar to the region, should properly find a place alongside the purely geographical data. Moreover, the determination of the emphasis to be attributed to the different data will at times prove a delicate matter depending on the surface reliefs and the configuration of the continental shelf. But difficulties of this kind are not completely new to the international law of the sea which, in relation to the question of tracing the limits of territorial waters, has already been faced with problems of this kind.

The solution which concedes to the coastal State such rights as are exercisable over the seabed and subsoil of the continental shelf has been unequivocally stated by the International Law Commission. Para. 5 of the Commentary on Art. 2 is as follows:—"The exercise of the right of control and jurisdiction is independent of the concept of occupation . . . The right of the coastal State under Article 2 is also independent of any formal assertion of rights by that State." That is to say, proclamations by which coastal States make express claims to rights over the continental shelf are of a purely declaratory character. The validity of such proclamations depends solely on whether the Draft of the International Law Commission should be deemed to be an expression of *lex lata* or only of *lex ferenda.*

* * * *

What rights can be exercised in relation to the continental shelf? In Art. 1 the concept of exploitability serves to define and delimit the

[6] *Cf.* para 4 of the International Law Commission's Commentary on Art. 2, the final sentence of which runs, "in most cases the effective exploitation of the natural resources will depend on the existence of installations on the territory of the coastal State to which the submarine areas are contiguous."

[7] I.e., 1952.

continental shelf. In Art. 2 (which contains the principles basic to the whole Draft) this concept is applied so as to subject the continental shelf "to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources." The Commission has expressly pointed out the limiting character of these words in its Commentary on Art. 2, and the necessary consequences appear in Arts. 3, 4, 5, and 6 of the Draft. The Commentary runs as follows:—"In this Article the Commission *accepts* the idea that the coastal State may exercise control and jurisdiction over the continental shelf, *provided that such control and jurisdiction shall be exercised solely for the purposes stated.* The Article excludes control and jurisdiction *independently* of the exploration and exploitation of the natural resources of the seabed and subsoil."[8]

The consequence of the restricted and specialised nature of the rights of the coastal State is that their exercise should leave the use of the high seas as intact as possible. Since the natural resources of the continental shelf are to be found in the seabed and subsoil, the legal status of the shelf, from the point of view of exploitation of its resources, necessarily attracts the doctrine (well established in relation to waterways) of the "severability" of the superjacent waters and the seabed. In Art. 3 of its Draft the International Law Commission declares that "the exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the superjacent waters as high seas."[9] The other consequences drawn by the Commission from the restrictive character of the rule postulated by Art. 2 are successively stated with respect to the régime of the airspace above the superjacent waters (Art. 4), the laying and maintenance of submarine cables (Art. 5), and navigation and shipping (Art. 6).

In spite of these precise statements, certain questions are left open and now call for comment. The Commission has stated, in its Commentary on Art. 5, that it has not been deemed necessary to insert special provisions concerning pipelines; nevertheless the question is not devoid of practical interest, and appears to have two aspects. We can first take the view that no objection should be raised to the laying of pipelines on the continental shelf when they are ancillary to petroleum workings installed there. But a more difficult hypothetical case can be imagined in which a pipeline is laid on the continental shelf of State A for the purpose of carrying combustible fluids between States B and C; an example of this would be a pipeline between Mexico and Canada laid along the continental shelf of the United States. If

[8] Italics inserted by Professor Gidel.
[9] *Cf.* para. 10 of the Commentary on Art. 1.

the laying and maintenance of telegraph cables on the continental shelf under the high seas cannot be hindered, why should there be any difference as to the laying and maintenance of pipelines?

Another very complex problem is the determination of the extent to which the rights conceded to a coastal State over its continental shelf and relating to the seabed may or may not be used to impede the free exercise of fishing activities by means of trawling on the bottom of high seas areas constituting part of the continental shelf of that coastal State. Whether or not the International Law Commission took cognisance of that problem, it would be difficult to discover any solution in the drafts prepared by it. Fishing on the high seas, like freedom of navigation, is among the "primary interests." Does it follow that its exercise cannot be prejudiced in any way by conceding to the coastal State rights over its extraterritorial continental shelf? Can we escape from the difficulty by asserting that all fishing (whether by trawling or other means) involves merely *the volume or mass* of the waters and not the bed of the continental shelf? Should we go so far as to make a juristic assimilation of the seabed and the superjacent waters and to regard the seabed as being only the boundary, so to speak, of the superjacent waters? Such an assimilation would furnish an argument in favour of maintaining the freedom of trawling in the high seas superjacent to a continental shelf but would also put in jeopardy the exploitation of the natural resources of the subsoil by leaving the rights of the coastal State at the mercy of injurious activities by non-coastal States. There are sea areas (for example, in Indonesia) where tin is won by dredging tin-bearing mud from the bed of the sea; the coastal State could not be deemed to enjoy the benefit of the natural resources of its seabed and subsoil if these resources were diminished by juristic assimilation of the seabed and the superjacent waters.

Logically, if it is claimed that the assimilation of the seabed to the volume of the superjacent waters is valid because it constitutes the boundary of the latter, it is also possible to support the argument that there should be assimilation of seabed and subsoil because the former constitutes the boundary of the latter. It is in connection with the exploitation of the continental shelf that this argument must be answered. It is common knowledge that in mining law it is possible to separate surface rights from subsoil rights; but here the very object of the continental shelf doctrine is to permit, with a view to exploiting its natural resources, an attack upon the subsoil from the waters of the high seas, an attack that requires that the seabed should be opened and subsoil penetrated. These questions are probably too complex to be the object of a profound study in the brief time which the Confer-

ence has at its disposal; at least it is proper that their existence should be pointed out.

* * * *

One basic point which the Conference should investigate is the effect of the words "control and jurisdiction"; these words are used by the International Law Commission to indicate the rights which it recognised as vesting in the coastal State "for the purpose of exploring the continental shelf and exploiting its natural resources." They had already figured in President Truman's Proclamation of 28th September, 1945. When certain governments rejected them and used the word "sovereignty" they were recalled to a better understanding of the matter by the Department of State[10] and by Great Britain.[11] Nevertheless some noted British commentators on the Truman Proclamation[12] said that they could not see what difference lay between "control and jurisdiction" and "sovereignty" itself when this control is made the subject of an exclusive claim. "Sovereignty", said Sir Cecil Hurst, "is not an easy term to define; but in a case of this sort, I think we are entitled to look at the facts of the situation more than at the language used . . . One cannot read this Proclamation without feeling that within the area of its continental shelf the United States is claiming rights which are as large as sovereignty; the claim may be unjustified and impossible in law—that is another matter. What I am suggesting at the moment is that if the rights claimed over the continental shelf and its recources were called sovereignty, they would be no more extensive than what are claimed in the Proclamation."

At that time, official British practice had already characterized those rights as importing sovereignty; Orders in Council relating to British possessions in the American Continent have been consistent therewith:—

(1) in the annexation of the submarine areas of the Gulf of Paria;[13]

(2) in the extension of the boundaries of
   (a) the Bahamas;[14]
   (b) British Honduras;[15]

10 See Notes of 2nd July 1948 to Chile and Peru.
11 See Notes of 6th February 1948 to Chile and Peru.
12 E.g., Sir Cecil Hurst at the Conference of the Grotius Society, 1st December 1948.
13 Trinidad and Tobago Order in Council of 6th August 1946 (United Kingdom Statutory Rules and Orders 1946, Vol. I. 919); *cf.* Submarine Oil Mining Regulations, Trinidad and Tobago, of 22nd May 1945.
14 Order in Council No. 2574 of 26th November 1948.
15 Order in Council No. 1649 of 9th October 1950.

(c) Jamaica;[16]
(d) the Falkland Islands.[17]

Professor H. Lauterpacht sums up the effect of these Orders in Council in the following words: "The purely British proclamations, such as those embodied in the Orders in Council relating to the Gulf of Paria and to the continental shelf of the Bahamas, Jamaica, and Falkland Islands amount, by clear implication, to an assumption of rights of full sovereignty. No other interpretation can be put on the announcement that the 'boundaries' of the territories in question are 'extended' so as to include the continental shelf or that the Gulf of Paria is annexed."[18] The provisions of these instruments tend, however, to meet possible objections made on the basis of those general principles of the international law of the sea which might be raised against them. Sections 4 and 5 of the Order in Council with respect to Trinidad and Tobago, section 3 of the Bahamas Order in Council, and other analogous provisions echo the words of President Truman's Proclamation by stating that "Nothing in this Order shall be deemed to affect the character as high seas of any waters above the continental shelf outside territorial waters." But the fact that these qualifications are consistent with customary international law as to the use of such waters does not alter the position that the assumption of complete control over the extraterritorial shelf does constitute an extension of sovereignty—that is to say, the sum total of State powers. It is not merely an extension of control and jurisdiction for the specific purposes of exploration and exploitation—which would connote the assumption of particular and limited powers. For these reasons it is easy to understand why English juristic thought in this field seeks to minimise the difference between "control and jurisdiction" and sovereignty and to insist, conversely, on the restrictions which may be imposed on sovereignty. Professor Lauterpacht, for example, has written that "Sovereignty over the adjacent submarine areas—like sovereignty over territory in general—is not incompatible with restrictions imposed by customary international law or undertaken by treaties. Thus although the rights acquired, or claimed, by States over submarine areas are rights of sovereignty, this does not mean that they are not subject to such limitations as follow from international law and, in especial, from

16 Order in Council No. 2575 of 1948.

17 Order in Council No. 2100 of 21st December 1950.

18 *Sovereignty over Submarine Areas*, 27 BRITISH YEAR BOOK OF INTERNATIONAL LAW (1950) 376, at 387.

any reasonable requirements of the principle of the freedom of the sea."[19]

The Draft of the International Law Commission is as far removed from the above practice as it is from theories using it as the basis of a scheme of legal rights. Art. 2 was drawn up at a time when the claims of a number of coastal States had been strongly pressed not merely to control and to jurisdiction but also to sovereignty over their respective continental shelves; it roundly condemned "any reference to the 'sovereignty' of the coastal State over the submarine areas of the continental shelf" (para. 7 of the Commentary on Art. 2). It also takes pains to set strict limits to the application of the expression "control and jurisdiction" itself, and contains a significant innovation. Up to the time when the document was drafted, State practice had used the expression "control and jurisdiction" *simpliciter*. In marked contrast the Draft added to the expression a precise formulation of the two strictly limited functions (exploitation and exploration) which in its view are implied by the concept of control and jurisdiction over the continental shelf. It was impossible to frame a more plain spoken—indeed outspoken—rejection by the International Law Commission of the whole notion of a general power of control and jurisdiction exercisable by a coastal State over the extraterritorial continental shelf; it "conceded" that control and jurisdiction only for limited and specified purposes. To emphasise this point, para. 7 of the Commentary on Art. 2 once more sets out the limitations on the powers which the Commission was prepared to concede to the coastal State in relation to the continental shelf.

Thus two schools of thought come into direct conflict over this problem of delimiting a coastal State's rights. Art. 2 of the Commission's Draft is as different from the provisions of the British Orders in Council as are the views of Professors H. Lauterpacht and G. Schwarzenberger. The former writes, "It is not believed that such a claim to sovereignty, pure and simple, over submarine areas is improper or—assuming that it is not otherwise contrary to international law in general or to the principle of the freedom of the sea in particular—that it does not provide the best solution."[20] On the other hand Professor Schwarzenberger writes, "In the sense of exclusive jurisdiction of the flag of State over its ships on the high seas, the principle of the freedom of the seas came to be acknowledged in time of peace. Today

[19] Lauterpacht, *op. cit.* at 391; see especially his argument as developed in Part IV under the sub-title of "The nature of the rights over submarine areas."

[20] *Op. cit.* at 390-391.

this freedom is again indirectly challenged by extravagant claims of States to the so-called continental shelf."[21] Whenever it becomes necessary to choose between these two opposing schools of thought, it will be wise to bear in mind that the adoption of the thesis which favours vesting sovereignty over the seabed and subsoil of the continental shelf in the coastal State is bound to bring further claims in its train, particularly after the judgment of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*. This will happen even if we attempt to set bounds to that sovereignty to such an extent as international law makes possible; it is not easy to see what valid objections could be raised against claims to make other uses of the continental shelf once sovereignty over it has been conceded to the coastal State.

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The demarcation of submarine areas vested in coastal States abutting on a common continental shelf is above all a technical matter and does little more than raise a question of principle: Whether there is anything to be gained from seeking to establish predetermined rules, or whether it is not better to leave to the States concerned the task of determining by agreement their common boundaries? The International Law Commission favours the latter solution, but adds the suggestion that in default of agreement the interested States should be under an obligation to submit their dispute to judicial decision or to arbitration (Art. 7 and Commentary), the judge or arbitrator to be empowered to prepare his judgment or award *ex aequo et bono*. The difficulty of laying down in advance adequate rules, capable of taking into account the infinite diversity of possible fact situations, justifies the solution adopted by the Commission.

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Another extremely difficult problem is to determine to what extent, at the present time, the concept of the continental shelf, together with the juristic inferences deducible from it, forms part of international law. The International Law Commission has touched upon this question. In para. 6 of the Commentary on Art. 2 of its Draft it expressed the following view: "The Commission has not attempted to

21 Schwarzenberger, *The Frontiers of International Law*, 6 YEAR BOOK OF WORLD AFFAIRS (1952) 246, at 264; footnote 29 to his statement adds, "See further Green, *The Continental Shelf*, 4 CURRENT LEGAL PROBLEMS (1951) 54."

base on customary law the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in Article 2. Though numerous proclamations have been issued during the last decade, it can hardly be said that such unilateral action has already established a new customary law." The problem of determining to what extent a unilateral juristic act may produce effects in international law is difficult and controversial. The most plausible thesis is that a unilateral juristic act creative of rights enuring to the State which so expresses its will is effective only when, by this expression of will, that State places itself within a juristic category which already exists in international law; for example, by a declaration of neutrality. On this basis the question is, can it be said that there is at the present time a principle of international law which defines the legal position of a coastal State with respect to its extraterritorial continental shelf?

Professor Lauterpacht thinks there is, for two reasons; firstly, that a certain number of maritime Powers (or, to be more exact, of the major maritime Powers) have asserted rights over their continental shelves; and secondly, that other States have acquiesced in these assertions. He says that " . . . the appropriation—or, which is essentially the same, the right of appropriation—of the adjacent submarine areas has become part of international law by custom initiated by the leading maritime Powers and acquiesced in by the generality of States."[22] In asserting the existence of a customary law on this matter the learned author did not attempt to specify the date on which this customary law was formed. Was it on the morrow of the Gulf of Paria Treaty, 1942? Or was it after President Truman's Proclamation in 1945? Or was it later, after the Orders in Council referred to earlier, and if so, after which one of them? Or was it in 1949 after the Proclamations of the Rulers of the Trucial Coast "acting under British control and responsibility"? The learned author does not furnish any guidance on this point; he restricts himself to saying that a rule of customary law may take form in four years (but which four years?). This much seems certain: Of those States which have claimed similar rights (although in many instances the claims lack that exact similarity which is a condition precedent to their recognition as a common rule), each has unilaterally expressed an intention *in substantial conformity* with that expressed by the others; thereafter it cannot *venire contra factum proprium,* it is estopped from denying to others rights similar to those which it has claimed for itself. Because in this way there has been formed a reciprocal system which has already acquired considerable

[22] *Op. cit.* 431.

importance it may be said that *a* régime of the continental shelf has come into being. But is that régime equivalent to a precept of customary international law capable of operating as a general category for every unilateral expression of intention of the same nature and therefore able to make such expressions of intention effective *erga omnes?* It may be noted that international maritime law, particularly with reference to claims to adjacent waters, does not provide many examples of such easy compliance with the conditions required for the creation of a valid rule of customary international law. It is therefore easy to understand the caution shown by the International Law Commission towards the notion of a "common law" which from now on might be generally invoked. Weighty arguments militate against the assertion that here and now there are principles of customary international law with respect to the continental shelf. First we see the striking dissimilarity between the rights claimed; then out of some twenty expressions of State policy (and these are by no means uniform) a correction should be made to the number of those properly listed in the catalogue since all the instruments issuing from the United Kingdom, whether directly or indirectly, ought not legitimately to count for more than one!

Hence it appears, in relation to the continental shelf and from the standpoint of the development of a principle of international law in respect thereof, that there is only a series of unilateral acts which, being incapable of conferring on the declaring States any legal status actually recognised by international law, merely have the effect of precluding those States from disputing the validity of identical declarations by other States, this inhibition operating solely in relation to the States concerned.

After it had rejected the hypothesis of the existence of a "new customary law", the International Law Commission concluded its observations (in para. 6 of the Commentary on Art. 2) as follows:— "It is sufficient to say that the principle of the continental shelf is based upon the general principles of law which serve the present-day needs of the international community." But does the problem really relate to "general principles of law"? What is really in issue is not merely the ascertainment of certain physical and economic facts and needs which, in the face of the continual growth of the population of the world and of the continual depletion of the world's resources, make it desirable to raise a number of simple precepts of convenience and equity to the level of "general principles of law." The object of these precepts should be to ensure that natural resources are exploited both efficiently and wisely. In the present state of world affairs the

littoral State is best placed to undertake this exploitation since the submarine plateau abuts on to the land mass of that State. Ideas such as these do not appear to be very far removed from those which inspired the recent (April 1952) resolution of the Commission on the Rights of Man; paradoxically, the Commission connected its resolutions with the "rights of man" by means of the right of peoples to determine their own destiny. Viewed in this light, the doctrine of the continental shelf is associated with the right of each people to develop *its* natural resources.

* * * *

Should Articles 1, 2, and 3 of the International Law Commission's Draft be regarded as an enunciation of principles which here and now form part of international law; or as a statement of principles which it might be beneficial to incorporate in the international law of the future? This question was examined in August 1951 by the late Lord Asquith of Bishopstone when acting as arbitrator in a dispute between the Sheikh of Abu Dhabi (one of the sultanates of the Trucial Coast) and Petroleum Development (Trucial Coast) Ltd. on the proper interpretation of a contract between the parties of 11th August 1939. Clause 2 (a) of this contract provided that "The area included in this agreement is the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and all the islands and sea-waters which belong to that area. And if in the future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area shall coincide with the limits specified in this definition." In 1949, shortly after the issue of a Proclamation of 10th June on the subject of his rights over the submarine areas adjacent to the coasts of his sultanate, the Sheikh of Abu Dhabi was considering the grant of a concession to the Superior Corporation, an American company. This concession, if granted, would consist of certain of the rights claimed by the Proclamation. Would such a concession be consistent or inconsistent with the terms of the contract executed some ten years earlier with Petroleum Development Ltd.? The issue was formulated in these terms: "What are the rights of the Company with respect to all the underwater areas over which the Sheikh has or may have sovereignty, jurisdiction, control, or mineral oil rights?"

The arbitrator sought to resolve the problem whether the Continental Shelf Doctrine was a rule of international law. On this point he consulted Articles 1, 2, and 3 of the Draft which the International Law Commission of the United Nations had, as it happened, just adopted

at Geneva during its third session (1951). These articles had been invoked by Petroleum Development Ltd. as constituting principles which at the time formed part of international law or, alternatively, as embodying the form in which those principles *must* be cast. In neither case did the Company put them forward merely as principles which *should* be part of international law or which it would be advantageous to incorporate in that law at some future time. Those submissions on the part of the Company were not accepted by the arbitrator, who took the view that unilateral acts could not be deemed to have already established a new rule of customary law and that para. 6 of the Commission's Commentary on Art. 2 showed that this was also the view of the Commission. It followed that the Commission's Draft could not provide a means of interpreting the 1939 contract since the Continental Shelf Doctrine was not at that time a part of the corpus of international law—nor has it since become such a part. Hence the arbitrator's award was that the Company had a clear right to exploit the subsoil of the sheikhdom's *territorial waters,* including the territorial waters of its islands, but not to exploit the subsoil of the "plateau", that is, the adjacent submarine areas beyond the outer limits of those territorial waters. On the other hand the arbitrator conceded that the Sheikh was entitled to rights over the zone of the shelf. This is somewhat surprising, since he was dealing with rights asserted by means of a unilateral declaration of intention; hence we must inquire whether, in the absence (as found by the arbitrator himself) of a rule of customary international law relating to the continental shelf, such a unilateral declaration of intention could give rise to valid legal consequences. It should be made clear, however, that in any event this point is irrelevant to the dealings between the Sheikh and Petroleum Development Ltd; the claims of the Company to rights over the continental shelf were rejected.[23]

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In conclusion: The Conference has before it a choice between various views:—

I. (A) Has a right of customary law, taking effect here and now, developed in this field; and, consequently, do unilateral declarations of State intention in connection with the continental shelf constitute nothing more than an affirmation of

[23] Here Professor Gidel interpolates, "Une autre sentence, mentionnée par lord Asquith, a été rendue par lord Radcliffe à propos de la concession de Qatar (Côte Truciale); le texte ne nous en est pas connu."

existing rights which are valid *erga omnes* to the extent of their conformity with existing customary law?

I. (B) Are the unilateral declarations of intention made by certain States concerning their continental shelves merely potential material for the development of a customary law of the continental shelf? If that is so, have they in the meanwhile no other juristic effect in international law than to require States making these declarations to recognise the validity of analogous declarations of intention by other States?

II. If the view expressed in I.(A) is adopted, then what are the rights which customary international law concedes to the coastal States over their continental shelves? (a) Are they rights of "sovereignty", subject only to such qualifications as are thereon imposed by the international law doctrine of the freedom of the seas? (b) Are they general rights of "control and jurisdiction", and, if so, how do they differ from "sovereignty?" (c) Are they rights of "control and jurisdiction" limited to the exploration and exploitation of the natural resources of the continental shelf? Are the outer limits up to which such rights may be exercised to be determined at any given time by the state of technological progress of such exploration and exploitation?

Work directed to the exploration and exploitation of the natural resources of the continental shelf has passed beyond the experimental stage and is now an accepted part of industrial activity. It is therefore not premature to take steps to secure, within the framework of the doctrine of the freedom of the high seas, an adjustment between the various uses to which the high seas can be put and the exploitation of the natural resources of the continental shelf. There are various means of effecting such an adjustment, such as conventions (bilateral or multilateral), rulings as to jurisdiction, and international conferences on a world scale. Special conventions are too often at the mercy of the inequality of bargaining power as between the participating States; results as favourable as might have been expected are not always obtained from multilateral conventions, because of the absence of some States or the preponderating influence of others, with the consequence that they do not always achieve that balance between contending interests which produces generally acceptable settlements. Rulings as to jurisdiction can only be given after a dispute has arisen and, frequently, only when the dispute is long protracted or has assumed some degree of acuteness.

In spite of its well known disadvantages, an international conference appears to offer the best prospects for framing an acceptable settlement. Even where it fails to bring about an agreement between the participating States, it does at least clarify and bring out into the open the conflicting viewpoints. The effectiveness of a conference is not always measured by its apparent success (or failure!). It has sometimes happened that the nominal failure of a conference has brought about even more important results than could have been achieved by its success, particularly where the price of success might have been at least a transient immutability of the agreed principles.

Perhaps in closing one can express the confident hope that the work of the International Bar Association at its Madrid Conference may contribute to the clarification of this subject and to the development of the law with respect to the continental shelf. One means of achieving this will be to keep constantly in mind the two guiding principles formulated in 1950 by the International Law Commission of the United Nations: (1) to encourage the exploitation of the natural resources which the continental shelf offers to mankind, since it is estimated to constitute more than seven per cent. of the world's sea areas; (2) to avoid the imprisonment of legal thought within a rigid and formalistic conception of the doctrine of the freedom of the seas. At the same time the Conference will be well advised not to jettison the general system of the law of the high seas which has been slowly built up through the ages to meet the needs of a world constantly faced with new situations.