The Legal Status of the Sea-Bed and Subsoil

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Section I: Introductory

Since the end of the Second World War few subjects have aroused the interest of international lawyers to the same extent as the problem of the legal status of the bed of the sea, including the subsoil lying beneath the bed of the sea [1]). Before 1939 this problem was little discussed, except in connexion with special questions such as the Ceylon pearl fishery or the Channel Tunnel [2]). Since 1945, however, the problem of the legal status of the sea-bed and subsoil, or at any rate of the continental shelf [3]), has given rise to an immense volume of literature [4]).

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[1]) The following abbreviations will be used in this article: A.J.I.L. = American Journal of International Law; B.Y.I.L. = British Year Book of International Law; I.C.L.Q. = International and Comparative Law Quarterly; and T.G.S. = Transactions of the Grotius Society.

[2]) See, for instance, Sir Cecil Hurst in B.Y.I.L. vol. 4 (1923–24), p. 34 and in Annuaire de l'Institut de Droit International (1925), p. 159; L. F. L. Oppenheim in Zeitschrift für Völkerrecht Bd. 2 (1908), p. 1; R. Robin in Revue Générale de Droit International Public, Année 15 (1908), p. 50; C. J. Colombos, Le tunnel sous la Manche et le droit international (1917); P. Fauchille, Traité de droit international public (1925) vol. 1, part. II, p. 18–20; G. Gidel, Le droit international public de la mer (1932) vol. 1, p. 488–501, 507–514; E. de Vattel, Le droit des gens (1758) book 1, chapter XXIII, section 287; and J. Westlake, International Law (1904) part I, p. 186 f.

[3]) The meaning and the special significance of the term "continental shelf" are discussed in Section II below.

[4]) The following is a brief list of some of the more important individual contributions in the English language alone: J. W. Bingham in A.J.I.L. vol. 40 (1946), p. 173; E. Borchard, ibid., p. 53; S. W. Boggs in Geographical Review vol. 41 (1951), p. 185, and in A.J.I.L. vol. 45 (1951), p. 240; L. F. E. Goldie in I.C.L.Q. vol. 3 (1954), p. 535; L. C. Green in Current Legal Problems vol. 4 (1951), p. 54; Sir Cecil Hurst, in T.G.S. vol. 34 (1949), p. 153; H. Lauterpacht in B.Y. I. L. vol. 27 (1950), p. 376; M. W. Mouton, The Continental Shelf (1952); D. P. O'Connell in A.J.I.L. vol. 49 (1955), p. 185; F. A. Vallat in B.Y.I.L. vol. 23 (1946), p. 333; C. H. M. Waldock in T.G.S. vol. 36 (1951), p. 115; R. Young in A.J.I.L. vol. 42 (1948), p. 849; vol. 43 (1949), p. 530, 790; vol. 45 (1951), p. 225; and »Memorandum on the Régime of the High Seas« prepared by the Secretariat of the United Nations (A/CN. 4/32 of July 14, 1950) – referred to subsequently as Secretariat Memorandum.

The reason for this is not far to seek. International lawyers have been commendably quick to appreciate the significance of the issues raised by the development of scientific techniques which has made possible the exploitation of the resources of the sea-bed and the subsoil both at far greater depths, and at far greater distances from the coast, than has hitherto been the case. They have realized too that these techniques are at present only in the early stages of development and that, before many years elapse, exploitation at still greater depths, and even further from the coast, may be possible. It has also been well understood that the development of these techniques is all the more important because it is taking place, not in a vacuum, but against a background of powerful demographic and social pressures. Rising populations in almost every country, increasingly vociferous demands of the masses everywhere for improved standards of living, growing exhaustion of present sources of supply of foodstuffs and raw materials alike – such are the realities which international lawyers have had to face, particularly since 1945.

Confronted with this situation, international lawyers have reacted in a remarkably constructive spirit. Writers of very different outlooks and doctrinal positions have hastened to give the assurance that no rules of international law stand between the world and the fulfilment of its needs. As Sir Cecil Hurst told the Grotius Society in 1948, in words of characteristic simplicity and forthrightness: "Now in the face of an increasing demand for a diminishing supply I feel – and I hope that you will all agree with me – that international lawyers must approach this subject of the Continental Shelf on a realistic basis. It is useless to underestimate the need for petroleum in the modern world. To take only one aspect of it. We are told that the number of mouths to be fed in the world is increasing at the rate of 65,000 a day [5]). If so, the mechanization of the agricultural industry all over the globe is a matter of prime importance, and tractors and other agricultural implements all want petroleum products". Sir Cecil proceeded to warn his audience that, seen against the necessity of obtaining the supplies of petroleum required, if necessary from underneath the bed of the sea, "some of our old ideas about international law may be found to be inadequate, or even unsatisfactory." And he concluded: "If the world must have petroleum and petroleum is present in available quantities in the Continental Shelf, and the engineering experts say that from such sources it is a feasible proposition to obtain it, the necessary operations to obtain it will

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[5]) Speaking before the International Conference on the Peaceful Uses of Atomic Energy at Geneva, on August 11, 1955, Mr. R. A. Silow of the Food and Agriculture Organization of the United Nations said that this figure is now 100,000 a day.

be undertaken. That is the situation which international lawyers must face" [6]).

Professor (now Judge) Lauterpacht expressed the same sentiments, albeit with more reserve, when he wrote in an article in 1950 [7]): "It is unlikely that any purely doctrinal opposition of lawyers – even if otherwise well founded – would be able to stem the hitherto uniform progress of claims and developments, which are not intrinsically unreasonable, in the matter of the 'continental shelf' ". Indeed, the author felt able to give the positive assurance that "the attitude of international lawyers may be of assistance not only in containing such developments within the channels of moderation and order, but also in demonstrating that there is little or nothing in the properly conceived notion of the freedom of the seas which stands in the way of such developments". For, according to Professor Lauterpacht, the problem of reconciling claims and developments in regard to the continental shelf with the traditional legal principle of the freedom of the seas is one of the two main reasons why international lawyers, as distinct from students of politics and economics, have recently become so concerned with the question of the legal status of submarine areas [8]). The other reason is that this question raises "the more general issue of the adaptation of international law, labouring as it does under the absence of effective machinery for creating and changing the law, to fresh needs and conditions of the international community". Compared with this issue the problem of the legal status of the continental shelf is, as Professor Lauterpacht rightly said, "of limited compass" [9]). The general issue alone would be sufficient to explain and justify the interest taken in the particular problem of the sea-bed and subsoil by international lawyers of the greatest eminence. It should be added, however, that much of the literature is not of this degree of profundity, being concerned more with special conditions existing off the coasts of individual countries and national legislative or executive measures taken to deal with these conditions.

The distinguished Belgian jurist, and former member of the International Court of Justice, Professor Charles De Visscher, has recently alleged

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[6]) T. G. S. vol. 34 (1949), p. 158 f.

[7]) Loc. cit.

[8]) See, especially, Waldock, loc. cit. Undoubtedly the connexion with the traditional legal principle of the freedom of the seas explains much of the interest taken by international lawyers in the problem of the sea-bed. For, important as the latter problem is, it hardly compares in significance with the problem of the legal control of nuclear energy, in regard to which the contribution so far made by international lawyers has been rather limited.

[9]) Loc. cit.

with regard to the period before the First World War that, although this was indeed a classic period in the development of international law, the law which emerged from it possessed an excessively formal and static character. The reason for this, he says, lay in the tendency of the international lawyers of the time to attach too much importance to the formal processes of the elaboration of the law and too little to the ethical, political and social factors underlying the law [10]). The extracts from the articles of Sir Cecil Hurst and Professor Lauterpacht, which have been cited above, are proof of the concern of leading international lawyers of the present time that, whatever the defects of modern international law, this particular charge shall not be levelled against it. These extracts happen to be taken from the works of English writers. But international lawyers the world over have shown the same concern, although naturally the problem of the sea-bed and subsoil is one which has aroused the particular interest of writers who belong to countries which either have long maritime traditions or for some other reason are actively involved at present in this question.

The important articles already referred to, as well as other recent writings upon this subject, consist for the most part – quite naturally and properly – of attempts to analyse the many laws and proclamations and other instruments drawn up recently by Governments with regard to what are variously described as "submarine areas", "continental shelf", "sea-bed and subsoil", etc. The attempt is also made in these articles to estimate the legal effect of these instruments, taking account not only of the traditional principles relating to the freedom of the seas and the acquisition of territory, but also, in certain special cases, of the protests which the steps taken by some Governments have evoked from others. It is of course of such stuff that international law is made. Because, however, this particular method of elucidating the development of the law has already been so ably employed, it is not proposed to make use of it here to any great extent. It would indeed be somewhat tedious, as well as superfluous, to employ this method again, because the list of the instruments available for study – as well as of commentaries upon these instruments – grows longer and longer. Indeed, if this article is to be kept within reasonable proportions, it will be essential not only to devote less attention to this aspect of the matter than earlier writers have done, but also to begin by making certain assumptions.

The first of these assumptions is that international law will continue, within the foreseeable future, to govern, as it does at present, "relations between independent States" [11]). In other words, the hypothesis of a federal

10) Théories et réalités en droit international public (1953), p. 72.
11) The Lotus case (P.C.I.J., Series A, No. 10, p. 18).

World State is excluded. If such a hypothesis were to be realized, the nature of the problem would, from the legal point of view, be transformed. It would no longer be a question of framing rules of international law suitable to the utilization of the sea-bed and subsoil by an international society made up, as is the present one, of political entities enjoying "sovereign equality" [12]) and lacking any superior institutional authority. It would rather be a question, as it is to-day within the United States and in other federal countries, of apportioning the sea-bed and subsoil between the federal authority on the one hand and the authorities of the separate States on the other hand. Even the adoption of a quasi-federal solution, whereby control over the exploitation of the resources of the sea-bed and subsoil might be transferred to some supra-national authority – similar to the European Coal and Steel Community – would transform the nature of the problem. Such a hypothesis is equally excluded.

The second assumption is that international society as a whole, and certain individual States in particular, will continue to have need to utilize the sea-bed and subsoil, and to exploit its resources. If this were not so, these areas would give rise to few legal problems.

The problem, therefore, presents itself as one of framing rules of international law appropriate to the utilization of the sea-bed and subsoil, and the exploitation of their resources, in a society of independent States possessing "sovereign equality".

Certain other fundamental aspects of the problem must also be mentioned here. These include the fact that the rate of population growth, the pressure of population upon resources as a whole, and the dependence of communities upon maritime resources in particular, vary enormously from country to country. While such considerations are perhaps not directly relevant from the legal point of view [13]), they can nevertheless not be ignored by international lawyers inspired by sentiments such as those which moved the writers mentioned above, and which tend to move most modern students of international law. Moreover, there is direct legal relevance in the fact that the geological condition of the sea-bed varies greatly as between one coast

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[12]) Article 2 (1) of the Charter of the United Nations.

[13]) Nevertheless, in the Anglo-Norwegian Fisheries case, the International Court of Justice prefaced its decision with a reference to the fact that "In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing". This fact, the Court considered, was among "the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law". The Court referred elsewhere to "the vital needs of the population" as a factor which might "legitimately be taken into account" (I.C.J. Reports 1951, p. 116 at p. 128, 142).

and another [14]). It follows, therefore, that international lawyers can not afford to ignore, but must be prepared to acquaint themselves, at least to a limited degree, with the sciences of geology, geography, oceanography and marine biology, and perhaps other sciences also. All members of the profession owe a great debt to Captain M. W. Mouton of the Royal Netherlands Navy, who has not only made the most comprehensive survey so far of the legal problems connected with submarine areas, but who has also performed the additional service of presenting, in a form admirably suited to further legal study by others, some of the essential scientific data [15]).

It has already been stated that no attempt will be made in this article to analyse in great detail the many laws and proclamations and other instruments issued recently with regard to the sea-bed and subsoil, let alone the voluminous commentaries already made by lawyers upon these various instruments. Rather an attempt will be made to focus attention upon certain aspects of the problem which have perhaps received less attention so far. Particular regard will be paid to what may generally be described as the scientific aspects, in the belief that international law will never arrive at a solution of the problem which is both just and practical unless these are fully taken into account. This does not mean, however, that the importance of these aspects should be exaggerated. For example, it would be short-sighted folly to modify, merely on *a priori* or so-called "scientific" grounds, an important principle such as the freedom of the seas which has stood the test of time and has already contributed so much to human welfare. Modifications should only be made to so important a principle of international law if it can be shown by overwhelming evidence that that principle is no longer contributing, as once it did, to human welfare and that the proposed modifications are necessary in the general interest of mankind.

The arrangement of the article is as follows. It begins with a consideration of the geological and oceanographic aspects of the problem (Section

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[14]) In the case just mentioned the International Court of Justice equally considered among "the realities which must be borne in mind" various under-water features of the seas off the Norwegian coast, despite the fact that the dispute related to the delimitation of territorial waters and not to the sea-bed as such. The Court referred to "comparatively shallow banks, veritable under-water terraces which constitute fishing grounds where fish are particularly abundant" (ibid., p. 127). If such features are relevant to the delimitation of territorial waters – the United Kingdom had argued that they were not – obviously they are all the more relevant to the determination of the legal status of the sea-bed itself.

[15]) The Continental Shelf, 1952. This work was awarded the Grotius Prize, 1952, of the Institute of International Law. Mention should also be made of the valuable lectures delivered by Captain Mouton at the Academy of International Law at The Hague in 1954 (Recueil des Cours de l'Académie de Droit International, 85 [1954] [I], p. 347). Except where otherwise mentioned, references to the writings of Captain Mouton will be to the prize-winning book of 1952 rather than to the 1954 lectures.

II) and continues with a study of the biological aspects (Section III). The object of these two Sections is to examine the essential facts connected with the sea-bed and subsoil which give rise to issues requiring the application of principles of law. Then comes an analysis of the attitude of States (Section IV). Finally, the article concludes with an attempt to discover the rules of international law at present applicable (Section V).

Section II: The Geological and Oceanographic Aspects

In 1951, as part of its work on the codification of the régime of the high seas, the International Law Commission issued a report [16]) to which it annexed certain "Draft Articles on the Continental Shelf and Related Subjects". The Commission, in Article 1 of the draft, defined the term "continental shelf" as referring to "the sea-bed 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 sea-bed and subsoil". Explaining the term "continental shelf", the Commission said that the sense in which it used the term "departs from the geological concept of that term". The Commission justified its distinct use of the term with the comment that "The varied use of the term by scientists is in itself an obstacle to the adoption of the geological concept as a basis for legal regulation of the problem".

That the Commission's use of the term "continental shelf" differed from any geological concept – even allowing for disagreements among the geologists – was apparent from the text of Article 1 of the draft. For, in addition to the geological factor ("the sea-bed and subsoil of the submarine areas contiguous to the coast"), the Commission introduced a legal factor ("but outside the area of territorial waters"), and also what might be called a technical factor ("where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil"). The Commission had, therefore, to consider seriously whether it should use the term "continental shelf" at all. It decided to retain the term because it was "in current use". Presumably, the Commission meant that the term "continental shelf" was "in current use" in a non-scientific sense by Governments and by writers upon international law, in addition to being "in current use" – though in a different sense – by scientists. If that was so, it might have been better, in our submission, if at that relatively early stage the Commission had put the weight of its auhority behind an attempt to prevent any further

[16]) Report of the International Law Commission covering the work of its third session 16 May – 27 July, 1951. General Assembly Official Records: Sixth Session Supplement No. 9 (A/1858).

use of the term in an unscientific sense [17]). However that may be, the Commission continued, in its 1951 report, with the following commentary upon its use of the term "continental shelf". "The Commission", it was explained, "considered the possibility of adopting a fixed limit for the continental shelf in terms of the depth of the superjacent waters. It seems likely that a limit fixed at a point where the sea covering the continental shelf reaches a depth of 200 metres would at present be sufficient for all practical needs. This depth also coincides with that at which the continental shelf, in the geological sense, generally comes to an end and the continental slope begins, falling steeply to a great depth. The Commission felt, however, that such a limit would have the disadvantage of instability. Technical developments in the near future might make it possible to exploit resources of the sea-bed at a depth of over 200 metres."

This important passage in the Commission's 1951 report calls for a number of comments. The distinction between the continental shelf and the continental slope is one made by most geologists. Referring to the development of oceanographic research, Captain Mouton says:

> "One of the outstanding features of the sea-bottom relief was the fact that going from the shore towards the sea, the soundings showed that the depth increased slowly to a certain figure, not everywhere the same, but let us say for the time being about 200 metres, whereafter the depth increased more rapidly. In other words, generally speaking, it was found that the land shelves away to

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17) In their comments on the International Law Commission's draft articles of 1951, the Governments of Belgium, Israel, Norway and Sweden pleaded with the Commission to use some other term than "continental shelf". The Government of the United Kingdom, however, agreed that, "whatever the precise geological meaning of the term 'continental shelf', this term should continue to be used in international law to cover those submarine areas over which the coastal State (which may be an island as well as a State forming part of a 'continent') is entitled to exercise sovereignty". In its revised draft articles, issued in 1953, the Commission retained the term "continental shelf", explaining that "the wide acceptance of that term in the literature counselled its retention". While there is much to be said for the Commission's decision, we are inclined to agree with the thoughtful observations of the Government of Israel. That Government said in its comments:

"The science of the law has to work hand-in-hand with the physical sciences, for it is the application of these that makes possible the exploitation of the natural resources of the sea-bed and subsoil from which the legal interest in the matter derives. We are here dealing with a new sphere of human activity in which both the lawyer and the scientist are taking their first steps. They must work in harmony and mutual understanding, and the use by the lawyer and the scientist of identical terminology with differing connotation may lead in the future to serious misunderstandings and even disputes, and retard the healthy development of the law." (For the Commission's revised draft articles of 1953, as well as the comments of a number of Governments on the original draft articles of 1951, see the Report of the International Law Commission covering the work of its fifth session 1 June – 14 August, 1953. General Assembly Official Records: Eighth Session Supplement No. 9 [A/2456]).

the sea with a small angle or gradient to an average depth of 200 metres, after which the gradient increases rather rapidly to a steeper slope going down to ocean-depth. The isobath of 200 metres forms in this simplified picture an edge."

"The part of the sea-bottom between the shore and this edge is called the continental shelf" [18]).

By contrast, Captain Mouton defines the continental slope as "the part between the edge and the ocean-bottom" [19]).

The figure of 200 metres is of course only an average or approximation. Most authorities put the depth of "the first substantial fall-off" [20]) – a good expression for the point at which the continental shelf merges into the continental slope – at 100 fathoms (182.9 metres) [21]).

This difference of 17.1 metres is a relatively minor one, being caused largely by the use of different systems of measurement. A more serious divergence, however, is that not a few authorities place the depth of "the first subtantial fall-off" at only 70 fathoms (128.03 metres). This represents a considerable difference in depth as compared with the figure usually put forward, although the difference in terms of distance is as a rule less considerable. For, generally speaking, the continental shelf descends gently as far as depth of 50 fathoms (91.45 metres), then rather more steeply to a depth of 70 fathoms (128.03 metres), and then more steeply still. Thus, the difference involved, in terms of distance from the coast, between a depth of 70 fathoms and a depth of 100 fathoms is usually not great.

Defined as above, a continental shelf may be said to exist in most parts of the world. But lawyers must beware all the time of forming too simple a mental picture of the facts of oceanography. The variety of these facts is enormous. In some areas (e. g. the Persian Gulf, the Baltic Sea, the Aegean Sea and the Northern Adriatic) there is no continental shelf in the geological sense, because there is no "substantial fall-off" and the depth of the entire area concerned is less than 200 metres. In some cases, particularly off the coasts of Maine, Nova Scotia and Newfoundland, there is no gradual descent of the sea-bed, but rather a succession of ledges and canyons. In terms of distance the continental shelf varies between one kilometre and about a thousand kilometres from the coast. Thus there is an extensive shelf off the British Isles and Denmark, and a narrow one off Norway; an exten-

[18]) Op. cit., p. 6.

[19]) Ibid., p. 7.

[20]) This expression was used by J. Bourcart in Geographie du fond des mers. Etude du relief des océans (1949), p. 130. The actual French words are "la première rupture de pente importante". See Secretariat Memorandum, p. 50.

[21]) The English fathom of 1.829 metres is used here. As Captain Mouton points out, however, there are also Danish, Norwegian, Swedish, Spanish and Dutch fathoms, and possibly other fathoms as well (ibid., p. 13).

sive shelf off the east coast of North and South America and a narrow one off the west coast of these continents. Moreover, geologists warn of the existence not merely of a single continental shelf (from 0 to 200 metres), but possibly of a succession of continental shelves (200 metres to 500 metres; 500 metres to 1,000 metres; and so on).

As for the depth at which exploitation of the resources of the sea-bed and subsoil is possible, this technical question naturally turns on the type of exploitation envisaged. Where exploitation is by means of drilling or tunnelling from the shore, the problems involved are different from those arising where exploitation is by means of drilling from platforms mounted on the sea-bed. The latter of these two methods (i. e. drilling from platforms mounted on the sea-bed) is the more extensively used at present for the purpose of obtaining petroleum, and is apparently feasible, for this purpose, up to depths of about 30 metres. The former method (i. e. drilling or tunnelling from the shore) has been used for a long time up to a relatively small distance, in mining for coal off the coasts of Cornwall, Cumberland and Durham; in mining for iron, as at Diélette in the Cotentin; and in mining for tin in Sumatra [22]). In the case of petroleum the full potentialities of this type of exploitation are not likely to become apparent for some time, owing to its high cost. But, if the price of petroleum should ever justify its development, this method may well prove itself more efficient in the long run than the method of drilling from platforms mounted on the sea-bed [23]).

Despite the limitations of present methods of exploiting mineral resources lying beneath the waters of the sea, the Government of the French Republic, when commenting upon the International Law Commission's 1951 report, seems to have thought that the rate of technical progress is so fast that "it might be better to contemplate a specified depth-limit of, say, 300 metres,

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[22]) In the London "Daily Telegraph and Morning Post" of May 20, 1955, there appeared a photograph of a floating drilling-tower to be used for boring into the sea-bed to discover reserves of coal. In an explanatory article it was stated that attempts would be made by the National Coal Board, using this tower, to investigate the reserves of coal under the sea, particularly off the coasts of East Scotland, Durham and Northumberland. It was also stated that the first boring would be made 1¼ miles offshore in the Firth of Forth, but that, if this was successful, another boring would be made "about three miles out at sea to provide information about the levels and inclinations of the 600 million tons of coal estimated to lie under the sea in that area". Possible future boring of the undersea reserves of the Durham coalfield was also mentioned. The tower has a displacement of 750 tons, living quarters for a crew of 25, and can work in depths of up to 120 feet (20 fathoms or 36.6 metres).

[23]) Mouton, op. cit., p. 305. In addition to Captain Mouton's treatise, much valuable and easily intelligible information on the geological aspects of the problem of the sea-bed and subsoil is to be found in the Secretariat Memorandum. There appear to be good reasons for presuming much of this Memorandum to have been prepared by Professor Gidel (See Lauterpacht, op. cit., p. 408, n. 1).

to avoid having to change it too soon". The Commission, however, in its 1953 report, reaffirmed its view that a depth of 200 metres was "at present sufficient for all practical needs". It went further and, in response to the requests of many Governments, amended its previous draft by substituting this definite figure for the somewhat vague expression "where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil". In addition to these differences of view as to the depth at which the continental shelf may be said to come to an end, and also as to the depth up to which exploitation is, or may soon become, possible, there are differences of a more substantial nature. Most geologists, apparently, consider the continents, the continental shelves and the sea-bed and subsoil lying beneath the deep oceans to be constituted fundamentally of the same material. But there are some theories according to which the continents and the continental shelves are made up of material different from that which constitutes the sea-bed and subsoil lying beneath the deep oceans. These theories do not appear to be generally accepted, but, even if they were, it is doubtful what practical or juridical conclusions, if any, should be drawn from them. It is not at all likely that any possible difference in the composition of the continental masses as compared with the ocean-floor can compare in significance with the distinction, obvious to the layman, between land on the one hand and water on the other hand. It must be conceded, however, that phenomena such as drying shoals present awkward problems to the jurist who would seek to exaggerate even so simple distinction as that between land and water. There may, after all, be a wonderful unity in nature capable of defying all distinctions which jurists or anyone else find it convenient to draw.

Another question on which the experts are much divided is the explanation of the origin of the continental shelf and other submarine phenomena. According to one view, the continental shelf represents the restoration to the continents, in a submerged form and by a process of "marine attrition", of land formerly belonging to them but lost by erosion. According to another and somewhat similar theory, the continental shelf is an area gradually undergoing "accession" or "accretion" to the continent by means of a process of "marine sedimentation". According to yet another view, the continental shelf – and possibly also the other various shelves which are thought to exist at greater depths – were previously part of the various continents but were submerged one after the other by successive processes of "marine transgression" [24]).

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[24]) For a brief explanation of the various theories mentioned above see Secretariat Memorandum, p. 67–71.

Apart from a few exceptions, however, legal writers as a whole have not shown the same interest either in the ultimate explanation of submarine phenomena or in the exact physical nature of the bed of the sea and the subsoil, as they have in the fact of the contours of the sea-floor and particularly in the phenomenon of the continental shelf and the continental slope. Until recently at any rate precise scientific information on the more fundamental matters has been lacking. But it is clear that a difficult question, which arises in this connexion, is what, if any, is the distinction between the sea-bed and the subsoil. Do the terms "sea-bed" and "subsoil" have a precise scientific meaning? Or are they merely legal terms of art, introduced into the sphere of submarine law by jurists familiar with problems concerning the respective rights, in the matter of the ownership of minerals lying beneath areas of land, of surface-owners ond other possible claimants, such as concessionaires and the State?

According to Higgins and Colombos, "A clear distinction must be drawn between the bed of the sea and its subsoil. As regards the former, the better opinion appears to be that it is incapable of occupation by any State and that its legal status is the same as that of the waters of the open sea above it [25]). On the other hand, the subsoil under the bed of the sea may be considered capable of occupation" [26]). The same view is taken by Professor Gidel, who argues that there is a fundamental difference between the sea-bed and the subsoil. Works executed on the sea-bed, he says, necessarily involve repercussions, more or less pronounced, but inevitable, upon the right to use the high seas, whereas this is not so in the case of works executed in the subsoil. Whence it follows, the argument continues, that any interference with the sea-bed is incompatible with the principle of the freedom of the seas, whereas interference with the subsoil may be compatible with that principle [27]).

Another author who takes this view is Captain Mouton. Asking the question, "What are the resources of the sea-bed?" this author proceeds as follows: "The sea-bed is nothing else than the surface dividing the sea from the subsoil. But it is an evasive thing. If we dig into it, if we dredge sand or shells out of it, the material once forming part of that dividing surface is taken away, but the sea-bed is still there. The bottom of the pit we have made forms the new sea-bed. It is true that the sea-bed is the roof of the subsoil, but it is infinitely thin. Even if we take only a tiny quantity of

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25) The authors are, of course, writing of the sea-bed beneath the high seas, not beneath territorial waters.

26) The International Law of the Sea (1943), p. 54 f.

27) Op. cit., vol. 1, p. 507.

material from it, this material actually belongs to the subsoil. One could argue that in practice the upper layer is called sea-bed and the deeper layers subsoil. We would ask, how deep is this upper layer, and nobody could answer this question. If we dump sand or clay on the sea-bottom, the sea-bottom rises. In short the sea-bed is indestructible. How then can we extract resources from the sea-bed? If we dredge mud from the sea-bottom in order to extract tin-ore as is done in the drowned river-valleys in the Singkep tin concession in Indonesia, we do not take anything from the sea-bed, we only displace the sea-bed to a lower level. The material, the mud with the tin-ore we get to the surface, we appropriate, is in fact subsoil, and nothing else" [28]).

This very interesting argument is designed to show that "the status or régime of the sea-bed is very much akin to that of the high seas" and that "the sea-bed has much more in common with the high seas than with the subsoil". The reason, according to Captain Mouton, is that, when resources are taken from the bottom of the sea, the resources themselves are really taken from the subsoil and that, so far as the sea-bed is concerned, there is no occupation of it but "only a penetration necessary to get hold of the subsoil". This, the author says, is a form of u s e of the sea-bed, similar to the use of it made by a ship using an anchor or sounding lead whilst navigating the high seas [29]).

With respect, we submit that Captain Mouton's conclusions do not properly follow from his argument. Rather the conclusion which properly follows is that Captain Mouton's "evasive" yet "indestructible" sea-bed must be treated as part and parcel of the subsoil. Does not he himself say that the sea-bed is "the upper layer" of the subsoil and that material taken from the sea-bed "actually belongs to the subsoil"? We agree on this question with Young who says that the sea-bed and the subsoil "are but two aspects of the same thing" [30]). In particular, we consider that the sea-bed and subsoil (taken together) are capable of having resources which it is reasonable to describe as "resources of the sea-bed" [31]) rather than as "resources of the sea".

We have tended in this section to discuss the continental shelf as distinct from the sea-bed as a whole. We have seen that this shelf constitutes that portion of the bed of the sea which lies relatively close to land territory and is covered by water at the most not more than 200 metres deep. We have seen also that at present it is not feasible to exploit the mineral resources

[28]) Op. cit., p. 281 f.
[29]) Ibid., p. 282 f.
[30]) A.J.I.L. vol. 45 (1951), p. 227.
[31]) Including, of course, also the subsoil.

of the sea-bed and subsoil to any large extent at depths in excess of 30 metres, although optimists may hope in the not too distant future to exploit the whole area of the continental shelf and perhaps even some way beyond. There is also apparently good reason to believe that this area may be peculiarly rich in supplies of petroleum [32]). All this no doubt explains the peculiar interest taken at the moment, by Governments, business men and lawyers alike, in the continental shelf. It does not, however, in our opinion suffice fully to justify the view put forward by two professors that President Truman's proclamation of September 28, 1945, in regard to the continental shelf – which will be discussed below – constituted "one of the decisive acts of history, ranking with the discoveries of Colombus as a turning point in human destiny" [33]). Even some of the members of the International Law Commission seem to have felt overwhelmed by the significance and vastness of the problem confronting them [34]). It is as well, however, to maintain a sense of proportion. The continental shelves the world over apparently constitute but 7.6% of the surface of the oceans [35]). All the continents and continental shelves together make up only 34.7% of the surface of the earth, whilst 10.7% of the earth's surface consists of oceans between 200 and 3,000 metres deep, and as much as 54.6% of it of oceans more than 3,000 metres deep [36]). Rather the conclusion which, in our opinion, should be drawn from a study of the geological and oceanographic aspects of the problem of the sea-bed and subsoil is essentially a cautious one. We repeat the view, which we have already expressed [37]), that the exploitation of the continental shelf does not – at any rate so far – compare in significance with the growing utilization of nuclear energy. Post-war developments in regard to the continental shelf have hardly as yet acquired the character of a scientific revolution. Neither these developments, nor the information made available by modern science, seem to point decisively towards the adoption of any particular juridical solution of the problem. They may indeed indicate that certain juridical solutions are more appropriate than others, but it is doubtful if as yet they require any radical overhaul of traditional concepts concerning the régime of the high seas – provided that in other respects these concepts are still valid and useful. The present state of the knowledge derived from geology and oceanography

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[32]) Mouton, op. cit., p. 37–39.

[33]) Professors Clark and Renner in Saturday Evening Post, April 14, 1946.

[34]) See, for instance, the views of some members of the Commission summarized in Lauterpacht, op. cit., p. 377, n. 2.

[35]) Mouton, op. cit., p. 7.

[36]) Encyclopaedia Britannica (1945 ed.), vol. 16, p. 682.

[37]) Above, n. 8.

seems, therefore, to us to be such as to render justifiable an attitude of some reserve – though not, of course, of sheer negation – towards the claims of Governments to exercise sovereignty or other forms of exclusive control over submarine areas, in so far as these claims purport to be based on conclusions dawn from these two sciences. Nevertheless, no conclusion to be drawn from geology and oceanography is positively incompatible with the recognition of such claims, if there are other cogent considerations which require their recognition.

Section III: The Biological Aspect

In many of the discussions upon the continental shelf there has been a tendency to regard the expression "the natural resources of the sea-bed and subsoil", used both by the International Law Commission and some Governments, purely in terms of mineral resources, and above all of petroleum. The Government of the Netherlands even suggested that it should be made clear that the Draft Articles of the International Law Commission were intended to deal only with mineral resources. The Commission itself seems to have been of this opinion in 1951. It relegated to a separate article, under a separate heading of "related subjects", the question of sedentary fisheries. Explaining this decision, the Commission said: "The Commission considers that sedentary fisheries should be regulated independently of the problem of the continental shelf. The proposals relating to the continental shelf are concerned with the exploitation of the mineral resources of the subsoil, whereas, in the case of sedentary fisheries, the proposals refer to fisheries regarded as sedentary because of the species caught or the equipment used, e. g., stakes embedded in the sea-floor. This distinction justifies a division of the two problems".

In 1953, however, the Commission changed its opinion and made the following important statement:

> "The Commission decided, after considerable discussion, to retain the term 'natural resources' as distinguished from the more limited term 'mineral resources'. In its previous draft the Commission only considered mineral resources, and certain members proposed adhering to that course. The Commission, however, came to the conclusion that the products of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the régime adopted and that this aim could be achieved by using the term 'natural resources'. It is clearly understood, however, that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat

at the bottom of the sea or are bred there. Nor do these rights cover objects such as wrecked ships and their cargoes (including bullion) lying on the sea-bed or covered by the sand of the subsoil".

Finally, the Commission expressed the view that, apart from special cases where the nationals of other States had already acquired rights with regard to sedentary fisheries, "the sovereign rights of the coastal State over its continental shelf cover also sedentary fisheries". This, the Commission explained, was the reason why it was not thought necessary "to retain, among the articles devoted to the resources of the sea, an article on sedentary fisheries".

The first conclusion to be drawn from this change of mind on the part of the Commission is that it was here confronted with a question of exceptional technical difficulty. The second conclusion is that part of the difficulty was of the Commission's own making in that no satisfactory definition was given of the term "sedentary fisheries". It makes no difference that the term is a familiar one in international law because, unless it be clearly defined, its very familiarity is all the more likely to be a reason for its being understood in more senses than one.

In the Commission's view a fishery is sedentary "because of the species caught or the equipment used, e. g., stakes embedded in the sea-floor". Also, it seems that, if the species caught were "permanently attached" to the sea-bed, the Commission regards them as being "natural resources of the sea-bed" – with all the significance which that expression has come to acquire in international law. Clearly, in defining a sedentary fishery, the Commission was influenced by Professor G i d e l, who once wrote:

> « Sous ce nom on peut désigner deux sortes de pêcheries: ou bien celles qui comportent la cueillette d'espèces fixées au sol au aux accidents du relief marin; ou bien celles qui ont pour but la capture d'espèces mobiles mais qui, pour cette capture, utilisent des installations fixes, telles que des pieux plantés dans le fond de la mer » [38]).

In our view it is inappropriate to describe a fishery as "sedentary" merely because swimming fish are caught by means of stakes driven into the sea-bed. But it is appropriate to describe a fishery as "sedentary" if it involves the gathering of species attached to the sea-bed *(la cueillette d'espèces fixées au sol)*.

Similarly, it is inappropriate to describe as "natural resources of the sea-bed" rather than as "natural resources of the sea" swimming fish caught by means of stakes driven into the sea-bed. The question, however, whether marine species attached to the sea-bed are to be regarded as "natural resources of the sea-bed" or as "natural resources of the sea" is a very difficult

[38]) Op. cit., vol. 1, p. 488.

one. After some hesitation the International Law Commission seems to have decided – as we have just seen – that certain forms of marine life are better described as "natural resources of the sea-bed" rather than as "natural resources of the sea". The Commission unfortunately did not enumerate or specify the species which should be regarded as "natural resources of the sea-bed", althought it indicated that the principal characteristic of such species was that they should be "permanently attached to the bed of the sea" and that the so-called "bottom fish" were not to be so regarded. Here too the Commission's line of reasoning is not new. In a famous article, written as long ago as 1923–4, Sir Cecil H u r s t expressed the view that "Wherever it can be shown that particular oyster beds, pearl banks, chank fisheries, sponge fisheries or whatever may be the particular form of sedentary fishery in question outside the three-mile limit have always been kept in occupation by the Sovereign of the adjacent land, ownership of the soil of the bed of the sea where the fishery was situated may be presumed, and the exclusive right to the produce to be obtained from these fisheries may be based on their being a produce of the soil". And, he continued, "It cannot be too strongly emphasized that the recognition of special property rights in particular areas of the bed of the sea outside the marginal belt for the purpose of sedentary fisheries does not conflict in any way with the common enjoyment by all mankind of the right of navigation of the waters lying over those beds or banks. Nor does it entail the recognition of any special or exclusive right to the capture of swimming fish over or around these beds or banks . . . The claim to the exclusive ownership of a portion of the bed of the sea and to the wealth which it produces in the form of pearl oysters, chanks, coral, sponges or other f r u c t u s of the soil is not inconsistent with the universal right of navigation in the open sea or with the common right of the public to fish in the high seas" [39]).

These views of Sir Cecil Hurst have been criticised by a number of authors, notably by G i d e l [40]), who says that it is impossible to argue that the exclusive rights of a single State over sedentary fisheries outside the three mile limit are compatible with the principle of the freedom of the seas, according to which principle – international conventions apart – the fishermen of all nations have an unrestricted right to use the high seas for the purpose of fishing. Sedentary fisheries, according to Professor Gidel, are only admissible as an exception to the principle of the freedom of the seas, the conditions of such exception being "l'usage effectif et prolongé d'une

[39]) B.Y.I.L. vol. 4 (1923/24), p. 34 at p. 40, 42 f.

[40]) And also, not surprisingly, by the author of the Secretariat Memorandum (see n. 23, above).

partie de la haute mer aux fins de pêcheries sédentaires, sans que les autres Etats, et spécialement ceux qui pourraient du fait de leur situation géographique faire valoir des objections particulières, aient opposé à cet usage des protestations formelles et persistantes" [41]).

The question whether the exclusive control of a single State over sedentary fisheries outside the limit of territorial waters is more accurately described as an exception to, rather than as a separate principle completely compatible with, the principle of the freedom of the seas may seem to be a rather formal one. Nevertheless, underlying this question, is the more substantial question whether the sea-bed is to be regarded as merely the upper layer of the subsoil and therefore capable – together with the subsoil – of being subject to a legal régime different from that of the high seas; or whether the sea-bed is to be regarded as having more in common with the high seas than the subsoil and, therefore, from the juridical point of view, subject to the same régime as the high seas. On this question we have already indicated that, though we are somewhat suspicious of all distinctions where natural phenomena are involved, we are inclined to the view that, (i), geologically, the sea-bed is more properly regarded as being part and parcel of the subsoil than treated as having more in common with the superjacent waters than with the subsoil; and therefore, (ii), that it is intrinsically reasonable to distinguish between "resources of the sea-bed" and "resources of the sea".

Captain Mouton has advanced a number of arguments to show why it is wrong, in principle, to regard sedentary fisheries – even in the sense of species attached to the sea-bed – as "natural resources of the sea-bed". Criticizing Sir Cecil Hurst's view that "the exclusive right to the produce to be obtained from these fisheries may be based on their being a produce of the soil", Captain Mouton writes as follows:

> "The biological facts are quite different. We cannot compare the sea-bed where mussels or oysters or sea-cucumbers [42]) or sponges happen to be with a garden and the animals with real cucumbers, pumpkins or other fruit growing in that garden. The animals do not grow in the soil with roots, they do not derive food from the soil, but from the water of the sea covering the sea-bed, they are not even in all cases permanently attached to the soil . . . Mussels do move about as long as they are not attached to a cluster of other mussels. Oyster-larvae, when trying to settle down, do detach themselves, when the spot is not to their liking and can repeat this several times, until they 'anchor' forever, showing their 'animus manendi', and thus obtaining 'domicile'. The sponges of course are similarly attached to the sea-bed. The sea-cucumbers or trepang

41) Op cit., vol. 1, p. 500 f.
42) Sometimes called "trepang" or "bêche-de-mer".

on the contrary move freely about without ever settling down. Therefore there is no question of 'products of the soil' . . . [43]).

It may be conceded that Hurst's point about sedentary fisheries being "a produce of the soil" is misconceived. It is also not entirely clear which, in Hurst's view, comes first, the ownership of the sea-bed or the ownership of the sedentary fisheries. The argument is equally capable of the interpretation that ownership of the sea-bed follows from ownership of the sedentary fisheries or that ownership of the sedentary fisheries follows from ownership of the sea-bed. In our view, the real point about sedentary fisheries is not so much that the species are products of the soil in the sense of deriving food from the soil as that they are attached to the soil *(fixées au sol)* and that they are reduced to the use of man by a process of picking or gathering *(cueillette)* rather than by a process of catching *(capture)*. Where species are thus attached to the sea-bed it does not seem to us wrong, in principle, to describe them as "resources of the sea-bed" rather than as "resources of the sea", notwithstanding the fact that they are dependent for their growth upon the waters of the sea. Crops grown on the land are nonetheless "resources of the land" despite the fact that they depend for their growth upon rays from the sun.

Moreover, Captain Mouton's argument does not appear to us to be entirely consistent. He admits that sponges are "attached to the sea-bed" and that oysters "anchor for ever". Elsewhere, contrasting oysters with fish which merely live at the bottom of the sea, without being attached to the sea-bed (i. e. "bottom fish"), he says:

". . . once settled down we can say, that, because of the place where it settled down the oyster becomes the property of the coastal State, which had a prescriptive right. Here is the difference with bottom-fish: we can say that an oyster or sponge attached to a bank i s somebody's property, whereas the fish can only b e c o m e somebody's property when caught" [44]). This reasoning appears to us to be valid, but incompatible with the thesis that sedentary fisheries are not "natural resources of the sea-bed". The true position appears to us to be that, while again it behoves us to be careful of distinctions where natural phenomena are concerned, there is nothing wrong in principle between distinguishing between "natural resources of the sea-bed" and "natural resources of the sea". That is to say, certain types of marine life are capable of being regarded as "natural resources of the sea-bed" and others as "natural resources of the sea". Where the line should be drawn between these two types of resources is a matter to be determined,

[43]) Op. cit., p. 150.
[44]) Ibid., p. 155.

upon biological and other considerations, in each particular case. It may be that – for the reasons advanced by Captain Mouton – only relatively few species should be included in the former, rather than in the latter, category.

We are, however, entirely convinced by another, and considerably more important, argument put forward by Captain Mouton. We refer to his contention that there is no necessary biological connexion between the existence of a continental shelf and the existence of large populations of fish, even though it frequently happens in practice that, where there is a continental shelf, fish populations are large. This, however, would appear to be the result not so much of the presence of the continental shelf as of the presence of other conditions, particularly the circulation of the waters by convection currents and upwelling. Favourable conditions for the production of fish are usually found near the coast – where of course the water will tend to be shallow – but this is not necessarily because the water is shallow. Recent evidence has tended to indicate that fish populations in the deep oceans may be larger than was previously supposed [45]). We do not doubt that the fact that these favourable conditions so often exist near the coast is a matter which international law should take into account when it is concerning itself with the regulation of fisheries in general. But it seems clear to us that there is no link between the sea-bed and the production of fish such as would justify a legal claim by a State possessing sovereignty over the sea-bed to exercise exclusive control over fish inhabiting the waters above that sea-bed; or such as would justify a State enjoying the right to regulate the fisheries in certain areas of the sea in claiming on that account alone to possess sovereignty over the sea-bed lying under the waters concerned. The lack of any such direct link between the sea-bed and the production of fish seems to us to apply to the case of the so-called "bottom fish" (e. g. plaice, haddock, halibut, cod, flounder and whiting) just as much as to the case of the so-called "surface fish" (e. g. herring, sardine, mackerel, anchovy, tuna, barracuda and salmon). With the so-called "sedentary fisheries", however, as we have just seen, different conditions apply. There, by virtue of the fact that they are attached to the sea-bed, certain species may be regarded as "natural resources of the sea-bed" so that, in the ordinary course of events, and unless he has disposed of them by way of express grant, he who is legally owner of the sea-bed will also be owner of all natural resources found there.

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[45]) Captain Mouton refers to successful catches of tuna in the Pacific Ocean and to the fact that the Japanese have caught "good edible fish taken far from land and from ocean depths up to 500 fathoms (Ibid., p. 57, and see, generally, p. 46–58).

Section IV. The Attitude of States

The attitude of States to the problem of the legal status of the sea-bed and subsoil is to be discovered largely by studying (A) their national legislation and international agreements, (B) their diplomatic notes, and (C) their comments on the draft articles of the International Law Commission. We have already indicated that we do not propose to analyse the national legislation and the international agreements of States to the same extent as this has been done by other authors. At the same time, since this source undoubtedly constitutes the primary indication of the attitude of States [46]), it will be necessary to consider it at least in outline.

Where a State has made known its attitude by legislation or through a treaty, it will usually be found that its diplomatic notes and its comments on the work of the International Law Commission merely constitute a reaffirmation of the attitude already adopted. Nevertheless, these latter sources are not unimportant, partly because they sometimes clarify the attitude adopted, though not always clearly expressed, by States in other instruments; and partly because, in the case of States who have not legislated or entered into treaties on this question, they constitute the only indication of the attitude of such States in regard to the legal status of the sea-bed and subsoil.

(A) National Legislation and International Agreements

The *United Nations Legislative Series*, in its volume "Laws and Regulations on the Régime of the High Seas" published in 1951 [47]), contains the texts of forty-six national laws, decrees and other acts and one international treaty relating directly or indirectly to the bed of the sea. With four exceptions, of which only one is of major international importance [48]),

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[46]) In the Minquiers and Ecrehos case the International Court of Justice said that it attached "in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration and to legislation" (I.C.J. Reports 1953, p. 47 at p. 65).

[47]) This volume will subsequently be referred to under its reference number, namely, ST/LEG/SER.B/1 of January 11, 1951.

[48]) The exception of major international importance is the Treaty of February 26, 1942, between the United Kingdom and Venezuela relating to the submarine areas of the Gulf of Paria. The other exceptions are (i) a Portuguese decree of 1910 prohibiting trawling off the coast of Portugal at depths of less than 100 fathoms; (ii) an Act of the Legislature of the State of Texas of 1941 proclaiming ownership of the waters (including the sea-bed) of the Gulf of Mexico up to a distance of 27 miles; and (iii) an Act of the Union of South Africa of 1935 declaring the Governor-General of the Union to be the owner of the sea and the sea-bed within a limit of 3 miles from the coast.

all these instruments bear a date between 1945 and 1951, which will certainly go down in the history of international law as a most important formative period in the development of the law of the sea.

The laws and decrees and other acts contained in the volume just mentioned emanated from Argentina, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Iceland, Mexico, Nicaragua, Pakistan, Panama, Peru, the Philippines, Portugal, Saudi Arabia, the Union of South Africa, the United Kingdom, and the United States (including an Act of the State of Texas). So far as the United Kingdom was concerned, not one single piece of legislation related to the metropolitan territory of Great Britain and Northern Ireland. The legislation rather related to colonies such as the Bahamas, British Honduras, the Falkland Islands, Jamaica, and Trinidad and Tobago; to the Trucial States (Abu Dhabi, Ajman, Dubai, Ras al Khaimah, Sharjah, and Umm al Qaiwain); or to other States for the conduct of whose international relations the United Kingdom is responsible (e. g. Bahrain, Kuwait and Qatar). The single international treaty was that of February 26, 1942, between the United Kingdom and Venezuela relating to the submarine areas of the Gulf of Paria.

Since the publication of the volume of the *United Nations Legislative Series* in 1951 certain other instruments have been published. These include a proclamation issued by South Korea [49]) on January 18, 1952, and one by Israel [50]) on August 3 of the same year; the Australian Pearl Fisheries Acts of 1952 and 1953, as well as two proclamations issued by the Governor-General of the Commonwealth of Australia on September 11, 1953 and another proclamation from the same source on September 25, 1953; Orders in Council issued by the United Kingdom Government in 1954 relating to North Borneo, Sarawak and British Guiana; and the Treaty of Santiago concluded between Chile, Ecuador and Peru on August 18, 1952. These instruments, as well as those published in the United Nations volume, will be considered presently.

According to Captain Mouton, the legislation of States can be divided into three categories. First, there is a group of countries whose claims are limited to certain rights over the mineral resources of the continental shelf outside territorial waters. Second, there is a group of countries who claim rights, not merely over the mineral resources of the continental shelf outside territorial waters, but also over all the natural resources of that shelf. In some cases, though not in all, the rights claimed by the countries of this group amount expressly to full sovereignty over the sea-bed and

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[49]) Contemporary Japan, vol. 22 (1953), p. 389 f.
[50]) A.J.I.L., vol. 48 (1954) Supplement, p. 103.

subsoil of the continental shelf outside territorial waters. Third, there is a group of countries whose claims amount in fact, if not in name, to an extension of territorial waters, either as far as the edge of the continental shelf or, in cases where the edge of the continental shelf is not very far from the coast, to distances – of the order of 200 miles or so – far exceeding anything claimed in the past. This group, however, usually invokes the continental shelf as a justification of the claims made, though other reasons are put forward as well [51]).

This classification is useful provided it is remembered that there are sometimes variations of practice within each category and also that it is not always easy to decide whether the legislation of a particular country should be placed in the one or the other category.

It will be convenient, in the main, to study the claims of these three groups of countries in the order of the magnitude of the claims put forward. It is common ground among all three groups that the coastal State is entitled to sovereignty over the sea-bed and subsoil, as well as over the waters themselves, within the limit of territorial waters [52]). It is also common ground among the three groups that the coastal State is entitled to sovereignty over a belt of territorial waters extending for a minimum distance of at least three miles from the coast. Differences of view exist, however, not only as to the nature and extent of the rights allowed to the coastal State in respect of the sea-bed and subsoil beyond territorial waters, but also as to the permitted maximum extent of territorial waters themselves.

Logically, the question of the maximum distance which territorial waters may extend from the coast should be discussed, and if possible decided, before we pass on to the other question, namely, the nature and extent of the rights allowed to the coastal State in respect of the sea-bed and subsoil beyond territorial waters. If, for instance, it were the law that each State were allowed to extend its territorial waters as far as the edge of the continental shelf, it would follow that the question of rights over the continental shelf would be entirely merged in the question of the extent of

[51]) Recueil des Cours de l'Académie de Droit International, 85 (1954) (1), p. 367–379, 424–436.

[52]) In his Individual Opinion in the Anglo-Norwegian Fisheries case Judge Alvarez said that the coastal State has duties in respect of, as well as rights over, its territorial sea (I.C.J. Reports 1951, p. 116 at p. 150). In his Dissenting Opinion in the same case Sir Arnold (now Lord) McNair said the possession of territorial waters is "not optional, not dependent upon the will of the State, but compulsory" in the case of "every State whose land territory is at any place washed by the sea" (ibid., p. 160). It appears, therefore, that it is not just a case of the coastal State being entitled to sovereignty over territorial waters (including the sea-bed and subsoil beneath them), but even of its having to accept such sovereignty and the responsibilities that go with it.

territorial waters and would cease to exist as a separate question. It is, however, an unfortunate fact that few questions in international law are so difficult and complex as the question of the breadth of territorial waters. To broach that question here would result in this article exceeding all reasonable proportions.

At the same time no article on the question of rights over the sea-bed and subsoil can proceed on a realistic basis unless the writer is prepared to give some indication of his views on the essentially preliminary question of the breadth of territorial waters. The present writer, therefore, takes as a starting-point the assumption that, not only is the breadth of territorial waters a matter regulated by international law, but also that the breadth permitted by international law is, in principle, three miles and more extensive claims require special justification [53]).

We shall begin with the group of countries whose claims in respect of the continental shelf are least extensive – i. e. those countries whose claims are limited to certain rights over the mineral resources of the continental shelf. This group, according to Captain Mouton, consists of Guatemala, the Philippines, and the United States of America. Thus the Guatemalan Petroleum Law of August 30, 1949, declares that "All deposits or natural reserves of petroleum within the land or sea boundaries of the Republic, up to the extremity of the continental shelf or platform of the Republic, shall, whether they lie on or under the earth, lakes, rivers or seas, be the property of the nation . . ." The legislation is clearly limited to petroleum. Similarly the Philippine Petroleum Act of June 18, 1949, provides that "All natural deposits or occurrences of petroleum or natural gas in public and/or private

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53) The justification of this assumption is as follows. In the Anglo-Norwegian Fisheries case the Court said: "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law" (ibid., p. 132). Moreover, after much toil and labour the International Law Commission has now arrived at the following conclusions in regard to the breadth of the territorial sea. "1. The Commission recognizes that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles. 2. The Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles. 3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles" (See Article 3 of Draft Articles on the Régime of the Territorial Sea published in the Report of the International Law Commission covering the work of its seventh session, 2 May – 8 July, 1955. A/CN. 4/94). The decisive conclusion here is, in our view, that which says that "international law does not require States to recognize a breadth beyond three miles".

lands in the Philippines, whether found in, on or under the surface of dry lands, creeks, rivers, lakes, or other submerged lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries, belong to the State, inalienably and imprescriptibly".

With regard to the claims of Guatemala and the Philippines, however, it is pertinent to draw attention to other evidence which tends to show that these claims are not so modest as might appear at first sight. Guatemala, apparently, claims a territorial sea of 12 miles [54]), whilst the Philippine claim in the matter of territorial waters seems to be so vast that, in the opinion of the Government of that country, "the extension inside Philippine territorial waters of the Bornean shelf (in the geological sense) cannot . . . be considered continental shelf" in the International Law Commission's sense of "the sea-bed and subsoil of the submarine areas contiguous to the coast, but *outside the area of territorial waters*", but is rather "a submarine area inside Philippine territorial waters, and therefore subject to the sovereignty of the Republic of the Philippines" [55]).

Undoubtely what gives real importance to Captain Mouton's first group of countries is the fact that he includes the United States of America in that group. We, however, think that the United States is more properly classified along with the countries of the second group. Since the exact nature of the United States claim is a matter of much controversy, we shall defer consideration of it – as well as of the Australian claim, the nature of which is also controversial – until we have discussed the principal characteristics of the claims of all three groups.

If it really be the case that the United States is more properly classified among the countries of the second group, it may well be asked if there is any purpose in maintaining the distinction between the first and second groups, i. e. the distinction between countries whose claims are limited to certain rights over the mineral resources of the continental shelf outside territorial waters, and countries who claim rights, not merely over the mineral resources of the continental shelf outside territorial waters, but also

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[54]) See I.C.J., Pleadings, Oral Arguments, Documents; Fisheries Case (United Kingdom *v.* Norway), vol. III, p. 691.

[55]) See the comments of the Government of the Philippines on the draft articles of the International Law Commission on the continental shelf and related subjects, published in the Report of the International Law Commission covering the work of its fifth session 1 June – 14 August, 1953, General Assembly Official Records: Eighth Session Supplement No. 9 (A/2456). Wherever, later in this article, mention is made of the comments of Governments on these draft articles, the reference is to the same source.

over all the natural resources of that shelf. Although the position is somewhat obscure, it would appear – as we have just seen – that the Philippines ought to be included in the third group rather than in the first. That would leave only Guatemala in the first group, and even Guatemala has somewhat compromised any right she might otherwise have to be considered among the countries, whose claims in the matter of the continental shelf are least in the order of magnitude, by claiming a territorial sea of 12 miles.

It may be conceded that the distinction between the first group and the second group is far less marked than that between the second group and the third group. As a matter of practice it would be difficult for a country to assert a claim to the mineral resources of the continental shelf without also exercising control over all the natural resources of that shelf. Still, since the distinction between the first and the second groups appears to be a theoretically valid one, and since one or two countries – possibly Guatemala – may now, or may at some future time, belong to this group, we shall leave undisturbed Captain Mouton's basic classification of the various claims into these three groups.

We come now to the second group. There is no doubt that the United Kingdom and various other countries closely associated with it belong to this group. Our consideration of the United Kingdom's practice in this matter may begin with the Treaty with Venezuela of February 26, 1942, relating to the submarine areas of the Gulf of Paria. In this Treaty the United Kingdom and Venezuela drew certain lines across the Gulf of Paria and declared that they would "not assert any claim to sovereignty or control over those parts of the submarine areas of the Gulf of Paria" which lay on the other side of those lines. They also stated that nothing in the Treaty was to affect in any way either "the status of the islands, islets or rocks above the surface of the sea together with the territorial waters thereof" or "the status of the waters of the Gulf of Paria or any rights of passage or navigation on the surface of the seas outside the territorial waters of the contracting parties". But there was a clear implication that the status of the submarine areas in question was affected in the sense that each party was free to claim sovereignty over the sea-bed and subsoil lying outside its territorial waters on the one hand but inside the treaty lines on the other hand. That this implication was correct was confirmed by the Submarine Areas of the Gulf of Paria (Annexation) Order of August 6, 1942, under which the United Kingdom declared that the submarine areas on the Trinidad side of the lines – defined as "the sea-bed and subsoil beneath the waters, excluding territorial waters" – "shall be annexed to and form part of His Majesty's dominions and shall be attached to the Colony of Trinidad and

Tobago for administrative purposes, and the said submarine areas are annexed and attached accordingly" [56]).

That it was, and is, the policy of the United Kingdom Government to claim sovereignty over the sea-bed and subsoil of the submarine areas which are of concern to it is clear from a number of Orders in Council issued subsequent to 1942. On November 26, 1948, there was issued the Bahamas (Alteration of Boundaries) Order in Council, 1948, in which it was provided that "The boundaries of the Colony of the Bahamas are hereby extended to include the area of the continental shelf which lies beneath the sea contiguous to the coasts of the Bahamas", although again, as in the case of the Gulf of Paria, it was provided that "Nothing in this Order shall be deemed to affect the character as high seas of any waters above the continental shelf and outside the limits of territorial waters". On the same day a similar Order in Council was issued in respect of Jamaica.

On October 9, 1950, an Order in Council in precisely the same terms was issued in respect of British Honduras. But the Order in respect of the Falkland Islands, issued on December 21, 1950, differed in that, instead of the expression "the area of the continental shelf which lies beneath the sea", it used the expression "the area of the continental shelf being the sea-bed and its subsoil". More important, in the case of the Falkland Islands the area annexed was precisely defined by reference to charts, and it was expressly stated as extending as far as the 100 fathom line. In the other Orders issued by the United Kingdom Government no indication was given as to the depths up to which sovereignty was claimed over the areas in question. But having regard to the Falkland Islands (Continental Shelf) Order in Council of December 21, 1950, and to the attitude taken up by the United Kingdom Government in its comments on the 1951 report of the International Law Commission, it is not unreasonable to hold that in every case the claim to sovereignty extends as far as the 100 fathom line [57]).

In the Orders in Council issued in 1954 relating to Sarawak and North Borneo (the Orders of June 24) and to British Guiana (the Order of Oc-

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[56]) It would therefore seem reasonable to include Venezuela also as belonging to the second group of countries.

[57]) In these comments the United Kingdom Government said that, in its view, "every State is entitled to exercise sovereignty over the sea-bed and subsoil off its coasts as far as the first point at which the depth of the water becomes 100 fathoms, regardless of the fact whether this sea-bed and subsoil constitute a continental shelf in the geological sense or not". This statement is possibly even more important for the reason that in it the United Kingdom Government seems to have put on record the view that sovereignty over the sea-bed and subsoil "as far as the first point at which the depth of the water becomes 100 fathoms" vests *ipso jure* in the littoral State, independent of any "occupation", effective or even fictitious.

tober 19) the expression "the area of the continental shelf being the sea-bed and its subsoil" was retained, but there was no mention of the depths up to which the claims were made. However, the considerations just mentioned would seem to apply. It is significant that all these Orders in Council from 1942 onwards were described as being "made by His (Her) Majesty, in pursuance of the powers conferred upon Him (Her) by the Colonial Boundaries Act, 1895". Reference to this Act is a clear indication that there was an intention to annex in sovereignty. But in all the United Kingdom Orders in Council it was expressly declared that there was no intention of proclaiming sovereignty over the waters above the continental shelf and outside territorial waters.

Not surprisingly, in view of the political connexion with the United Kingdom, the legislation of the Trucial States and of the States of Bahrain, Kuwait and Qatar may be classified in the second group. Thus the Ruler of Abu Dhabi proclaims that "the sea-bed and subsoil lying beneath the high seas in the Persian Gulf contiguous to the territorial waters of Abu Dhabi and extending seaward to boundaries to be determined more precisely, as occasion arises, on equitable principles, by us after consultation with the neighbouring States, appertain to the land of Abu Dhabi and are subject to its exclusive jurisdiction and control". Any intention of affecting the status of the high seas or "the fishing or traditional pearling rights in such waters" is expressly excluded. The proclamations of the other Rulers of the Trucial States are in similar form, and only minor variations exist in the proclamations of the Rulers of Bahrain, Kuwait and Qatar. The emphasis upon the necessity of determining the boundaries of the continental shelf by agreement with neighbouring States and upon preserving intact "fishing and traditional pearling rights" is to be explained by reference to the geography and history of the Persian Gulf.

Also to be included in the second group are Brazil, who has proclaimed that "that part of the continental shelf which adjoins the continental and insular territory of Brazil is integrated into that territory . . . . ."; Israel who claims that "The territory of the State of Israel shall include the sea-bed and the subsoil of the submarine areas contiguous to the coasts of Israel and outside the territorial waters to the extent that the depth of the superjacent waters admits of the exploitation of the natural resources of those areas"; Nicaragua who claims that the national territory comprises "the adjacent islands, the subsoil, the territorial waters, the continental shelf, the submerged foundations, the air space, and the stratosphere"; Pakistan who has declared that "the sea-bed along the coasts of Pakistan extending to the one hundred fathom contour into the open sea shall . . . . . be included in the

territories of Pakistan"; and Saudi Arabia who claims that "the subsoil and sea-bed of those areas of the Persian Gulf seaward from the coastal sea of Saudi Arabia but contiguous to its coasts, are declared to appertain to the Kingdom of Saudi Arabia and to be subject to its jurisdiction and control". In all these cases the status of the superjacent waters was left unaffected.

We come now to the third group of countries. This group consists of Argentina, who claims sovereignty over the continental shelf and also over the "epicontinental sea" – defined as "the waters covering the submarine platform"; Chile, who claims (i) sovereignty over "all the continental shelf adjacent to the continental and island coasts of its national territory, whatever may be their depth below the sea, and claims by consequence all the natural riches which exist on the said shelf, both in and under it, known or to be discovered"; (ii) sovereignty over "the seas adjacent to its coasts whatever may be their depths, and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas, placing within the control of the government especially all fisheries and whaling activities with the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of the said riches to the detriment of the country and the American continent" [58]); and (iii) in consequence of the sovereignty claimed under (ii), the right to declare "protection zones for whaling and deep sea fishery" extending for 200 miles from the coast; Costa Rica, Honduras and Peru, whose claims are very similar to Chile's; Ecuador who claims that the continental shelf up to a depth of 200 metres "and all or any part of the wealth it contains, belong to the State, which shall exercise the right of use and control to the extent necessary to ensure the conservation of the said property and the control and protection of the fisheries appertaining thereto"; El Salvador, who claims sovereignty over "the adjacent seas to a distance of 200 sea miles from low-water line and the corresponding air space, subsoil and continental shelf"; Iceland, who has authorized her Ministry of Fisheries to "issue regulations establishing explicitly bounded conservation zones within the limits of the continental shelf of Iceland, wherein all fisheries shall be subject to Icelandic rules and control"; Mexico, who "lays claim to the whole of the continental platform or shelf adjoining

58) The translation here is taken from ST/LEG/SER.B 1 of January 11, 1951. Captain Mouton suggests good reasons for preferring, in (ii) the translation "to the full area necessary" to the translation "within those limits necessary" (op. cit., p. 82). It also seems to us that in (i) the expression "whatever may be their depth below the sea" should read "whatever may be its depth below the sea".

its coast line and to each and all of the natural resources existing there, whether known or unknown", and who apparently includes "high-seas fisheries" among the resources in question; Panama who claims sovereignty over the continental shelf and has also declared that "for the purposes of fisheries in general, national jurisdiction over the territorial waters of the Republic extends to all the space above the sea-bed of the submarine continental shelf"; and South Korea, who claims national sovereignty over the continental shelf "no matter how deep it may be" and also over the adjacent seas "no matter what their depths may be" [59]).

Generally speaking, countries in the third group have disclaimed any intention of seeking to interfere with the rights of international navigation in the waters affected by their various decrees and proclamations. These disclaimers may be accepted. At the same time we find it impossible to accept them when they extend – as they sometimes do – to a denial that any extension of territorial waters is intended. The majority of these claims seem to us to imply, even if they do not publicly proclaim, an extension of territorial waters beyond the normal three mile limit. Sometimes the extension is as far as 200 miles; sometimes it is far as the edge of the continental shelf, however far that may be. Certainly, Chile, Ecuador and Peru did not disguise their intention of extending their territorial waters when they concluded the Treaty of Santiago on August 17, 1952. In this Treaty the three countries declared (i) that "the geological and biological factors which condition the existence, conservation, and development of the maritime fauna and flora in the waters adjacent to the coasts of the declarer countries, render the old extent of the territorial sea and of the contiguous zone insufficient for the conservation, development, and exploitation of these resources to which the coastal countries are entitled"; (ii) that, in consequence, the three governments "proclaim as a rule of their international maritime policy the exclusive sovereignty and jurisdiction corresponding to each of them over the ocean adjacent to the coasts of their respective countries up to a minimum distance of 200 marine miles from said coasts" [60]); and (iii) that "the exclusive jurisdiction and sovereignty over the maritime zone indicated above include also exclusive sovereignty and jurisdiction over the land and subsoil corresponding to it" [61]).

[59]) According to Captain Mouton the South Korean claim amounts in practice to an extension of territorial waters to 170 miles (Recueil des Cours de l'Académie de Droit International, 85 [1954] [1], p. 378 f.).

[60]) Presumably, by referring to a "minimum distance of 200 marine miles" the Governments of Chile, Ecuador and Peru have reserved the possibility of extending their territorial sea still further should, in their view, "geological and biological factors" render a territorial sea of 200 miles "insufficient".

[61]) The text of the Treaty of Santiago appears as Appendix 10 to the statement of

Although the claims of the third group of countries vary somewhat in extent, their common denominator appears to be that the countries concerned are not content to put forward claims solely in terms of rights over the sea-bed and subsoil outside territorial waters. Their claims amount instead either to a very considerable extension of territorial waters beyond the generally accepted 3 mile limit, or, at the very least, to exclusive rights over "natural resources" beyond the 3 mile limit other than merely resources which are to be found in the subsoil or attached to the sea-bed.

We now come to the doubtful or controversial cases, namely, those of Australia and the United States. The Australian case is controversial not merely in the sense that it may be difficult to decide into which of Captain Mouton's three categories the Australian claim should be placed, but also because it has provoked an actual controversy with the Government of Japan. Since the latter controversy is to a certain extent *sub judice*, it will not be discussed here.

In a Proclamation of September 11, 1953, the Governor-General declared that Australia has "sovereign rights over the sea-bed and subsoil of ..... the continental shelf contiguous to any part of its coasts ..... for the purpose of exploring and exploiting the natural resources of that sea-bed and subsoil". A similar Proclamation was issued in respect of the trust territory of New Guinea. In both Proclamations any intention of affecting the status of the waters above the continental shelf was excluded.

The Australian formula is interesting in that it is probably based on the 1953 report of the International Law Commission. As Captain Mouton has pointed out [62]), it was only on August 17, 1953, that there appeared the stencilled version of this report, Article 2 of which says that "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources". Captain Mouton is inclined to criticize Australia for putting these proposals into practice so quickly. It may be true, as this author says, that individual Australian Ministers misunderstood the nature of the proposals and were inclined to regard them as already having legislative effect. Nevertheless it is not altogether fair, in our view, to blame the Australian Government as such for basing its legislation on the draft articles of the International Law Commission [63]). That Government doubtless regarded those draft articles as

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Mr. W. M. Chapman, Director of Research, American Tunaboat Association, San Diego, California, before the Committee on Merchant Marine and Fisheries of the House of Representatives of the United States Congress on July 2, 1954.

[62]) Recueil des Cours de l'Académie de Droit International, 85 (1954) (1), p. 445–451.

[63]) The Australian Government was not alone in this respect. In its proclamation of August 3, 1952, the Government of Israel proclaimed that "The territory of the State of

being, in substance, declaratory of the rules of international law. Probably the Australian Government also thought that, so far as form was concerned, it would make for international order if Governments in this formative period of the law of the sea-bed based their legislation on the actual words of draft articles prepared after years of effort by an international body of experts. At any rate the action of the Australian authorities is a remarkable tribute to the work of the International Law Commission and evidence that that work is not necessarily without effect even if it does not immediately result in legislative conventions concluded by Governments.

The Australian Government, however, did not confine itself to declaring Australia's "sovereign rights over the sea-bed and subsoil of the continental shelf ... for the purpose of exploring and exploiting the natural resources of that sea-bed and subsoil". It proceeded to put the rights claimed into effect by enacting further legislation the effect of which is to subject to the licensing control of the Australian authorities all fishing for pearl shell, trochus, *bêche-de-mer* and green snail within certain specified areas of the continental shelf.

In principle, the Australian legislation seems to us to belong clearly to the second group, inasmuch as (i) it claims rights over the natural resources – and not merely over the mineral resources – of the continental shelf, and (ii) it is not intended to affect the status of the waters above the continental shelf. To the extent that the "sovereign rights" claimed are restricted to "the purpose of exploring and exploiting the natural resources of the sea-bed and subsoil" the Australian legislation is less comprehensive than that of most countries in the second group, who acknowledge no such limitation. What, however, seems to have given the impression that the Australian legislation is of a sweeping character, even approximating to that of certain countries in the third group, is that Australia has had occasion to specify and apply the rights she claims. In applying her rights she has clearly indicated, not only that she considers pearl shell, trochus, *bêche-de-mer* and green snail to be natural resources – which is hardly open to question – but also that she considers them to be "natural resources of the sea-bed" rather than of the sea itself. It is this assumption which critics of the Australian legislation question. We cannot, however, consider this matter here. Its solution – historic rights apart [64]) – must, in our submission, depend on the

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Israel shall include the sea-bed and the subsoil of the submarine areas contiguous to the coasts of Israel and outside the territorial waters to the extent that the depth of the superjacent waters admits of the exploitation of the natural resources of those areas". It thus based itself on Article 1 of the Commission's 1951 draft.

[64]) It would seem that the Australian-Japanese controversy turns as much on the

application of the criteria mentioned in Section III above to the facts of each particular case.

We come now to the case of the United States of America. In Proclamation No. 2667, issued on September 28, 1945, President Truman declared that "the Government of the United States regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control". He also declared that "The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected".

The expression "natural resources" is certainly a good deal wider than the Guatemalan expression "all deposits or natural reserves of petroleum" or the Philippines expression "all natural deposits or occurrences of petroleum or natural gas". Nevertheless, it seems clear that President Truman had petroleum principally in mind. A press release accompanying the proclamation referred to the belief of "petroleum geologists" that portions of the continental shelf beyond the three mile limit – Texas and California were specifically mentioned – contained "valuable oil deposits". (This press release also made it clear that by continental shelf was meant "submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms [600 feet]".) At the same time the President was careful to keep open the possibility of extracting other minerals from the continental shelf. The Proclamation itself, apart from using the equivocal expression "natural resources" in its operative part, refers in the preamble to the need for "new sources of petroleum and other minerals". Similarly the press release says that "Valuable deposits of minerals other than oil may also be expected to be found in these submerged areas".

It is therefore not surprising that many commentators have come to the conclusion that, while Presidential Proclamation No. 2667 was intended to assert that all mineral resources that might lie in the continental shelf "appertained to the United States and were subject to the "jurisdiction and control of the United States", it was not intended specifically to deal with fisheries and other non-mineral resources. This impression is confirmed by the fact that on the same day there was issued Presidential Proclamation No. 2668 concerning the policy of the United States with respect to coastal fisheries in certain areas of the high seas.

This latter Proclamation did not refer to the continental shelf, or even

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historic rights of the parties as on the general rules of international law (See Goldie, op. cit.). This was also true of the Anglo-Norwegian Fisheries case.

to the sea-bed and subsoil in any form. It must, however, be mentioned because it has exercised a considerable influence upon the development of the law of the sea. This Proclamation declared that where fishing activities "have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States". Where, however, fishing activities "have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States", there, the Proclamation continued, "explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements". On the face of it, therefore, this Proclamation seemed to accord entirely with the traditional principle of the freedom of the seas, under which a State may not regulate fishing on the high seas by foreigners without the consent of the State of which such foreigners are nationals. In fact, so much did the Proclamation accord with traditional principles that it might have seemed superfluous but for a hint given in the accompanying press release of its possible real purpose. As Captain Mouton has pointed out, this press release contains a sentence which states that "In areas where fisheries have been or shall hereafter be developed and maintained by nationals of the United States alone, explicitly bounded zones will be set up in which the United States may regulate and control *all* fishing activities" [65]).

Thus the possibility seems to have envisaged that, in the event of a failure to reach agreement with other States over the need for, or extent of, the "explicitly bounded conservation zones" in areas where the fisheries had in the past been developed mainly by United States citizens, the United States might of itself, and unilaterally, have to take the necessary conservation measures, even to the extent of enforcing them against any foreigners who might be seeking to intrude into such fisheries. Against the background of the relations of the United States with other countries over fisheries matters, not least in the Pacific, such an attitude would not be difficult to understand.

At the same time another explanation of the attitude of the United States is possible, and has been given. Speaking before the Committee on Merchant Marine and Fisheries of the House of Representatives of the Congress of the United States on July 2, 1954, M. W. M. Chapman, Director of Research of the American Tunaboat Association of San Diego, California,

[65]) Italics ours. See Mouton, op. cit., p. 71.

said that the fundamental intention behind issuing the two Proclamations in 1945 was "to split the juridical problems connected with the water and its contained resources away from the juridical problems of the submerged land and its contained resources; to leave unchanged international law and practice with respect to the former [66]) and to change international law and practice with respect to the latter". Mr. Chapman thought that the Continental Shelf Proclamation (No. 2667) was "quite frankly designed to initiate a change in international law". Moreover, he went on, "It may be said that this act of the United States was, in itself, completely successful. No objection to this tenet has been received by the United States from other nations, numbers of riparian nations have taken similar action, and it may now be safely said that it is a principle of international law that jurisdiction over the Continental Shelf and its contained resources pertain to the adjacent nation".

Mr. Chapman supports with very little authority this somewhat categorical assertion. It is in itself a remarkable proposition that an important change in international law can take place within a few years for no other reason than that one country issues a proclamation, against which no other country protests, and that this proclamation is followed by similar proclamations from an impressive number (though still a minority) of other countries [67]). We will, however, leave aside this point for the time being and pass on to Mr. Chapman's next point, which was that the policy of splitting the legal problems of high seas and fisheries on the one hand, and of the sea-bed and petroleum resources on the other hand, had failed. As he rightly said, "In spite of this careful preparatory work there immediately began being issued proclamations by other countries purporting to assimilate into their territory not only the adjacent Continental Shelf but the ocean above it and, in some cases, far beyond" – and the United States (as well as other countries and, in particular, the United Kingdom) had felt it necessary to enter protests against such developments.

The reason for the failure of the policy of the United States is not difficult to determine. It lies in the ambiguity – referred to above – between the actual words of Proclamation No. 2668 and the accompanying press release. Foreign Governments are hardly to be blamed if they interpreted – as many of them did – Proclamation No. 2668 as giving the President power to declare conservation zones unilaterally, if necessary. For example,

[66]) Such an intention would, of course, hardly be consistent with an intention to declare conservation zones for high seas fisheries which would be enforceable against foreigners without the consent of the States of which the foreigners concerned were nationals.

[67]) Moreover, in the case now under consideration, it is only in a very loose sense that the other proclamations can be described as "similar".

in its comments on the International Law Commission's 1951 report, the Chilean Government said that "On 28 September, 1945, the President of the United States of America formulated a new doctrine when he issued a proclamation accompanied by an executive order, declaring the right of his country to establish fisheries conservation zones in the high seas areas contiguous to the coasts of the United States, either *exclusively* or in agreement with other States concerned" (Italics ours).

To return, however, to the question of the category in which the United States claim should be placed, we are not convinced by Captain Mouton's argument that the effect of Proclamation No. 2667 is to place the United States in the first group. This argument, as we have seen, is based largely on the preamble of the Proclamation, on the accompanying press release and on surrounding circumstances. But it seems to us that the United States is, in law, not estopped from contending that the "natural and ordinary meaning" of the expression "natural resources" [68]), which occurs in the operative part of the Proclamation, is that this expression includes non-mineral as well as mineral resources.

Support for this view is to be found in the fact that, in the Submerged Lands Act, 1953, the purpose of which is to divide the ownership of the sea-bed and subsoil between the United States and the several States, we find, in Section 2 (e) of the Act, the same term "natural resources" defined as including "without limiting the generality thereof, oil, gas and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp and other marine animal and plant life" [69]). If this definition were to be applied to Proclamation No. 2667, it would mean that the United States, so far from belonging to the first group of countries, would be putting forward claims more extensive than those of any country in the second group, including Australia, and possibly even as extensive as those of the countries in the third group. Final consideration of the extent of the United States claims

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[68]) The International Court of Justice has said, at any rate with reference to the interpretation of the provisions of a treaty, that the first duty is "to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur" (Case of the Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950, p. 4 at p. 8).

[69]) We also find it stated in Section 3 (a) of the Outer Continental Shelf Lands Act, 1953, that "the subsoil and sea-bed of the outer continental shelf" – this time not qualified at all by the term "natural resources" – "appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act. Also, in Section 4 (a) (1) of the same Act, it is stated that "The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and sea-bed of the outer Continental Shelf .....". It, therefore, seems to us difficult to deny that in practice the United States claims sovereignty over the continental shelf contiguous to its coasts.

must await an examination of the attitude adopted by that country in its diplomatic notes, when it has had occasion to formulate its position as regards the claims of other countries. It is, however, worth referring here to another matter relevant to this question which has been much discussed by the writers.

Many writers have drawn attention to the fact that, whereas some countries put forward claims in terms of "sovereignty", others put forward claims in terms of "jurisdiction and control"; and also to the fact that, whereas some countries refer to "the sea-bed and subsoil" as such, other countries refer to "the natural resources of the subsoil and sea-bed". Thus, the United Kingdom avowedly claims sovereignty over the sea-bed and subsoil; Saudi Arabia declares that "the subsoil and sea-bed ..... appertain to the Kingdom of Saudi Arabia" and are "subject to its jurisdiction and control"; and the United States declares that "the natural resources of the subsoil and sea-bed" are to be regarded as "appertaining to the United States, subject to its jurisdiction and control". We agree, however, with Professor Lauterpacht that the distinction between jurisdiction and control over the resources of submarine areas and jurisdiction and control over the submarine areas themselves is a purely artificial one [70]). Equally, it seems to us clear, from the terms of the Saudi Arabian proclamation, that "sovereignty" and "jurisdiction and control" are interchangeable expressions. Accordingly, we agree with Sir Cecil Hurst that "the distinction between the jurisdiction and the exclusive control which are claimed (i. e. in the Truman Proclamation) and sovereignty is so small as to be little more than a question of name" [71]).

The difference between these various types of claim seems, therefore, to be one of form rather than of substance. Thus we agree with Young who, referring to these claims, says:

> "Insofar as the claims apply to submarine areas, it would seem unprofitable to speculate on possible shades of meaning in the various phrases used. All have in common a minimum intent to control exclusively the resources of certain areas of sea-bed and subsoil; and as a practical matter it would seem impossible to control these resources *in situ* without controlling the sea-bed and subsoil which contain them" [72]).

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[70]) Op. cit., p. 389.

[71]) T.G.S. vol. 34 (1949), p. 161. Since the passing of the Outer Continental Shelf Lands Act, 1953, it seems doubtful if the distinction is any longer made by the United States itself (see n. 69, above).

[72]) A.J.I.L. vol. 45 (1951), p. 228.

(B) Diplomatic Notes

These notes will be referred to only insofar as they throw further light on the attitude of certain States [73]).

On July 2, 1948, the Government of the United States addressed more or less identical notes to the Governments of Argentina, Chile and Peru. All three notes began by pointing out that these States, in the preambular part of their respective Declarations extending their sovereignty over the continental shelf and the waters above it – and in the case of Chile and Peru declaring "protection zones" stretching as far as 200 miles from the coast – had all cited Presidential Proclamation No. 2667. The quotation which follows is taken from the note to Chile (the other notes being substantially the same).

> "My Government", said the Ambassador of the United States to Chile, "is accordingly confident that His Excellency, the President of the Republic of Chile, in issuing the Declaration, was actuated by the same long-range considerations with respect to the wise conservation and utilization of natural resources as motivated President Truman in proclaiming the policy of the United States relative to the natural resources of the subsoil and sea-bed of the continental shelf and its policy relative to coastal fisheries in certain areas of the high seas. The United States Government, aware of the inadequacy of past arrangements for the effective conservation and perpetuation of such resources, views with utmost sympathy the considerations which led the Chilean Government to issue its Declaration".
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> "At the same time, the United States Government notes that the principles underlying the Chilean Declaration differ in large measure from those of the United States Proclamations and appear to be at variance with the generally accepted principles of international law. In these respects, the United States Government notes in particular that (1) the Chilean Declaration confirms and proclaims the national sovereignty of Chile over the continental shelf and over the seas adjacent to the coast of Chile outside the generally accepted limits of territorial waters, and (2) the Declaration fails, with respect to fishing, to accord

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[73]) Among diplomatic notes which have been published, the following may be mentioned. In ST/LEG/SER. B/1 of January 11, 1951, the text is published of notes addressed by the United States in 1948 to Argentina, Chile and Peru. The text of these notes, as well as of notes addressed by the United States and by the United Kingdom to Costa Rica, Ecuador, El Salvador and Honduras, is also given in I.C.J. Pleadings, Oral Arguments, Documents; Fisheries Case (United Kingdom *v.* Norway), vol. IV, p. 583–604. For the text of notes adressed by the United Kingdom to Chile and Peru, see ibid., vol. II, p. 747, 750. The notes just mentioned were all notes of protest. The text is also available of the very interesting note of April 7, 1951, in which the French Government made certain observations upon the claims of various Latin American countries, after these claims had been brought to its attention by the United Kingdom Government (see ibid., vol. IV, p. 605).

appropriate and adequate recognition to the rights and interests of the United States in the high seas off the coast of Chile. In view of these considerations, the United States Government wishes to indicate to the Chilean Government that it reserves the rights and interests of the United States so far as concerns any effects of the Declaration of 25 June 1947, or of any measures designed to carry that Declaration into execution".

The following comments may be made upon this note, which is unfortunately not free from ambiguity:

(i) If, as Captain M o u t o n maintains, the United States belongs to the group of countries whose claims are confined to rights over the mineral resources of the continental shelf (i. e. the first group), then surely this would have been an excellent opportunity for the United States to make its position clear beyond doubt. Instead of this, however, the note repeats the phrase " n a t u r a l resources of the subsoil and sea-bed".

(ii) In referring to "the inadequacy of past arrangements for the effective conservation and perpetuation of such (i. e. natural) resources" the note gives some ground for believing that the United States belongs, not so much to the first group, as to the third group. So far from there ever having been a lack of arrangements for conserving the mineral resources of the continental shelf, there had in the past been no arrangements for extracting them. Indeed it was the object of Presidential Proclamation No. 2667 to make arrangements for extracting them. Whereas, if the expression about "the inadequacy of past arrangements" be read in connexion with "natural resources" – and in particular with "natural resources of the sea" – it makes sense. So far as is known, the United States had no reason to complain of "the inadequacy of past arrangements" for the conservation and perpetuation of the "natural resources of the sea-bed", i. e. minerals and marine species attached to the sea-bed. It had, however, good reason to complain of the inadequacy of arrangements in the past for conserving and perpetuating the "natural resources of the sea", i. e. swimming fish.

(iii) But the protest against Chile for confirming and proclaiming its sovereignty "over the continental shelf and o v e r t h e s e a s adjacent to the coast of Chile outside the generally accepted limits for territorial waters" renders it impossible to believe that the United States belongs to the third group. If the United States belongs to this group, why should it protest to Chile at all? This still leaves unanswered, however, the question whether what the United States objected to was exclusively the proclamation of Chilean sovereignty "over the seas adjacent to the coast of Chile outside the generally accepted limits of territorial water"

or whether the United States objected to the proclamation of Chilean sovereignty "over the continental shelf" just as much as "over the seas adjacent to the coast of Chile outside the generally accepted limits of territorial waters". The wording is ambiguous, but it must be admitted that the latter interpretation – which is Captain Mouton's – is the more reasonable one. This, it might seem, would be sufficient to take the United States out of the second group of countries. Before such a conclusion is accepted, however, regard must be had to the very important fact that, whereas the United States has found it necessary to protest against the claims of the countries in the third group, it has not found it necessary to protest against the claims of the United Kingdom and other countries in the second group [74]). Indeed the whole plattern of diplomatic exchanges in the matter of the sea-bed and subsoil seems to us to be that of protests by countries in the second group (including, in our submission, the United States) against the claims of countries in the third group.

For these reasons, therefore, we submit that, though the matter is not free from doubt, the United States belongs to the second group. It should be made clear, however, that the second group is wide enough to include both countries who avowedly claim sovereignty over the sea-bed and subsoil and also countries whose express claims are confined to ownership or "jurisdiction and control" of "the natural resources of the subsoil and sea-bed". The difference between these two types of claim seems to us, as we have already said, to be one form rather than of substance.

In a note of April 7, 1951, addressed to the United Kingdom Government, the French Government put on record the very important view that, since the claims of various Latin American countries to extend their territorial waters had not been notified to it "par la voie diplomatique", there had been no necessity for it "dans ces cas précis, à formuler un avis". Nevertheless, the French Government continued, "Il estime . . . sur un plan général que de telles revendications ne sont pas recevables car elles lui paraissent en contradiction avec un principe de droit international qui n'a jamais, jusqu'à présent, été contesté . . . Aucun Etat ne peut, par une déclaration unilatérale, étendre sa souveraineté sur la haute mer et rendre cette annexion opposable aux pays qui ont le droit d'invoquer le principe de la liberté des mers, tant

74) The answer to this difficult problem may be also partly a formal one. Thus, whereas Chile proclaims sovereignty over the continental shelf, the United States merely regards "the natural resources of the subsoil and sea-bed of the continental shelf but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control". We have already indicated that we believe this distinction to be one of form rather than of substance.

que ces derniers ne l'auront pas formellement acceptée. Une renonciation à une règle de droit international établie dans l'intérêt de la communauté des nations ne peut pas se présumer."

(C) Comments on the Draft Articles of the International Law Commission

These comments will be referred to only insofar as they provide an indication of the attitude of Governments who have not up till now expressed their views fully in any other way.

The Danish Government thought that the littoral State should not have sovereignty over the sea-bed and subsoil contiguous to its coasts, but only an "exclusive right to exploration and exploitation". However that Government thought "it would . . . be desirable to have it expressly established that the exclusive right recognized for the coastal State shall cover any other exploitation of the sea-bed and subsoil, with submarine cables as the only exception, for instance the right to cultivation (algae and other marine plants), establishment and maintenance of permanent installations for exploitation of the sea-bed, including the fixing of permanent stakes and other fishing devices, stone-gathering and pearl-fishing on the sea-bed, etc., so that other States could not in any case, apart from submarine cables, use the sea-bed or the subsoil without the consent of the coastal State, with the explicit recognition that the exclusive right comprises all such forms of exploitation". The Danish Government also "noted with satisfaction that no extension of territorial waters is involved". Despite the reservations on sovereignty and submarine cables, Denmark seems to us to belong clearly to the second group. The inclusion of the cultivation of algae and other marine plants and also pearl-fishing among the exclusive rights of the coastal State indicates that Denmark's position is not far removed from that of Australia.

According to the French Government, the matter of the continental shelf is "not as yet (1952) covered by international rules". It is also that Government's view that the instinction between "sovereignty" and "control and jurisdiction" is not a real one and that "The legal consequence of the monopoly of exploitation vested in the coastal State will be the exercise of effective, though limited, sovereignty over the continental shelf and this sovereignty will be a fact even though the actual term is not involved".

The Government of the Netherlands commented as follows: "Needless to say, the country of G r o t i u s attaches particular importance to the principle of the freedom of the seas. Nevertheless the Netherlands Government is aware that these principles cannot be applied in such a way as to impede a development of law which should be considered beneficial to the

whole community of nations". Accordingly, this Government favoured the rather limited conception of giving the coastal State "jurisdiction and control" over the mineral resources only of the adjacent submarine areas, and was "very firmly opposed to any attempt to claim exclusive fishing rights beyond the limits of territorial waters".

The Norwegian Government was opposed to the whole idea of distinguishing between the sea-bed and the subsoil on the one hand and the superjacent waters on the other hand. It was equally opposed to any distinction being drawn between sedentary and other fisheries. "There are good reasons", it said, "why the exploitation of the resources of the sea as well as the exploitation of the resources of the sea-bed and the subsoil should be regulated and controlled. It is not clear why the control and jurisdiction should be left to the coastal State in the case of the exploitation of the resources of the continental shelf, while a quite different procedure is recommended when it comes to fisheries. It might in particular be questioned whether the coastal States should be entitled to a monopoly of the resources of the continental shelf. The exploitation of the resources of the sea-bed and subsoil might very well be regulated by the coastal States without excluding non-nationals". Alternatively, the Norwegian Government thought that "If it is necessary to give coastal States a right of control and jurisdiction for the purpose of exploring and exploiting the natural resources of the sea-bed and subsoil, the best thing would probably be to limit that right to a contiguous zone, of a fixed breadth". Presumably, in the Norwegian Government's view, the contiguous zone would include the superjacent waters as well.

The Government of Sweden pointed out that "Certain countries have made all kinds of claims varying in extent and differing in substance, based on various arguments, and these have involved departures from the rules of law hitherto accepted as part of the régime of the high seas". These claims, the Swedish Government said, had "no foundation in existing international law". Nevertheless, it was prepared to consider a convention which would "grant control and even monopoly rights" to the coastal States which would enable them to exploit the natural resources of the continental shelf, especially petrol, of which the world stood in need, "even though this would entail sacrifices by other States". But, said the Swedish Government, the rights granted to the coastal State should not be wider than necessary and "the rights now enjoyed by all States under the principle of freedom of the seas, especially rights of navigation, and fishing in free waters, should be preserved and protected as far as possible".

Accordingly, the Swedish Government thought it would be sufficient to

subject the continental shelf to "the exercise by the coastal State of control and jurisdiction for the purpose of exploring and exploiting its natural resources". This was also the view of the Governments of Belgium and Syria, but the Governments of Egypt and of the Union of South Africa thought that the coastal State should have "sovereignty" over the adjacent submarine areas. The Government of Yugoslavia thought that "the solution of these problems as regards the continental shelf would be founded on a much more sound basis if this question were to be settled simultaneously with a uniform delimitation of marginal waters . . .". This can only be interpreted to mean that this Government would solve the problem of the sea-bed and subsoil by permitting an extension of territorial waters.

Section V: The rules of international law at present applicable

For practical purposes the first question which has to be decided is whether the Swedish Government is right in its contention that all the claims made by States since the end of the Second World War to control the continental shelf and the superjacent waters have "no foundation in existing international law". Secondly, if the Swedish Government is wrong in that contention, the question still has to be decided whether all three groups of claims are valid under existing international law, or whether this can only be said of the claims of the first and second groups, or possibly even of the claims of the first group only.

Logically, the way to answer these questions would be to establish what the relevant rules of international law were in 1939, and then to consider whether the claims made since then were in conformity with those rules; and, if they were not, to go on to consider whether, either as a result of the claims being made or simultaneously with their being made, there had occurred any changes in the rules of international law such as would render all, or at least some, of the claims valid. We shall, however, not apply this method for the simple reason that, in our opinion, it is just as difficult, if not more difficult, to establish what the relevant rules of international law were in 1939 as it is to establish what they are now. It may well be true, as Professor Lauterpacht says, that although a major change appears to have taken place in the legal status of the sea-bed and subsoil since 1939, this change is "more apparent than real" [75]).

Professor Lauterpacht is of the opinion that the right of the coastal State to appropriate adjacent submarine areas has "become part of

[75]) Op. cit., p. 376, 394.

international law by custom initiated by the leading maritime Powers and acquiesced in by the generality of States" [76]). He has no doubt, however, that claims to sovereignty over the high seas, even if only for limited purposes – in which connexion he mentions the claims of Chile, Costa Rica, El Salvador and Peru – are "contrary to international law" [77]). In other words, he would say – using the terminology which we have borrowed from Captain Mouton – that the claims of the first two groups of countries are valid, and that those of the third group of countries are invalid. He bases this conclusion partly on the argument that, unlike the waters of the high seas above them, the adjacent sea-bed and subsoil are not *res omnium communis;* and partly on the fact that, whereas the claims of countries in the third group have evoked protests – not least from countries in the second group – the claims of countries in the other two groups have not given rise to protests [78]).

Captain Mouton is of the opinion that the claims of the countries in the third group are illegal under customary international law and that sufficient protests have been made to prevent their becoming validated by prescription; that the claims of the countries in the second group are equally illegal under customary international law, but that they might be on the way to being validated through prescription; and that the claims of the countries in the first group – in which of course he includes the United States – are on their way to becoming legal under customary international law, even if they are not yet entirely legal [79]).

As between these two views, we are – as we will show later – inclined to agree with that of Professor Lauterpacht, though not necessarily for the same reason. In view of the very stringent tests laid down by the Hague Court for the proof of a rule of customary international law [80]); in view of the negative, if not contrary, attitude expressed by such important maritime countries as Belgium, France, the Netherlands, Norway and Sweden; and in view also of the doubts as to whether the United States ought to be placed in the second group or not; we find it difficult to say with any real certainty that there exists a rule of customary international law under which countries not in the second group "recognise themselves as being obliged" to abstain, or are "conscious of having a duty to abstain", from challenging the legality of the claims of the countries in this group.

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[76]) Ibid., p. 431.
[77]) Ibid., p. 413.
[78]) Ibid., p. 393–398, 413 f.
[79]) Recueil des Cours de l'Académie de Droit International, 85 (1954) (1), p. 423–436.
[80]) In the Lotus case, referring to the attempt of the French Government to argue that, since in collision cases prosecutions usually occurred in the courts of the flag State,

From the views of the two authors just mentioned we will turn to the work of the International Law Commission. This Commission, in its draft articles of 1951, defined the continental shelf – as we have already seen – as "the sea-bed 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 sea-bed and subsoil" (Article 1), and recommended that "The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources" (Article 2). It also stated 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" (Article 3). In the 1953 draft these three articles were amended to read as follows:

Article 1

As used in these articles, the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas continguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres.

Article 2

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

Article 3

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas.

A mere glance at these articles is sufficient to show that, on the whole, the legislation of the countries in the first and second groups is consistent with these principles, but that the legislation of the countries in the third group is inconsistent with them. It is argued by Captain Mouton that, since the International Law Commission has been dealing with the subject of the continental shelf under the provisions of its Statute which provide for the

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there was a rule of international law that such prosecutions must not take place before the courts of other States, the Permanent Court of International Justice said: "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom." (P.C.I.J., Series A, No. 10, p. 28). See also the Asylum case (I.C.J. Reports 1950, p. 266 at p. 276 f.) and the case concerning Rights of Nationals of the United States of America in Morocco (I.C.J. Reports 1952, p. 176 at p. 200).

"progressive development" of international law rather than its "codification", these rules may not be taken as evidence of the existing state of international law [81]). We do not necessarily agree. Both the 1951 and the 1953 drafts of the International Law Commission contain proposals for compulsory arbitration of disputes relating to the continental shelf (Article 7 of the 1951 draft, Article 8 of the 1953 draft). In view of the categorical statement of the Permanent Court of International Justice to the effect that "no State can, without its consent, be compelled to submit its disputes with any other States either to mediation or to arbitration, or to any other kind of pacific settlement" [82]), there can be no doubt that this article at least is a proposal for the "progressive development" of international law. But this does not mean that all the articles are in that category. In our view, there is no reason why the draft articles of the International Law Commission, taken as a whole, should not be regarded as "subsidiary means" for the determination of the existing rules of international law within the meaning of Article 38 (1) (d) of the Statute of the International Court of Justice [83]) – though not, of course, as authoritative as, for instance, a pronouncement of the Court itself would be.

According to Article 38 (1) of the Statute of the Court the sources of international law are (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; and (c) the general principles of law recognized by civilized nations. It is evident that, apart from the purely local Anglo-Venezuelan treaty of 1942, there is no international convention directly bearing upon this matter. We have already said that, in our view, there is also no firm rule of customary international law bearing upon the matter. The question remains, therefore, whether the matter is covered by "the general principles of law recognized by civilized nations".

Commenting upon Article 2 of its 1951 draft, the International Law Commission said: "Though numerous proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of

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81) Recueil des Cours de l'Académie de Droit International 85 (1954) (1), p. 434.

82) P.C.I.J., Series B, No. 5, p. 27. This statement has been confirmed by the International Court of Justice on a number of occasions (see I.C.J. Reports 1949, p. 178; 1950, p. 71; 1952, p. 102 f.; 1953, p. 19).

83) According to this provision the Court may apply "the teachings of the most highly qualified publicists of the various nations" as "subsidiary means for the determination of the rules of law". There can be no doubt that the International Law Commission consists, for the most part, of "highly qualified publicists" and that the results of their collective deliberations are of more significance than their individual publications would be.

the continental shelf is based upon general principles of law which serve the present-day needs of the international community". We not only agree with the Commission but believe that it has here shown a profound insight into the nature and character of modern international law. It is through – and sometimes only through – the recognition of new "general principles of law" by civilized nations that international law keeps pace with the needs of international society. These principles, and the methods of their "recognition", are alike more flexible than the somewhat rigid procedures required by high international tribunals for the elaboration of new rules of customary international law.

A striking example of the application of new "general principles of law" by the highest international tribunal occurred, we believe, in the Anglo-Norwegian Fisheries case – a case which also concerned the sea and the interest of the coastal State in exploiting maritime resources. Judge Read showed, we believe rightly, that the "coast-line-rule" – i. e. the rule for the delimitation of territorial waters which was favoured by the United Kingdom and which, if it had been followed in this case, would have drastically reduced the extent of Norway's territorial waters as compared with the Norwegian "headland system" – was "an established rule of [customary] international law" [84]). Yet the International Court of Justice had no compunction in modifying this rule in order to adapt it to what it called Norway's "specific case" [85]). The elements of this "specific case" were, as we have already seen, various geographical and hydrographical features of the Norwegian coast, as well "the vital needs of the population" [86]) and the fact that "In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing" [87]). In such circumstances, the Court seems to have thought that the principle of the freedom of the seas ought to be counterbalanced, no longer by the customary "coast-line rule" but – significantly enough – by "the *principle* that the belt of territorial waters must follow the general direction of the coast" [88]).

Technical details apart, we believe that the significance of the Anglo-

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[84]) I.C.J. Reports 1951, p. 187.

[85]) Ibid., p. 131. It is sometimes suggested that the rule of the three mile limit for territorial waters is similarly capable of adaptation to "specific cases". In our submission, however, there are very strong reasons of principle why the belt of territorial waters should be uniform for all States. "Specific cases" are sufficiently taken care of by the admitted exceptions of "historic waters" and special methods of delimitation (e. g. the Norwegian "headland system") without introducing the complicating factor of a belt of territorial waters which would vary in breadth as between one State and another.

[86]) Ibid., p. 142.

[87]) Ibid., p. 128.

[88]) Ibid., p. 129. Italics ours.

Norwegian Fisheries case lay in the fact that, in it, the Court qualified the long-established principle of the freedom of the seas by reference to some such general principle of law as that the littoral State has a special or primary right to exploit the resources off its coasts provided that its claims in this respect are "kept within the bounds of what is moderate and reasonable" [89]). The Court, it will be remembered, upheld the principle of the freedom of the seas, declaring that, though a coastal State is entitled to delimit its own territorial waters, "the validity of the delimitation with regard to other States depends upon international law" [90]). But, when it is a question of competition for maritime resources not far from the coast, the Court seems to have considered that the balance of international interest lies, not so much in applying the principle of the freedom of the seas very strictly, as in allowing the coastal State to control the exploitation of these resources, provided that it does so in a manner which is "moderate and reasonable". There is no reason to suppose that the Court would apply stricter tests to the coastal State in the matter of the resources of the sea-bed and subsoil than in the matter of the resources of the sea. In fact, if anything, there are good reasons for supposing that the Court would permit greater latitude to the coastal State in the former case than in the latter (see Section IV).

Few principles have been of such service to the society of nations as has the principle of freedom of the seas. Yet it has been shown to suffer from the disadvantage that, when resources are limited, freedom can all to easily lead to unrestricted competition, and therefore to abuse. Theoretically, the solution of this weakness of an otherwise beneficent principle would be to institute some international machinery to regulate the exploitation of all maritime resources, those alike of the sea, of the sea-bed, and of the subsoil. Yet nothing is plainer from the developments of the past decade than that this solution finds little favour. Even those Governments, such as the Swedish Government, which are doubtful of the legality of these developments, seem disposed to agree that "It is necessary to grant control and even monopoly rights over the exploitation of these natural resources to coastal States, in order to prevent the development of chaotic conditions which would render any exploitation impossible". There is, as we have shown in Section IV, general recognition of the principle that the littoral State should be entitled to regulate the exploitation of the natural resources of the sea-bed and subsoil contiguous to its coasts – even though this general recognition does not extend to the natural resources of the sea itself.

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[89]) Ibid., p. 142.
[90]) Ibid., p. 132.

In conclusion, we submit that it is now one of the "general principles of law recognized by civilized nations", and therefore a rule of existing international law, that the littoral State is entitled to regulate the exploitation of the natural resources of the sea-bed and subsoil contiguous to its coasts. We submit further (i) that, generally speaking – and without committing ourselves as to every detail – the rules adopted by the International Law Commission in Articles 1 to 3 of its 1953 draft, and also the legislation of the countries in what we have called the second group, are in accordance with existing principles of international law; but (ii) that the legislation of the countries in what we have called the third group is in many respects contrary to existing principles of international law.