MARMARA ÜNİVERSİTESİ YAYINEVİ

MARMARA ÜNİVERSİTESİ YAYIN NO: 490
AVRUPA TOPLULUĞU ENSTİTÜSÜ YAYIN NO: 1

THE CONCEPT OF THE CONTINENTAL SHELF IN ITS HISTORICAL EVOLUTION
(With Special Emphasis On Entitlement)

Dr. Aslan GÜNDÜZ
Associate Professor of Public International Law,
University of Marmara School of Law

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Marmara Üniversitesi
Teknik Eğitim Fakültesi
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MARMARA ÜNİVERSİTESİ YAYINEVİ

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Abbrevations

AJIL	AMERICAN JOURNAL OF INTERNATIONAL LAW
Award	France - United Kingdom: Arbitration on the Delimitation of the Continental Shelf, Court Of Arbitration, 30 June, 1977
BYIL	BRITISH YEARBOOK OF INTERNATIONAL LAW
Cmnd	Command Paper (United Kingdom)
COLUM J. TRANSNAT .L.	COLUMBIA JOURNAL OF TRANSTNATIONAL LAW
EEZ	Exclusive Economic Zone
GA	General Assmbly
GAOR:	General Assembly Official Records
ICNT	Informal Composite Negotiating Text
ICLQ	INTERNATIONAL AND COMPARATIVE LAW QUARTERLY
ICJ	INTERNATIONAL COURT OF JUSTICE
ILA	INTERNATIONAL LAW ASSOCIATION
ILC	International Law Commission
ILM	INTERNATIONAL LEGAL MATERIALS
ISNT	Informal Single Negotiating Text
n.m	nautical mile
NAT. RES. LAWYER	NATURAL RESOURCES LAWYER
NG	Negotiating Group
OCEAN DEV & INT'L L.	OCEAN DEVLEOPMENT AND INTERNATIONAL LAW
RSNT	Revised Single Negotiating Text
s.m.	square mile
UN	United Nations
UNCLOS I	First United Nations Conference on the Law of The Sea, 1958
UNCLOS III	Third United Nations Conference on the Law of the Sea, 1973 - 1982
UN Seabed Committee	Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction
UN Ad Hoc Committee	Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the National Jurisdiction
UNTS	United Nations Treaty Series
VA. J. INT'L L.	VIRGINIA JOURNAL OF INTERNATIONAL LAW
YILC	Yearbook of Intarnational Law Commmission

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INTRODUCTION

The Concept of the continental shelf is one of a few subjects of international law which have generated a tremendous amount of literature and engaged the attention of states for so long a time. The practice of states, the work of the International Law Commission in 1950s, the records of the 1958 Geneva Conference, and the documents produced in and by the Ad Hoc Committee, the United Nations Seabed Committee, and the Third United Nations Conference, are matched by the writings of scholars and the decisions of the International Court of Justice and of other international bodies. This is not only because of the importance of the subject to the international community but also because of the fact that the law on the subject has changed very rapidly. In other words, it has been in a state of fluidity.

After the Truman Proclamation of 1945, a gigantic amount of submarine areas of the high seas which had been the common property of the whole international community, was put under the control and jurisdiction of the coastal state alone, under the designation of the continental shelf, for the purpose of exploration and exploitation of its natural resources. That happened in a very short span of time. The Geneva Convention on the Continental Shelf of 1958 was partly affected by that practice. But the definitions it provided were shortly overtaken by the rapid development of the technology and consequently the depth of water criterion and the exploitability criterion in Article 1 of that Convention became a source of controversy among states. Only three years after the entry into force of the Convention a consensus emerged among states to revise or replace it. After long and labourious efforts, the Montego Bay Convention was concluded in 1982 which contains a definition with two alternatives, based on principle of distance and principle of natural prolongation as enunciated by the International Court of Justice in the North Sea Continental Shelf Cases, in 1969. It also introduces the concept of exclusive economic zone, giving the coastal state sovereign rights over a maritime area extending to 200 miles from the shores, for the purpose of exploration and exploitation of both living and non - living resources of the seabed, subsoil and the water column. In other words, with the advent of the exclusive economic zone (EEZ), not only the mineral resources of seabed and subsoil of the submarine areas but also the swiming fish in, and even the use of wind blowing over, the waters of the high seas within 200 miles of the coast have gone under the control and possession of the coastal state. This tremendous gain to the coastal state and loss to the international community as a whole happened so quietly that it could properly be called as a peaceful revolution (or a negotiated plunder of the world oceans, if you like it).

The history of this negotiated partition is generally begun from the 1945 Truman Proclamation, but actually it goes back farther than that. The history of Man's interest in the bed of the high seas is much older, though the minerals beneath the sea have recently become the focus of constant attention. States made claims to the bed of the high seas at much earlier times for purpose of exploitation of sedentary fisheries,on the basis of occupation or prescription. At the very beginning of the 20 th. century the continental shelf was claimed as an habitat of the edible swimming fish, while the justification for such claims was always sought in the physical iden-

tity of the land territory and the contiguous submarine areas (slightly submerged part of the land, as it was called by some). It was that physical fact which provided the most convincing justification for recognition by the international community of the concept. The International Court of Justice endorsed that principle in its judgment in the North Sea Continental Shelf Cases in 1969.

However, the most recent redefinition of the continental shelf and its close relationship with the exclusive economic zone has partly obscured the above mentioned time - honored justification for title of the coastal state. The Recent decision of the International Court of Justice in Libya / Malta Case, in 1985, compounded it. The line between the acquired rights and the new benefits provided by the new Montego Bay Convention has become blurred. If the law relating to the legal basis of title to the continental shelf has changed, what exactly was the previous law? What would happen to the acquired rights? Was Article 1 of the Geneva Convention, with its 200 metre depth criterion and exploitability criterion, part of customary law in every detail? Has the the regime of the continental shelf been absorbed by that of the EEZ within the 200 mile limit? Has principle of distance replaced that of natural prolongation within that limit? If not, what is now the relevance of the principle of natural prolongation to the rules on delimitation? Those and similar questions need to be studied anew in the light of new developments. That, we believe, requires a thorough study of the concept from the very beginning. This work, which is intended to be a first part of a more extensive work, has its aim to do that.

In the first paragraph, the geological and geomorphological characteristics of the submarine areas will be studied. The scientific meanings of the submarine areas and those of other relevant terms will be clarified for a better understanding of the legal definition of the continental shelf.

In the Second paragraph, the legal status of the bed of the high seas prior to 1945 will be studied. Our purpose for doing so is not only to shed some light on the history of the continental shelf but also to show, if possible, the place where the basis of title to the latter lies.

The third paragraph shall study the emergence of the concept of legal continental shelf. A particular reference will be made to the then existing practice of states as a potential source of customary law.

The fourth paragraph will explore the theoretical aspects of the concept of the continental shelf as an object of territorial acquisition.

The fifth paragraph has its aim to study the first conventional regulation of the continental shelf in the Geneva Convention on the Continental Shelf. It is intended to ascertain and test the substance of a statement by the International Court of Justice in the North Sea Continental Shelf Cases, in 1969, that the first three articles of the Convention in question were regarded in 1958 as reflecting the customary law. It is therefore, particularly, intended to find out whether the criteria as provided in Article 1 ever constituted part of customary law. The practice of states spanning the period between 1958 - 1970 is also studied for the very same purpose.

The sixth paragraph will focus on the customary law on the seaward limit as developed and applied by the international tribunals, with particular reference to the concept of natural prolongation. The newly - attempted redefinition or reinterpretation of the latter will be specifically addressed.

The Seventh paragraph will explore the emergence of the concept of the EEZ and the drafting history of the new definition of continental shelf, with special reference to the revenue - sharing system as provided for the continental shelf extending beyond 200 mile limit. The relationship between the EEZ and the Continental shelf within that limit will be specifically addressed.

The eighth and final paragraph is intended to study the status of the new definition in customary law, to explore the implications of the wide recognition of the EEZ for the continental shelf rights within 200 miles of the coast.

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I - GEOPHYSICAL CHARACTERISTICS OF THE SEABED AND THE CONTINENTAL SHELF IN GEOLOGICAL SENSE

1.Geological Difference Between the Continental Crust and the Oceanic Crust

The land territory (emergent land), as it is commonly known, does not terminate at the coastline; rather it slopes away, generally gently, under the sea down to the ocean bottom. Now this dry land, with its under-sea extension, is called the "continent", although the same term one time referred exclusively to a major landmass of the world. (1) It is for this reason that the under-water portions of the land are considered as being integral parts of the "continent". The continent as thus described, however, does not extend under the sea infinitely; it ends where it meets the deep ocean bottom.

Here, a question may be posed as to why there should be a boundry between the continent and the deep ocean floor, which requires an explanation, in a few words, of the difference between the two parts of the seabed.

The answer to the question is amply provided by the science of geology. We are told by the geologists that the actual earth's surface, which is called the earth crust, includes two distinct parts: continental crust and oceanic crust which differ in their chemical compositions and natural characters. (2) The continental crust, which underlies the continent, is granitic in nature, while the oceanic crust, which underlies the ocean bottom, is basaltic. The continental crust is composed of sialic rocks

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(1) See, Hedberg, H.D., **Relation of Political Boundries to the Continental Margin**, 17 VA.J.INT'L L. 58,59 (1976). Encyclopedical definition of the word continent is: "large landmass rising abruptly from deep ocean floor including marginal region that are shallowly submerged..." See, Tver,D.F., (ed), OCEAN AND MARINE DICTIONARY... See, also, Eustis, F.E., **Method and Basis of Seaward Delimitation of Continental Shelf Jurisdiction**, 17 VA.J.INT'L L. 107, 109 (1976)

(2) See, inter alia, Emery-Ucuphi, THE GEOLOGY OF THE ATLANTIC OCEAN, New York, 194 (1984); Gros, G., OCEANOGRAPHY, 8 (5th. ed); Davis, PRINCIPLES OF OCEANOGRAPHY, 22 (1972); Worzel, **Standard Oceanic and Continental Structure**, in Burk and Drake (eds), THE GEOLOGY OF CONTINENTAL MARGINS, 59-66 (1974); Orlin, **Offshore Boundries: Engineering and Economic Aspects**, 3 OCEAN DEVELOPMENT & INTERNATIONAL LAW, 87-95 (1975); O'CONNELL, D.P., I THE INTERNATIONAL LAW OF THE SEA, 441 (1982); Eustis, supra note, 1, at 109 ; Feulner, G.R., **Delimitation of Continental Shelf Jurisdiction Between States: The Effect of Physical Irregularities in the Natural Continental Shelf**, 17 VA.J.INT'L. 83 (1976)

which are rich in silica and alumnia, as in granit, wheras the oceanic crust is composed of simatic rocks which are rich in silica and magnesia, as in basalt. This, in turn, means that the continental crust is less dense (average gravity 2.7) than oceanic crust (average gravity 3.1). That's why the former is lighter than the latter and is said to "float" on the ocean crust. The latter, on the other hand, is thinner (6 km) than the continental crust (25 km). Finally, a difference between the two structures is observed in their seismic velocity (velocity of waive of propagation). (3)

These data, consequently, show us where the continent ends and where the deep ocean floor begins. Thus, the oceanic crust, lacking the constituents of the continental crust, cannot be considered as being the natural prolongation of the continent. (4)

2. The Components of the Continental Margin

The natural boundary between the two oceanic provinces is the outer edge of the continental margin, which is further classified, in successive order to seaward, into three morphologic categories: **continental shelf, slope,** and **rise.** This latter classification is clearly by reference to the geomorphological nature of the continental margin. However, the commentators are divided on the exact extent of it. (5) While some argue that the continental margin is composed of the continental shelf, and the continental slope, the others would add the continental rise to the former ones. Still others would include the oceanic trenches. (6) However, it is generally accepted that the continental margin includes the continental shelf, slope, and rise. In fact, there is no doubt that it includes the first two features. It is only with respect to the continental rise that some doubts exist. (7) The reason is that while the sediments underlying the rise are formed of those coming down from the continental slope, the underlying rock is partly basaltic. (8) Nevertheless, the Montego

(3) See, Emery, K.O., **An Oceanographer's View of the Law of the Sea,** in J.Sztucki (ed.), SYMPOSIUM ON THE INTERNATIONAL REGIME OF THE SEA BED, (hereinafter to be cited as ROME SYMPOSIUM) 47,55 (1970); Gros puts gravity ratio as 2.8 g/cm for the continental crust and as 3.09 g/cm for the oceanic crust and he puts the thickness of the former as 30-40 km and that of the latter about 7 km. See, **supra** note 2, at 8. See, also, Orlin,**supra** note 2, at 95.

(4) See, O'connell, **supra** note 2, at 442.

(5) See, Hedberg, **supra** note 1, at 57.

(6) Oceanic trenches are long and narrow depressions running parallel to the margin of the continents and archipelagos. They are V-shaped. The Marina Trench is one of the known example, with a maximum depth of 70 km. See, Groves, D.G., -Hunt, L.M., (eds), OCEAN WORLD ENCYCLOPEDIA, 384 (1980).

(7) For various definitions of the continental margin see, Hedberg, **supra** note 1, at 73-75.

(8) See, Jennings, **Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment,** 18 INT'L & COMP L. Q. 819,830 (1969).

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Bay Convention has accepted the rise to be a part of the continental margin. (9) In the following paragraphs, an attempt will be made to clarify the meanings of the individual components of the continental margin.

A - Continental Shelf

Continental shelf lies immediately seaward of the coastline. It is a ledge-shaped under-water portion of the contiguous dry land. (10) That's why Webster's defines it as"...a ledge; a flat projecting layer of rock; a stratum with shelf-like surface..." (11) In fact, it is a downward projecting ledge of the continent in the sea. As it has been indicated before, the continent does not terminate at where it meets sea. Neither does it usually fall off to the greater depths in the immediate vicinity of the coast. It generally shelves away under the sea. It inclines at angle of about 0.1°. However, this gently sloping seabed areas terminate where there is a marked increase in the gradient, one above 1.5°. (12) The submerged area between the coast and this "geological break" is called **the continental shelf** proper. It is there that the shelf ends. In other words, that point is the edge of the geological continental shelf. **The International Committee on Nomenclature and the Ocean Bottom Features** described it, in recognition of this reality, as follows:

The zone around the continent, extending from water line to depth at which there is a marked increase of slope to greater depths. (13)

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(9) See, Article 76.

(10) See, among others, Shephard, F.P., GEOLOGICAL OCEANOGRAPHY, 122 (1977); Shephard, THE EARTH BENEATH THE SEA, 61 (Rev.ed. 1968); Guilcher, A.J., **The Configuration of the Ocean Floor and Its Subsoil; Geological Implications**, in Sztucki, J, (ed), SYMPOSIUM ON THE INTERNATIONAL REGIME OF THE SEABED, 4 (1970); Guilcher, **Continental Shelf and Continental Margin**, in Hill, M.V., (gnl ed), 3 THE SEA, 281 (1963); Gaskell, T.F., **Oil and Gas; Evaluation Exploration and Exploitation of Deep Sea Water Petroleum**,in ROME SYMPOSIUM, at 75-76,; Dietrich-Kalle, Krauss-Siedler (eds), GENERAL OCEAONOGRAPHY, 9 (1980); Groves-Hunt, **supra** note 6, at 72; Emery, ROME SYMPOSIUM, at 54.

(11) WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, (1976).

(12) **See, Report on Marine Science and Technology,** (submitted to the United Kingdom Parliament in April 1969 and Published as Cmnd 3992, Annex D.) p. 51, **reproduced** in Jennings' article **supra** note 8, at 827, n. 17. However, THE OCEAN WORLD ENCYLOPEDIA (**supra** note 6, at 72) gives an average inclination of 0.07°. Orlin's average inclination for the continental shelf is 0.1°. **See, supra** note 2, at 88.

(13) **See,** I YEARBOOK OF INTERNATIONAL LAW COMMISSION, 131 (1956), It is also reprinted in UNESCO Secreteriat, **Memorandom on Scientific Considerations Relating to the Continental Shelf** in UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, Official Records, Vol. I, at 39.

The outer edge of the continental shelf is usually taken at 100 fathoms or which is almost the same, at 200 metres. (14) However, there are instances where the increase of the slope occurs at depths of more than 200 metres (e.g. around Antarctica at a depth up to 555 metres). The average range varies generally between 50 and 500 metres. (15)

Its average width is about 75 kilometres. The width range varies between zero where coasts are precipitous, and 1500 km where the shelf slopes gently. In other words, the width of the continental shelf closely depends on at what depth the marked increase in slope occurs. (16) To give a common example, the continental shelves of the countries facing the Pasific Ocean are narrow, as is the case with Chile, Peru and the U.S., while the countries facing the Atlantic Ocean have much wider shelves, as is the case with Canada, the U.S. and Argentina.

The continental shelf is, on the other hand, underlain by igneous materials, (17) and other materials of sedimentary character, with a thickness of two kilometres. (18) The surface of the continental shelf is characterized by many irregularities, (19) such as depressions (channels, valleys, troughs, trenches) (20) and elevations (islands). (21) The depressions are common occurances in glaciated areas e.g. Labrador, Alaska, Norway, Antarctica. The islands may be situated on the shelf to which they are clearly appurtenant, and in some places they physically may not be a part of

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(14) The 100 fathom standard is said to have come into use simply because early sailing charts had only three depth contours: 10, 100 and 1000. See, THE WORLD OCEAN ENCYLOPEDIA, **supra** note 6, at 72.

(15) See, Jennings, **supra** note 8, at 827. Guilcher puts the average depth of the outer edge of the continental shelf at 72 fathom (130 metres). However, he admits that the depth range may vary considerably and may reach 550 metres, even more around the Antarctica. See, ROME SYMPOSIUM, at 4 and THE SEA, at 281. Emery takes the depth at the outer edge as something between 0 - 0,5 km. See, **Geological Limits of the Continental Shelf**, in OCEAN DEV. & INT'L L. 3 (1981). Shephard gives an average depth of 150 - 200 m, with exception of higher depths at high latitudes. See, GENERAL OCEANOGRAPHY., at 9. Orlin gives a depth range between 20 and 550 m. See, **supra** note 2, at 88.

(16) See, Emery, OCEAN DEV. & INT'L L. at 3; Orlin, **supra** note 2, at 88. However, Orlin's average width is 65 km. Dietrich and others give a width extending up to 300 km., See, **supra** note 9, at 9. The average width given by the OCEAN WORLD ENCYLOPEDIA is 78 km, while the range is said to extend up to 1206 km in Barent's Sea. See, supra note 6, at 72.

(17) That is, material solidified from molten state.

(18) That is, gravel, sand, silt and clay.

(19) As to the topography of the shelf see, Guilcher, THE SEA, at 282; Mouton, THE CONTINENTAL SHELF 16 (1952); THE OCEAN WORLD ENCYCLOPEDIA, **supra** note 6, at 73; Feulner, **supra** note 2, at 86; UNESCO Secretariat's Report, **supra** note 13, at 43.

(20) A valley is relatively shallow, wide depression with gentle slope, the bottom of which grades continuously downward. It is generally used to describe the features which do not have canyon-like shapes in any significant extent. See, GENERAL OCEANOGRAPHY, **supra** note 9, at 14.
A channel is a relatively shallow type of valley that extends across the continental shelf. It rarely exceeds 183 m in wall height. See THE OCEAN WORLD ENCYCLOPEDIA, **supra** note 6, at 373.
A trough is a long, broad depression on the ocean floor. It is normally shallower than a trench. **Id.**

(21) See, UNESCO Secreteriat's Report, **supra** note 13, at 43.

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the shelf but close to it (22). According to the UNESCO Secretariat's Report, in shallow seas islands sometimes form the raised margin of the continental shelf (e.g. Farrilhoes off Portugal, Taiwan off China, Aru Islands south of New Guiena). In some other cases, the shallow sea between the islands and the continents may be considered as the flooded part of the continent (e.g. Gulf of Paria, Baltic, White Sea, North Sea, Persian Gulf). The Report goes on to say that these areas merge imperceptively and without any change in character geologically or geomorphologically, with adjoining shelves facing wide oceans. Hence, it says, no doubt arises as to their belonging to the shelf (23)

The combined continental shelves of the world occupies approximetely 7.5 per cent of the total ocean floor.

However, the information given above about the continental shelf should not be understood as meaning that all the submarine areas underlying the high seas are so created as to fit the above-mentioned geomorphological definition. In such shallow areas as the Persian Gulf and the North Sea, the seabed does not meet the requirement of the geomorphological definition, which was the subject of considerable debate in the International Law Commission during 1950s. (24)

Besides, there may be places where the zone under the low-water mark is highly irregular, and the morphology of the seabed is quite different from that of the continental shelf proper, because the under-sea zone includes depths well in excess of those typical of the continental shelf. For such features the term **borderland** is used (25).

B - Continental Slope

Seaward of the outer edge of the continental shelf lies the continental slope. It begins where the increase in the gradient is above 1:5°. (26) The International Committee on the Nomenclature and Deep Ocean Bottom Features described it as:

a declevity from the outer edge of the continental shelf into great depths (27).

The average steepness of this declivity is 4.5°. It subsequently falls below 1.5° downward the slope. (28) At this point which is called the foot of the slope where the maximum change in the gradient occurs, the continental rise begins. Thus, the submerged area extending from the outer edge of the continental shelf to the foot of the slope is called the continental slope.

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(22) See, Feulner, **supra** note 2, at 86.
(23) See, **supra** note 13, at 40.
(24) See, I YBILC 218 (1950).
(25) See, UNESCO Secreteriat's Report, **supra** note 13. at 39.
(26) See, Jennings, **supra** note 8, at 827.
(27) See, UNESCO Secreteriat's Report, **supra** note 13, at 39.
(28) See, Emery, ROME SYMPOSIUM, at 53; GENERAL OCEANOGRAPHY, at 8, where an inclination of more than 1:40 is given. The range which Orlin gives changes from steeper than 1:40 to flatter than 1:40. See, **supra** note 2, at 93. OCEAN WORLD ENCYCLOPEDIA gives an average slope of 4° and a range changing from 3 to 6° See, **supra** note 6, at 73.

Its average depth at the foot of slope ranges from 1500 to 4000 metres. Its width range is between 20 km and 100 km. (29) If the 2000 km width is taken as the average seaward limit, then the slope occupies 8.5 per cent of the total ocean floor. According to Emery, the combined areas of the continental shelf and the continental slope of the world come about to 55 million square kilometres (30). There is no doubt that the continental slope is a part of the continent and consequently a part of the continental margin. Most of the times, the continental shelf and the continental slope is called under the name of continental terrace (31).

C- Continental Rise

The continental rise is the most oceanward part of the continental margin which lies oceanward of the foot of the slope, if the latter is not interrupted by trenches. The rise generally has a gentle slope which averages about half a degree. It extends to where the depth of the superjacent waters is between 4000 m and 5000 m where it overlappes the abyssal plain which is an extremely flat area of the ocean floor (32).

The continental rise is made of many layers of sediments which are deposited partly from suspens in water, partly as slides from the slope and the shelf. However, as indicated before,the underlying rocks may partly be basaltic, which is the source of the controversy among the scientists over whether the rise is a part of the continental margin. The total area of the rise is estimated at 25 million square kilometres (33). Its width range varies (between zero and 600 km) depending on whether the trenches exist oceanward of the foot of slope or not. (34)

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(29) OCEAN WORLD ENCYCLOPEDIA gives the average depth and width respectively as follows: 100 to 300 m-1400 to 3200 m and 20 km-100 km. See, **supra** note 10, at 8. In Guilcher's view, the depth of the slope is more than 300m. See, ROME SYMPOSIUM, at 8. See, also, Emery-Ucuphi, **supra** note 2, at 74; O'connel, **supra**. note 2, at 444.

(30) See, ROME SYMPOSIUM, at 54.

(31) Id

(32) See, Guilcher, ROME SYMPOSIUM, at 5 and THE SEA , at 290; Emery, ROME SYMPOSIUM, at 54; Orlin, **supra** note 2, at 93-95; GENERAL OCEANOGRAPHY, at 10; OCEAN WORLD ENCYCLOPEDIA, at 73.

(33) Emery, ROME SYMPOSIUM, at 54

(34) OCEAN WORLD ENCYCLOPEDIA, at 73.

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3 - Abyssal Plain

Finally, oceanward of the outer limit of the continental rise is the abyssal plain (35). It lies exclusively on the ocean crust. It is characterized by its flatness and fine and thin sediments, not exceeding a few hundred metres in depth. That is why it is not rich in oil and gas. The minerals of potential value are contained in manganese nodules, which are abundant on ocean floor. The abyssal plain sometimes alternate with oceanic hills. The oceanic ridges (36) and trenches (37) are the other markedly regular features of the ocean floor.

In conclusion, it may be said that the continental shelf is only one part of the under-water extension of the continent. The submerged part of the latter extends beyond the outer edge of the shelf to include the continental slope and the continental rise. Geologically, they are the natural prolongation of the continent but the abyssal plain is not.

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(35) See, Herzen, B.C,. **Abyssal Plain,** in THE SEA, **supra** note 10, at 312; Guilcher, ROME SYMPOSIUM, at 12; Emery, **id.** at 55; Emery-Ucupi, **supra** note 2, at 102; O'connel, **supra** note 2, at 445.

(36) Oceanic ridges are long, narrow elevations on the ocean floor. They have steep sides, in particular. The most spectacular example is the Mid-Ocean Ridge. See. OCEAN WORLD ENCYCLOPEDIA, at 310.

(37) See, **supra** note 6.

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II- LEGAL STATUS OF THE SEABED OF THE HIGH SEAS PRIOR TO 1945

Introduction

As we have indicated before, the continental shelf as described in terms of geology or geomorphology (hereinafter called as **geological continental shelf**) extends from the coastline into and under the sea out to where a substantial break occurs in the inclination of the seabed. Thus, it comprises the seabed and subsoil of the territorial waters as well as that of the area beyond (1). This definition, however, does not reflect the existing legal situation. In law, it is unanimously recognized that the coastal state has sovereignty not only over the water column but also over the seabed and subsoil of the territorial waters, although there exists some disagreement on the actual extent of the latter. While the sovereignty of the coastal state over the water column is subject to the right of the foreign vessels to the innocent passage, the exclusive use of the seabed and subsoil of the submarine areas beneath those waters is in the hands of the coastal state (2). Therefore, what is designated as continental shelf in law (legal continental shelf) starts from where the territorial waters end. It is for this reason that the focus of the legal continental shelf is the submarine areas beyond the territorial waters; that is , the areas lying beneath the high seas.

1- Early national claims to the sedentary fisheries in the high seas

A - Unilateral claims

a- Scope of the claims

The classic example of the early claims to the sedentary fisheries of the high seas is the pearl fisheries of Ceylon and Bahrein, about which we are informed by Vattel whose general views on the legal status of the high seas provided authoritative justification for the coastal nations, in general and for the rulers of Ceylon

(1) See, supra, Parag. I.

(2) The Hague Codification Conference of 1930 clearly confirmed this principle. See Report of the Second Committee, Draft Articles 1 and 2, III ACTS OF THE CONFERENCE, 126. The leading authority Gidel, too, explicitly sanctioned the principle in question. See, GIDEL, I LE DROIT INTERNATIONAL PUBLIC DE LA MER, Le Temps de la Paix, 510 (Paris, 1932 - 34). In Accord: See, Feith, J.P.R., Report to the International Law Association, Conference of Brussels in 1948, INTERNATIONAL LAW ASSOCIATION, REPORT OF FOURTY - THIRD CONFERENCE, Brussels, 1948, 183. (1948); Daniel, P., Sovereignty and Ownership in the Marginal Sea and Their Relation to Problems of the Continental Sea, prepared for the Fourty - fourth conference of the International Law Association, Copenhagen, 25 (1950).

and the persian gulf, in particular, to make national claims to the sedentary fisheries of the high seas near their coasts (3).

Vattel was of the view that the high seas could not be appropriated by any state to the exclusion of the others (4). He saw the main uses of the high seas as being navigation and fishing, which he deemed to be open to all nations. He justified this opinion on the grounds that the richness offered by the sea was inexhaustable and sufficient enough to supply the wants of each and every nation. The earth not furnishing sufficient things neccessary and useful for the human race, without cultivation, it became neccessary to introduce the right of property, so that each would cultivate that part of the earth which had fallen to his share. The high seas were different. Their resources were not exhaustable. Therefore, they were not to be appropriated. Such an act would have been an injurious act towards other nations (5).

However, Vattel made an exception to this general rule. He reasoned that various uses of the sea near the coasts rendered the former very susceptible of property (6). The reason was that such sea products as fish, shell, amber et cet. were exhaustable in this part of the sea. By overfishing they could be depleted. That fact enabled the nation to whom the coasts belong to appropriate to itself those resources and to convert them to its advantage. That was an advantage which the nature had placed within its reach. It could take possession of them in the same manner as it took possession of the land (7).

It was after this reasoning that Vattel referred to the legal position of the pearl fisheries of Ceylon and Bahrain:" Who can doubt that the Pearl Fisheries of Behrein and Ceylon may lawfully become property"? (8) Vattel went on to say that:

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(3) Vattel, M. de., THE LAW OF THE NATIONS OR THE PRINCIPLES OF THE LAW OF THE NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, Chapter XXII 125 (Sixth American edition, Translated by Joseph Chitty 1844). Contra: See, O'CONNELL. D.P., I THE INTERNATIONAL LAW OF THE SEA, 450 (1982, where he argues that "there is nothing to lead one to suppose that he [Vattel] was commenting other than on the grounds for establishing territorial waters or had the intention to justify appropriations of the seabed beyond the territorial waters.

(4) Vattel, **supra**, note 3, at 125.

(5) **Id., at 126**

(6) **Id., at 127**

(7) **Id., parag. 287**

(8) This statement of Vattel has been used extensively to show that he was of the view that the title to the seabed beyond national jurisdiction could be acquired by prescription or occupation. See, Sir Cecil Hurst, **Whose is the Bed of the Sea**, B.Y.I.L. 40 (1923-24); WESTLAKE, J., INTERNATIONAL LAW, Part I, Peace, 195 (1910). For other interpretations the subsequent writers put on this statement to justify their views of the status of the bed of the high seas, See, O'CONNELL, **supra** note 3, at 450.

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> And though, where catching of fish is the only object, the fishing appears less liable to be exhausted, yet, if a nation have on their coast a particular fishing of profitable nature and of which they may become master, shall they not be permitted to appropriate to themselves that bountous gift of nature, as an **appendage to the country they possess"** (emphasis added) (9).

The pearl fisheries of Ceylon and Bahrein which Vattel declared as the lawful property of the coastal nation on the above -mentioned grounds are said to have existed since time immemorial (10) and extended from six to twenty one miles from the coast, lying well beyond the outer limit of the territorial waters which used to be not broader than three miles. However, their status was regulated as late as 1811 by a colonial ordinance (the colonial power then was the United Kingdom) whereby the exclusive use and exploitation of the pearl beds were reserved to the coastal nation and unauthorized foreign vessels found in, hovering around, the enclosed area were subjected to various penalties (11). These exclusive claims were explained and justified on various legal grounds both by the Government of the United Kingdom and scholars. To that subject we will return after having dealt with some other similar examples.

A second well known example of nationally claimed high seas sedentary fisheries of the early time is provided by the sponge beds off the Tunisian coasts, extending seventeen miles offshore. To those fisheries, the Bey of Tunisia laid national claims which were recognized by the then maritime Powers of Europe (12). In 1875, when those rich sponge beds were hypothecated to the western powers as a security for the debts of the Bey, some individuals, apparently benefitting from the sponge beds, protested against that action. But the consuls of the Powers in Tunisia rejected the claims (13). As a matter of fact, they were no different in status from the pearl fisheries of Ceylon and Bahrein (14).

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(9) See, VATTEL, **supra** note 3, at 128.

(10) See, O'CONNELL, **supra** note 3, at 450; FULTON, T.W., THE SOVEREIGNTY OF THE SEA, 697 (1911). Kanakaratne of Ceylon stated, in the United Nations Conference on the Law of the Sea, in 1958, that "Ceylon rights over its pearl fisheries were based on the immemorial usage and uninterrupted ownership, going back as far as the fourteenth century". See, UNITED NATIONS DOCUMENT, A/CONF. 13/42.

(11) That legislation was later in 1925 amended by a new one which, in fact, enlarged the area subject to national jurisdiction by adopting a 100 fathom isobath as the limit. See, LEGISLATIVE ENACTMENTS OF CEYLON, Vol. IV, Ch. 168, p. 297.

(12) See, Hurst, **supra** note 8 at 41; HIGGINS AND COLOMBOS, THE INTERNATIONAL LAW OF THE SEA, 102 (1951 2nd.ed.); Francois' Report to the International law Commission, printed in II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 97 (1951); O'CONNELL, **supra** note 3 at 451 ; SMITH, H.A., THE LAW AND THE CUSTOM OF THE SEA, 81 (1959).

(13) GIDEL, I LA DROIT INTERNATIONAL DE LA MER, Le Temps de Paix, Paris, 492 (1932-34).

(14) Sir Travers Tviss whose opinion was requested on the subject is quoted as having said that there was no objection in principle to the Bey of Tunis asserting an exclusive right to the **fructus** of the banks off the coast of Tunisia, to which sponges and polypi attached themsleves, even though the banks lay more than three miles off shore. In his view, the right of the Bey was prescriptive in character. See, SMITH, H.A., II GREAT BRITAIN AND THE LAW OF NATIONS, 122.

The oyster beds off the Irish coasts is another similar case where the coastal state exercised national jurisdiction over a seabed area of the high seas, extending from twelve and a half to nineteen miles from the ordinary three mile limit (15). The regulation and exercise by the coastal state of the jurisdiction over the seabed in this case was closely connected with two treaties concluded between the United Kingdom and France respectively in 1839 and 1867, with which we will deal below. The treaty of 1839 had reserved to the French fishermen some oyster beds on an area of seabed in the Bay of Granville which partly overlapped an area which the Irish authorities claimed. When the act giving effect to the treaty in question was passed, the Irish claim was partly met, by suspending that part of the treaty which covered the area claimed by Irish authorities (16). In 1867, when the second treaty was concluded again with France, the Irish pressure was much stronger, which was responsible for insertion of a provision in the Convention Act of 1868 giving effect to the 1867 treaty, whereby the Irish authorities were given the power to regulate the dreging for oystres on any oyster-beds within a distance of 20 miles from a straight line drawn between Lambay Island and Carnsore Point. According to Fulton, the enclosed area was 1300 square miles and extended, in some places, to 19 miles beyond the ordinary 3 mile limit (17).

Pearl fisheries in Australia have also been cited as examples of nationally claimed sedentary fisheries the dimensions of which went beyond the outer limits of the territorial waters (18). Acts regulating and extending licensing systems to the pearl fisheries in Qeensland and Western Australia were enacted in 1888 and in 1889 respectively. However, those acts were limited to the territorial waters in their effects,so far as foreigners were cocerned, as the local government was not able to legislate extraterritorally (19). Later, in 1952, those acts were repealed by the Commonwealth Pearl Fisheries Acts (20).

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(15) See, FULTON, **supra** note 10, at 612, especially at 620-21; Hurst, **supra** note 7, at 41; O'CONNELL, **supra** note 3, at 452; AUSTIN, B.L., THE CONTINENTAL SHELF, THE PRACTICE AND POLICY OF THE LATIN AMERICAN STATES, with special reference to Chile, Ecuador and Peru, 53 (1961)

(16) See, infra, II, 1,B.

(17) See, FULTON, **supra** note 10, at 620

(18) id,. at 697; HIGGINS AND COLOMBOS, **supra** note, 12 at 101; MOUTON, THE CONTINENTAL SHELF, 140-41 (1952); AUSTIN, **supra** note 15, at 50-51. O'connell says that: " sometimes the pearl fisheries of Queensland and Western Australia are cited as cases of sedentary fisheries, but they are misunderstood; only British were affected by the legislation (governing those fisheries", See, O'CONNELL, **supra** note 3, at 452

(19) See, **O'connell**, Sedendary Fisheries and the Australian Continental Shelf, 49 AJIL 185-87 (1955).

(20) See, I UNITED NATIONS LEGISLATIVE SERIES, LAW AND REGULATIONS ON THE REGIME OF HIGH SEAS, (1951).

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Other sedentary fisheries cited by commentators as extending beyond the territorial waters included fisheries off the coasts of Mexico, Colombia, Peru, Algeria and Italy (21).

b- The justification as provided for national claims

The early writers generally recognized the validity of the above-mentioned national claims, but for different reasons.

Hall referred to the national claim to the pearl fisheries of Ceylon as being a claim" to the products of **certain portion of land** which have been treated from time immemorial by successive rulers of the island as subject of property and jurisdiction" (22).

Oppenheim, in one of his early edition, said that the explanation of the pearl fisheries of Ceylon and the persian Gulf was to be found in the fact that the freedom of seas had not been a rule of law when those fisheries were taken into possession (23).

Westlake explained the exceptional regime of the pearl fisheries of Ceylon as follows:

> The case of pearl fishery is peculiar, the pearls being obtained from the sea bottom by divers, so that a physical connection with the stable element of the locality is wanting to the pursuit of fish swimming in the water. When carried on the state protection, as that off the British Island of Ceylon or that in the Persian Gulf which is protected by the British ships in pursuance of treaties with certain chiefs of the Arabian mainland it may be **regarded as an occupation of the bed of the sea.** In that character the pearl fishery will be territorial (emphasis added) (24).

Fulton referred to the pearl fisheries of Ceylon as very valuable and as having been treated from time immemorial by the successive rulers of the island as subject of property and jurisdiction. He went on to say that the local laws governing the fisheries applied to nationals as well as to the foreigners (25).

Sir Cecil Hurst justified, in his famous article, the legal basis of the same fisheries as follows:

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(21) See, FULTON, **supra** note 10, at 697; SMITH, **supra** note, 12 at 81; O'CONNELL, **supra** note, 3 at 453, n. 34; Francois Report to the International Law Commission, **reprinted in** II YILC 98 (1951).

(22) HALL, FOREIGN POWERS AND JURISDICTION, 243 n.1 (1894).

(23) Oppenheim, **Der Tunnel unter Armelkanal und das Volkerrecht,** 2 ZEITSCHRIFT FUR VOLKERRECHT UND BUNDESSTAATSCRECHT, 10 (1908).

(24) WESTLAKE, **supra** note 8, at 195.

(25) FULTON, **supra** note 10, at 687.

> The pearl and chank fisheries of Manaar were claimed from early times by the successive Portuguese, Dutch and British rulers of the neighbouring territory, and there can be little doubt but that a good title to ownership of these beds can be made out, based on long continiued occupation (26).

Gidel, though a stout propenent of the freedom of the high seas, accepted that the above-mentioned claims constituted an exception to the main principle (27).

Finally, Mouton considered that the legal basis of those claims could only be the prescription (28).

On the other hand, the British government sought, on ocassions, justification for claims to pearl beds of Ceylon and Bahrain on the basis of uninterrupted and undisputed proprietorship by successive rulers, native, Portuguese, Dutch and British, since the period prior to the development of the doctrine of the three mile limit. (29)

However, there are other official statements (30) to the effect that the pearl fisheries stood on a different footing to the ordinary kind of fishing in the waters of the sea, as the banks where the pearl lay must be treated as part of the bed of the sea (31)

B- Bilateral regulations

Apart from the the unilateral regulations by some nations of the sedentary fisheries mentioned above, two international treaties concluded between the Great Britain and France in 1839 and in 1867 respectively brought certain order to the exploitation of the sedentary fisheries within proximity of their coasts (32). By the terms of the 1839 treaty a considerable stretch of sea overlying the oyster beds in the Bay of Granville, extending well beyond the ordinary territorial water limit was reserved exclusively for the French fishermen (33). The British fishermen were exclu-

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(26) Hurst, **supra**, note 8, at 41.
(27) GIDEL, **supra** note 2, at 488-501.
(28) MOUTON, **supra** note 18, at 155.
(29) **See, Parliamentary Debates**, H.C. 5th. Ser. Vol. 163, Cols. 1417-18, and **reprinted in** HACKWORTH, II DIGEST OF INTERNATIONAL LAW, 679
(30) For example the statement made by the under-secretary of Great Britain in 1930, in response to a question put to him by members of the Parliament. See, HACKWORTH, **supra** note 29, at 679.
(31) id.,
(32) **See, supra**, II,1,B.
(33) The treaty and the events leading to its conclusion and alteration are elaborated in FULTON, **supra** note 10 at 612 et seq.

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ded from the area. The treaty did not work well; the Irish community was not happy with it, as it was indicated before. In the face of those difficulties, the parties concluded in 1867 another treaty to replace the 1839 one. It was not much different from the previous one, so far as the regulation of the sedentary fisheries was concerned. Not being ratified by France, it could not enter into force, however (34).

Conclusion:

1. As it appears from the above-quoted precedents and scholarly opinions, there was almost a consensus among the writers and the governments concerned that it was possible to acquire seabed rights beyond the territorial jurisdiction (35). However, on the question of how those rights could be acquired the opinions differed. While a majority of writers, particularly those of British background, characterized the seabed as **res nullius**, that is, no man's land capable of acquisition by effective occupation by the first comer (36); others characterized it as **res communis**, that is, common property only exceptionally capable of acquisition through prescription (37).

2. The claims were made to the sedentary fisheries situated on the small portions of the seabed of the high seas, not to the seabed as such. Only the fishery banks or beds were in focus. However, the latter could not be claimed without the seabed.

3. The shallowness of the overlying waters and the closeness of the relevant seabeds to the coasts would seem to have been the main reason underlying the national claims. The sedentary fisheries banks and beds were considered as a part of the territory of the coastal nation, which allegedly enabled the latter to appropriate to itself the fisheries in question.

4. All claims but the Anglo-French treaties were unilateral, basing themselves on an uninterrupted and undisputed long usage and on perhaps some physical connection between the seabeds in question and the adjacent territories.

5. In all cases, the freedom of navigation and free swimming fishing were not interfered or impeded. In fact, no claims were made to the superjacent waters.

2- Early claims to the subsoil of the high seas

The claims to the seabed and subsoil of the high seas in terms of mineral claims were not numerous. The best known precedent is the Cornwall Submarine

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(34) Id., at 618, 620,621.
(35) See, O'CONNELL, supra note 3
(36) For details see, Id. at 455.
(37) See, infra III.

Mineral case, which took place between the Duchy of the Cornwall and the Queen of the Great Britain (38). The dispute was about who owned the minerals obtained from workings below low water mark in the high sea, the Queen or the Duchy? The arbitrator Sir John Patteson to whom the dispute was referred decided that the right to all minerals lying below the water mark in the high sea adjacent to the County of Cornwall but not forming a part of it, was vested in the Queen. But he did not give any clear reasons why it should be so (39).

Another illustration of the calims to the subsoil of the high seas is provided by a draft treaty concluded between France and Great Britain in 1876 to construct a tunnel under the English channel to connect the two countries (40). Each country was to exercise the jurisdiction up to a point half way across the Straits of Dover. Although the treaty was not ratified, it was assumed by the both Parties that the law permitted them to construct a tunnel under the high seas and to exercise national jurisdiction over certain parts of it.

In conclusion, it could be said that the calims to the minerals beneath the high seas or the attempts to construct tunnels under it, had nothing to do with the seabed itself. The minerals were worked or the tunnels were constructed under the subsoil by driving from the dry land or territorial waters. But the common belief was that the occupation or appropriation of the subsoil of the high seas was not against the international law, so long as the freedom of navigation and fishing was not infringed.

3. Early References to the Continental shelf

Direct references to the continental shelf, not in the sense we understand it today, but as a habitat of living resources, came to appear only at the beginning of the twentieth century. (41)

In 1910, the Portuguese Government issued a decree in which it referred to the **continental shelf** as a habitat of fisheries and an area where deep trawling by steam vessels at depths of under one hundred fathoms was considered as extremely harmful to the fisheries. The decree accordingly prohibited fishing by that method landward of the one hundred fathom bathimetric contour. In fact, that was not a claim to the continental shelf as such; it simply intended to regulate the fisheries on the continental shelf. However, there is no doubt that the area over which the national jurisdiction was claimed extended well beyond the territorial waters. (42)

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(38) See, Hurst, **supra** note 8, at 34.

(39) Sir Cecil Hurst gives a detailed account of this case and explains the probable justification of the award. Id., at 35.

(40) See, SMITH, LAW AND CUSTOM OF THE SEA, 82 (1959).

(41) See, O'CONNELL, **supra note 3**, at 468 - 69.

(42) For further details, see, AUSTIN, **supra** note 15, at 58. The text of the decree is reprinted in UNITED NATIONS LEGISLATIVE SERIES, LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS, 1951, vol. I, p. 19.

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In 1916, a second early governmental reference to the continental shelf came, this time, from the Imperial Russian Government. It was in from of a declaration notifying the other governments that the Russian Government regarded as an integral part of the empire some islands which allegedly formed a northern extension of the continental shelf of Siberia. (43) Though the Russian Government's reference to the continental shelf did not mean submarine areas as such, the implication was that the northern extension of the continental shelf of Siberia of which the islands formed a part was the territory of Russia.

The year 1916 and the following years witnessed unceasing attempts on the part of jurists and writers to bring about a continental shelf doctrine.

The Argentine writer Storni, who is considered as the instigator of the doctrine of the continental shelf, wrote a paper in 1916, in which he emphasised the importance of the continental shelf for commercial fishing (44).

Odon de Buen of Spain is known to have urged at the Fisheries Conference in Madrid, in 1918, that the national jurisdiction of the coastal state should extend the continental shelf as a habitat of important edible species of fish (45).

On the other hand, an event which took place in 1918, sheds some light on how the governments then considered individual claims to the bed of the high seas.

A citizen of the United States having discovered a huge oil pool in the Gulf of Mexico, about 40 miles from the land territory, on a reef where the depth of water was about 100 fathoms, asked the Department of State to grant him a property or leasehold right to a tract of the ocean bottom containing oil and to protect him in his effort to erect an artifical island for working the oil field. The discoverer went further in his application to suggest that he would turn over the oil field to the government for an agreed consideration if he were allowed to acquire the rights for which he applied. (46)

The Department of State responded that the U.S. had no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the outer limit of the territorial waters. Therefore, it declined to grant the rights requested by the applicant. However, the Department did not shut fully the door to the applicant by saying that if the creation of the island did not interfere with rights of the US citizens and did not cause any complaint "made apparently upon good grounds "by a foreign government, the Department would not object to such an attempt to create the island. But it was of the view that "it would seem that no foreign government would interfere with the erection of

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(43) AUSTIN, **supra** note 15, at 104.
(44) See, O'CONNELL, **supra** note 3, at 469.
(45) See, AUSTIN, **supra** note 15, at 42.
(46) See, HACKWORTH, **supra** note 29, at 680.

an artifical island in the Gulf of Mexico, unless its interests or rights of its citizens were injuriously affected thereby" (47). The Department went further in its report to say that, though it could not give any assurances as to the request, it might be possible to extend protection to the right of the occupant, if the island were erected and if the US took the control of it (48).

In 1925, Suarez, again, an Argentinian national, made further attempts, as a member of League of Nations' Committee of Experts for the Progressive Codification of International Law, for extension of jurisdiction of the coastal state to include continental shelf in order to preserve and protect fisheries beyond the territorial waters. Suarez's proposal would have enclosed a fishery zone extending from the shores to 200 metre isobath line. (49) Suarez summarized his proposal as follows:

> The exploitation of the products of the sea requiers regulation the most urgently in the waters nearest the coast, because it is in these regions and particularly on the shoals, that the species most useful to man have their habitat. In the open sea away from the continental shelf, where depths exceed 200 m. only a few species useful to man are to be found in upper levels of the sea. (50)

Suarez's proposal did not recieve support then but the thesis he advanced was to remain a constant policy among the Latin American States up to the acceptance of the institution of the exclusive economic zone.

Again another Latin American writer Ruelas said for the first time in 1930 that the continental shelf consituted a natural prolongation of the land territory and hence appertained to the coastal state. (51)

Later in 1936, the theory advanced by the Latin American writers found a great ally in person of the fishery community and the influental bodies representing it up in the U.S. When the Japanese fishing fleets alllegedly started to fish salmon heavily in the Bristol Bay, Alaska, the US fishery industry feeling that its interests were threatened by the overfishing there, began protesting against Japan, and made

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(47) Id.,
(48) Id.,
(49) See, Report of the Exploitation of the Products of the Sea, 2 AJIL, suppl. No 2, 231 (1926).
(50) See, Id., at 231.
(51) See, O'CONNELL, supra note 3, at 469, n. 10.

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representations to the Department of State. (52) In parallel to a gentlemen agreement which the Department concluded with the Japanese Government whereby the latter promised that it would not allow its citizens to fish in that area, the fishery community succeeded in moving some congressmen to introduce bills with a view to excluding the Japanese from the area permanently. (53) Thus, two bills were tabled. One called the Diamond Bill, basing itself on the premise that the salmon being hatched in the Alascan rivers, was the property of the United States, would have provided for a twelwe mile protection zone and an additional law enforcement area, with a possible outer limit of 100 fathom line, modelling itself on the Anti- Smuggling Act of 1935. (54) The other bill called the Copeland Bill stating that the shallow depths of the Behring Sea must be regarded as a slightly submerged margin of the American Continent, it urged the need to protect mineral deposits, fisheries, and animal life of the region. Its object was to extend the jurisdiction of the United States to all the water and the submerged land adjacent to the coast of Alaska and lying within the limits of the continental shelf. The outer edge of the shelf was said to be a line where the superjacent water was 100 fathoms in depth. However, both bills failed to pass through the Congress. (55)

On the other hand, President Roosevelt contemplated at that time to extend the national jurisdiction to such a distance that would protect the salmon fisheries. The President at one point even thought to go further and to forbid fishing by foreigners on the continental shelf of the United States, after he had been briefed by the Secretary of State Hull that the continental shelf was a kind of bridge between the deep sea bed and inland rivers and lakes where the salmon spawned. (56) There are reports that he thought to extend the territorial waters up to 100 fathom isobath to save the salmon (57).

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(52) See., Bingham, J.W., **The Continental Shelf and the Marginal Belt,** 20 AJIL 173 (1946); WHITEMAN, M.M., 4 DIGEST OF INTERNATIONAL LAW, 954 (1976); Selak, C.B., **Recent Developments in the High Seas-under the Presidential Proclamation of 1945,** 44 AJIL, 672 (1950); Waldock, C.H.M., **The Legal Basis of Claims to the Continental Shelf,** 36 THE GROTIUS SOCIETY, TRANSACTION FOR THE YEAR 1950, pp. 115 - 122. The resentment against the "invasion" was reportedly so strong that longshermen on the Pacific Coast threatened to tie up every Japanese ship in a port of the USA by refusing to move cargoes until the US Government found a favorable solution to the problem. Even a boycott of the Japanese products was suggested. Some went further to suggest that the US fishing fleet be equipped with proper weapons. See, Bingham, **supra** this note, at 175. However, Jessup writes that it was not clear whether the Japanese ever fished there. See, Jessup, P.C., **The Pacific Fisheries,** 33 AJIL 129 (1939).

(53) See, LEONARD, INTERNATIONAL POPULATION OF FISHERIES, 134 (1944).

(54) See, Jessup, **supra** note 52, at 130; Waldock, **supra** note 52, at 122; MOUTON, **supra** note 18, at 181.

(55) See, 33 AJIL 33 (1939); MOUTON, **supra** note 18, at 216-17. Jessup criticises the legal basis on which the bills were based. See, **supra** note 52, at 135.

(56) See, Hollick, A.L., **U.S. Ocean Policy: The Truman Proclamations,** 17 VA.J.INT'L L. 23,27 (1976).

(57) See, id, at 28.

4- The First Treaty Regulating the Regime of the Continental Shelf: Gulf of Paria Treaty

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The Gulf of Paria Treaty concluded in 1942, between the United Kingdom and Venezuela, is the first treaty ever to have established and regulated the exclusive rights for the Parties for the purpose of the exploration and exploitation of the submarine areas underlying the high seas in the Gulf. (58) The object of the treaty was "to make provision for and to define as between themselves their respective interests in the submarine areas of the Gulf of Paria". (59) The areas to which they laid claims were obviously beyond the territorial waters, as Article 1 defined it (60).

Each side undertook not to assert any claim to the sovereignty or control over those parts of the seabed and subsoil which remained on the other side of the dividing line (61).

The Parties mutually recognized the high seas status of the overlying waters. They also agreed that passage and navigation on the face of the sea should not be affected in any way. They particularly emphasised that the navigation should not be closed or impeded by any works or installation which might be erected (62).

The Parties made further provisions for the protection of the environment against pollution which might result from the exploration and exploitation of the seabed concerned (63).

The treaty was a bilateral one, and as such was binding only on the Parties. Therefore, it had no **erga omnes effect** (64). However, it did not generate any protests on the part of other governments. In fact, the area was not heavily used for shipping purposes and the only coastal states were the Parties themselves.

On the other hand, the treaty did not make any disunction between the seabed and the subsoil. It put them under the same regime, providing a good precedent for those who were later to assert the identity of the seabed and subsoil for the purpose of exploration and exploitation of its resources (65).

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(58) Treaty relating to Submarine Areas of the Gulf Paria, United Kingdom - Venezuela, 26 February, 1942, **reproduced in** 1 UNITED NATIONS LEGISLATIVE SERIES, 44 (1951).

(59) **See**, the preamble of the Treaty. For further details about the Treaty, **see**, Waldock, **supra** note 52, at 131 - 32; Hurst, Sir Cecil, **The Continental Shelf**, THE GROTIUS SOCIETY, TRANSACTIONS FOR THE YEAR 1948, vol. 34, pp. 162 - 64; Vallat, F.A., **The Continental Shelf**, 23 BYIL 333 (1946); MOUTON, **supra** note 18, at 250; Lauterpacht, H., **The Sovereignty over the Submarine Areas**, BYIL, 376 (1950); AUSTIN, **supra** note 15, at 59; Jagota, I.P., **Maritime Boundaries**, II ACAMEMIE DE DROIT INTERNATIONAL DE LA HAYE, 117 (1981).

(60) **See**, Article 1.

(61) **See**, Article 2.

(62) **See**, Article 6.

(63) **See**, Article 7.

(64) **See**, O'CONNELL, **supra** note 3, at 471.

(65) **See**, **infra** IV, 2.

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Neither, did the treaty make any mention of the term "continental shelf". The reason might be that the Parties thought that the submarine areas of the Gulf did not qualify geomorphologically for the continental shelf (66). They simply used the term "submarine area of the Gulf of Paria".

More importantly, the United Kingdom, by an Order in Council, dated 6 August 1942, formally annexed its portion of the submarine area to the Colony of Trinidad and Tobago, just as Venezuela annexed its portion to its territory. (67)

That was nothing but an application of the then valid doctrine of occupation as a mode of territorial acquisition. (68) The importance of the treaty lies not only in the fact that it is the first treaty of its kind, but also in the fact that it made it very clear that the seabed and subsoil of the high seas could be appropriated by occupation.

Conclusions:

The writers on international law, the goverenmental enactments and regulations, and various groups represented by governmental bodies referred to the continental shelf, as from 1910 to 1942, either as a habitat of the living resoruces in which they said the coastal state had a more preferential interest as opposed to the other states, or to a certain extent, as a location of the minerals which they contended the coastal state should exploit. Thus, it seems that the continental shelf was always considered as constituting a physical nexus with the territory of the coastal state. There are precedents to suggest that the fisheries on the continental shelf were claimed because it was thought that the former was a submerged part of the territory adjacent to the areas in question.

However, the Gulf of Paria Treaty aside, neither of the claims was in the form of a declaration of the existing law. Rather, they tried to justify and to have recognized by other states their calims to what they called the continental shelf. In other words, those claims did not constitute a part of the general law, but attempts to change it.

With the help of the then appropriate international environment, the pressing economic needs for the oil, however, paved the way for further and more drastic calims to the submarine areas of the high seas in the following years, a subject which we will address immediately below.

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(66) Compare: **infra** V, 2, A, bb, cc.

(67) **See**, United Kingdom (Trinidad and Tobago) Submarine Areas of the Gulf of Paria (Annexation) Order in Councill, August 1942, **reproduced in** I UNITED NATIONS LEGISLATIVE SERIES, 46 (1951).

(68) **See**, Waldock, **supra** note 52, at 131; Jagota, **supra** note 59, at 117.

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III - EMERGENCE OF THE CONTINENTAL SHELF AS A LEGAL INSTITUTION AND THE PREMONITIONS OF THE DOCTRINE OF THE EXCLUSIVE ECONOMIC ZONE

1 - The change in the ocean policy of the United States

Introduction

We have already indicated above that President Roosevelt contemplated in late 1930s to extend the US jurisdiction to the areas of the continental shelf contiguous to the land territory of the former so as to protect the Alaskan Salmon against foreign states, especially against the Japanese fishermen (69). Although it was not a proven fact that the Japanese fished salmon off Alaska at the alleged scales and despite the assurances by the Japanese Government that no catching of salmon would take place any more, the US fishing community was convinced that the fishing had taken place and that conviction was apparently shared by the President (70). The US Government of the time, with more national interests and less respect for international law, wanted to establish a permanent ocean policy, the details of which were worked out and presented to the President by the Secretary of Interior, to exclude foreigners from the fishing grounds of the high seas contiguous to its territory but to preserve the access of the US fishermen to the fishing grounds off the coasts of other states. The policy was intended to protect the Alaskan Salmon and to maintain the US interests in Tuna off Latin American coasts (71). On the other hand, at the time those activities were taking place, it so happened that there was an urgent world wide need for the oil which the geologists and oceanographers proved to be abundant beneath the subsoil of the high seas and capable of being extracted. Those reasons were sufficient enough to persuade a President innately eager to extend the maritime jurisdiction, to direct the relevant governmental departments to

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(69) See, supra, II, 3.

(70) See, Hollick, supra note 56, at 27.

(71) Though President Roosevelt and the Secretary of Interior Ickes always insisted on formulating a policy for excluding foreign fishermen from the fisheries off the US coasts (Hollick, id,.at 32), some other high ranking officials raised the question of the possible adverse impact of such a policy on the fishing activities of US fishermen near other countries (id,.at 38). The Division of International Trade Policy of the Department of State clearly indicated that the unilateral action of the US would generate similar actions on the part of other countries (id., at 53). In fact, that prediction soon came true when the Latin American States started declaring more ambitious national ocean policies just after the issuance of the Truman Proclamations.

make studies about and conseqently to formulate a comprehensive ocean policy (72). The preparations were made and with the initiative of the Department of Interior, the principles of new policy were embodied into two seperate documents, one dealing with the continental shelf, the other with the fisheries. It was then considered as appropriate that documents in question should be in the form of unilateral proclamations, apparently due to some domestic problems relating the power-sharing in the US governmental system between the Federal Government and States on one hand and the Federal Government and the Congress, on the other. Shortly before the proclamations became ready for issuance, President Roosevelt died. It fell to his successor Harry Truman to issue them, on September 28, 1945 (73).

A - The Presidential Proclamation concerning the continental shelf (Truman Proclamation)

The Proclamation concerning the continental shelf (hereafter to be cited as The Truman Proclamation) (74), recited in its preamble that there was a world-wide need for the resources of the petroleum, gas and other minerals which the experts said were available under the many parts of the continental shelf off the coasts of the United States. The said oil and other minerals, the proclamation stated, could be utilized or would become so in the near future and a prudent utilization and conservation of those resources required an exercise of **control and jurisdiction** over them. It was just and resonable that the coastal state should have that power. For the assumption by the coastal state of that power the Proclamation gave the following rationale:

Effective measures to utilize or conserve those resources was contingent on close cooperation and protection from the coast;

The continental shelf might be regarded as an extension of landmass of the coastal state and thus naturally appurtenant to it;

The resources frequently formed a seaward extension of a pool or deposit of oil or other minerals lying within the territory; and

Self-protection compelled the coastal state to keep a close watch over activities off its coasts.

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(72) **See. Id.**, at 29.

(73) **See, Presidential Proclamation,** No 2667. DEPARTMENT OF STATE BULLETTIN, September 30, 1945, pp. 484-87.

(74) As to the early reactions to and comments on the Proclamation see, inter alia, Orchard, E., **Resources of the Continental Shelf,** 40 AJIL 53 (1946); Bingham, **supra** note 52, at 173; Waldock, **supra,** note 52, at 115; Hurst, supra note 59, at 153; Vallat, **supra** note 59, at 333; Feith, **Rights to the Seabed and Its Subsoil,** INTERNATIONAL LAW ASSOCIATION REPORT OF THE FOURTY-THIRD CONFERENCE, Brussels, 183, 193 (1948); Lauterpacht, **supra** note 59, at 388.

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The Proclamation, having thus given its policy reasons, declared in its operative part that "the Government of the United States **regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States and subject to its jurisdiction and control"** (emphasis added).

The Proclamation went on to say, in its final part, that in cases where the continental shelf bordered the coasts of other states, the boundary would be determined by the United States and the state (s) concerned **in accordance with the equitable principles** and that the character as high seas of the the superjacent waters were not affected.

The Proclamation itself did not specify the outer limit of the continental shelf, except in so far as the rationale given for its existence amounted to such a definition (75). However, a press release issued simultaneously with the Proclamation defined the outer limit of the continental shelf as follows:

Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) is considered as the continental shelf (76).

The area of the continental shelf over which the United States, thus, acquired jurisdiction and control was about 750.000 square miles (77). The Secretary of Interior who was in the co-administration of the shelf likened, in his annual report, the continental shelf to the past land acquisitions in the following terms:

If we discount the obvious fact that it [the continental shelf] is inhabited or uninhabitable, the continental shelf ranks with the lands which we acquired by the Lousiana Purchase, or by Opening of the West, or by the Purchase of Alaska. (78)

The Annual report also gave a definition of the continental shelf identical with the one in the above-mentioned press release, and stated the width of the continental shelf of the United States as varying from 20 to 250 miles on the eastern coast and from 1 mile to 50 miles along the Pacific coasts.

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(75) That is, the continental shelf is a continuation of the land mass.

(76) **See,** I UNITED NATIONS LEGISLATIVE SERIES, 39 (1951).

(77) Remember that 100 fathom depth criterion had been used in the Copeland and Diamond Bills. See, supra, note 57 and accomponying text. President Roosevelt too had referred, in his conversation with under -secretary of state, to 100 fathom depth as a possible outer limit of the territorial waters. **See,** Hollick, **supra** note 56, at 28. The Secretary of Interior Harold L. Ickes gave this area as 760.000 square miles in his **Annual Report of the Secretary of Interior for 1945,** pp. vi, ix-x; **reproduced in** I UNITED NATIONS LEGISLATIVE SERIES, 39-40 (1951).

(78) **See, id.,** at 40.

The proclamation, thus, not only became an important means for the United States to acquire jurisdiction and control, not sovereignty, on a gigantic submarine area, but also became a starting point of the positive law on the continental shelf and was quickly emulated by other states, some of which clearly seized the opportunity to extend their sovereignty to the offshore areas, including the superjacent waters. Secondly, and perhaps more importantly, the Proclamation introduced the ipso jure acquisition doctrine which considered the continental shelf as natural prolongation of the land territory and thus explicitly did away with the doctrine of occupation as a mode of territorial acquisition. Thirdly, it extended the jurisdiction of the coastal state to the resources of the continental shelf and not to the seabed as such. Thirdly, it disclaimed extension of jurisdiction to the superjacent waters, if the effects of the Fisheries Proclamation, with which we will deal below, are discounted. However, all those precautions did not prevent the excessive claims from being made by other states (79).

B - The Presidential Proclamation concerning the coastal fisheries

The second Presidential Proclamation (hereafter to be cited as the Fisheries Proclamation) (80) recited in its preamble that the U.S. Government viewed with concern the inadequacy of the existing arrangements for the protection and perpetuation of the fishery resources contiguous to the coasts of its territory, that the fishery resources had a special importance to the coastal communities and the nations as a source of livelihood, as resources for food and as resources for industry, that the technological developments in the fishing methods made possible the intensified fishing over the wide sea areas and in certain cases even threatened the fisheries with depletion, and that consequently there was an urgent need to protect coastal fishing resources from destruction, by having due regard to conditions peculiar to each region and to the special rights and equities of the coastal state and of any other state which might have established an interest in the fisheries in question.

The proclamation then declared in its operative part the following principles as constituting the U.S. ocean policy regarding coastal fisheries:

The US Government considered as proper to establish unilaterally bounded conservation zones in those areas of the high seas which were contiguous to the coasts of the US wherein the fishing activities had been or in the future might be developed and maintained only by US nationals on a substantial scale and to regulate and control fishing activities in such zones.

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(79) See, infra, III, 2,A.

(80) For the text of the Proclamation and that of the executive order concerning application of the Proclamation See, 13 DEPARTMENT OF STATE BULLETIN, 484-87 (1945). For comments on it see, Borchard, supra note 74, at 53; Selak, supra note, 52, at 670; Allen, The Continental Limits of Coastal Fishing, 21 WASH.L.REV. 1 (1946); Bingham, The Continental Shelf and the Marginal Belt, 40 AJIL 53 (1946); MOUTON, supra note, 18, at 63.

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In areas where the fishing activities had been or might thereafter be **legitimately** developed and maintained jointly by nationals of the US and of other states, the US and such other states would establish under agreements bounded zones and would subject the fishing activities in such zones to their regulation and control as provided in such agreements.

Other states had, according to the Proclamation, right to similar conservation zones off their coasts,provided a corresponding recognition was accorded to the interests of the US which might exist therein. The character as high seas of waters of the contemplated zones was conceded.

The accompanying press release (81), after having stated the reasons for the issuance of the Proclamation, explained that as a result of the new policy the U.S. would be able to protect effectively its most valuable fishery, the Alaskan Salmon (82). Through painstaking conservation efforts of scientific management, it continued, the US had made an excellent progress in maintaining the salmon fishery, at high levels. But the salmon spending a considerable portion of its life in the high seas, was subject to the uncontrolled fishing activities of the fishermen of other states as well as nationals of the U.S. The new policy, it concluded, was the solution.

In fact, the high seas contiguous to the coast of Alaska are blessed with so many rich salmon fisheries that they deserve a special treatment by any standard. They are the richest fisheries of their kind in the world. Even during the period of 1931-1935 they accounted for 58 % of the world's total average supply. In 1936, they gave employment to 35.000 persons. In the same year, the value of the Alaskan Salmon yield was $45 million (83).

Now that in that area only US nationals had fished, the US Government could, under the terms of the Fisheries Proclamation, establish bounded zones therein and would be able to regulate and control fishing activities in the area. Thus, the US got what it wanted, seemingly without prejudice to its claims to the fisheries off the coasts of other states (84).

(81) The text is reproduced in I UNITED NATIONS LEGISLATIVE SERIES, 39 (1951).

(82) This clearly shows that the main reason behind the issuance of the Fisheries Proclamation was the fear that the foreign fishing fleets would interrupt the salmon on its way back to the Alaskan rivers where it was spawned. See, MOUTON, supra note 18, at 66.

(83) See, Jessup, supra note 52, at 131.

(84) Senator Green, the chairman of the Senate Foreign Relations Committee's Sub-committee, said, on the occasion of hearings as to some bilateral fishery treaties, that:
The Proclamation was misinterpreted by several nations, which assumed it to mean that the United States would accept the extension of sovereignty of these nations over the high seas off their coasts. The United States is strongly opposed to such extension of sovereignty on several grounds. The result of such extension of sovereignty out into the high seas could very well be disasterous to our interests in a number of the high seas fisheries. We have very important fisheries off the coasts of other countries, such as the Grand Bank Fisheries in which the United States fishermen have participated since the earliest history of our country; shrimps fisheries in the Gulf of Mexico which were explored and developed by our fishermen; the tuna fishery off the west coast of Latin America which is the most valuable fishery. see, Selak, supra note 52, at 680.

Though the character as high seas of the superjacent waters was not seemingly affected, the fishing activities were to be exclusively regulated by the U.S. The access by other states to the bounded areas was to be subject to the terms of national regulations of the U.S. (85). In other words, in so far as, at least, the fishing of salmon was concerned, the superjacent waters of the bounded areas would not be as much high seas as they had been before (86). It is surprising that when one conjures of imposing the fishery regulations upon the continental regime, that is, when two proclamations are read together, one sees an exclusive economic zone of loose nature, though the institution then was not in existence.

2 - The policy declarations and practices of other states

Introduction

Immediately after the Truman Proclamation, many nations took occassion to extend their jurisdiction to the seabed and, in some cases, to the overlying waters beyond the territorial waters. Almost each and every subsequent declaration, **inter alia**, relied on the Truman Proclamation and such other declarations as might have preceded it to justify new extension seaward of national jurisdiction. Here, an attempt will be made to give an outline of the major declarations in a chronological order, with special reference to the reasons advanced in support of entitlement to the offshore areas.

A - The Practice of Latin American States

a - Mexico, Presidential Decree of 29 October 1945

The Pesidential Decree (87), having referred to the growing need for the states to conserve natural resources which throughout ages had remained beyond their

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(85) See, MOUTON, **supra** note 18, at 66.

(86) Fenwick, commenting on both Presidential Proclamations, said that "both proclamations contemplate enchroachment upon traditional rights to use of the high seas.." INTERNATIONAL LAW, 423 (third ed. 1948). Even in cases where the United States was under the terms of the Fishery Proclamations, to make agreements with other countries, the fishermen of states which were not parties to the agreements in question would have to submit to the terms laid down by the agreements. See, Bishop, W.W., **The Exercise of Jurisdiction for Special Purposes in High Seas Area Beyond the Outer Limit of the Territorial Waters**, SIXTH CONFERENCE OF INTER-AMERICAN BAR ASSOCIATION, 10-11 (1949).

(87) See, I UNITED NATIONS LEGISLATIVE SERIES 13 (1951). For the text of a further Presidential Decree reading Presidential Decree Incorporating in the Property of "Petroleos Mexicanos" the Subsoil of the Lands Covered by the Territorial Waters of the Gulf of Mexico and other lands specified therein, 25 February 1949, See, **id.**, **at 14-15**, For the comments on the proclamation See, MOUTON, **supra** note 18, at 73-74, 253; Selak, **supra** note 52, at 70; Young, R., **Recent Developments with Respect to the Continental Shelf**, 42 AJIL 849, 851 (1948); Waldock, **supra** note 52, at 128-9; Garcia-Amador, F.V., THE EXPLOITATION AND CONSERVATION OF THE SOURCES OF THE SEA, 98 (1963).

control, proceeded to describe the continental shelf as submarine platform underlying the continent and as bounded by the 200 hundred metre isobath line. The shelf thus described, the Decree said, **formed an integral part of the continental countries. Proceeding on that geological (physical) integrity, the Decree found it unwise, imprudent and even impossible for Mexico to renounce its jurisdiction and control over and utilization of that part of shelf which adjoined its territory in both oceans.**

The Decree continued to recite that in the pre-war years, the western hemismphere had to stand aside, while permanent fishing vessels from other countries engaged in excessive and exhaustive exploitation of the fishery resources which must belong to the country possessing them and to the continent of which they formed a part. Relying on the purported possessive right thus described, the Decree found it essential that the coastal state should extend its protection and control to the places and zones indicated by science for the development of the high seas fisheries, irrespective of their distance from the coast.

The Decree accordingly laid claim to the whole of the continental shelf adjoining the Mexican coasts and to the natural resources found therein (88).

In its final part, it declared that the Mexican Government did not seek to disregard the lawful rights of third states on the basis of reciprocity and the character as high seas of the overlying waters was stated to be not affected.

Although the Decree used only terms **juridiction and control,** instead of **sovereignty,** and thus seemed to have been modelled on the Truman Proclamation, as Selak put it (89), it would seem that its approach to the notion of the continental shelf was different (90). It rather proceeded on the assumption that the continental shelf was a part of Mexico which had not been in use before but the Government decided to activate and it purported that it would not renounce the whole submarine area itself and not to mention the resources contained therein.

In fact, the subsequent legislative acts of that country confirmed this view. A further Presidential Decree (91), issued in 1949, incorporated the shelf areas into the national territory. And a bill sent by the Executive Branch to the Congress to amend the Constitution, pursuant to the 1945 Decree, contained elements suggesting extension of national claims to the superjacent waters as well (92).

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(88) However, Mexico apparently did not put those policies into the practice and made a bilateral treaty with the US with respect to fisheries. See, Selak, supra note 52, at 676.

(89) See, Selak. supra note 52, at 851.

(90) See, alsoWaldock, supra note, 52, at 129,

(91) See, supra note 87.

(92) See, AUSTIN, supra note 15, at 156-61.

b - Panamian Regulations

Two major documents throw light on the early policy of Panama relating to the continental shelf and the fisheries in the high seas. The Panamian Constitution of 1 March 1946 stated that "the areal space and submarine continental shelf which appertain to the national territory, belong to the state" (93). A decree issued later extended the national fisheries jurisdiction over the continental shelf and considered any fish products within the indicated area as national (94).

c - Argentina, Decree No 14708 concerning national sovereignty over epicontinental sea and the Argentine continental shelf, 11 October, 1946

If a decree of 1944 which declared for the first time temporary zones of mineral resources is not counted (95), the Argentine Decree (96), ranked third in the series in the chronological order, though its influence on the subsequent Latin American declarations was deeper and more persuasive than others (97).

The Decree stated in the preamble that the submarine or the continental shelf was closely united to the mainland both in morphological and geological sense (98). It described the waters covering the continental shelf as the epicontinental sea. Stating that in the international sphere a conditional recognition was accorded to the right of each state to consider as national territory the entire extent of the epicontinental sea and of the adjacent continental shelf, it referred to previously declared proclamations of the U.S. and Mexico respectively as asserting epicontinental sea and the continental shelf (99). Apart from the practice of the states it also purported to justify the doctrine thus specified on the basis of implicit recognition which international law allegedly had accorded to it and on the scientific support recently made available by the commentators.

The preamble finally stated that the manifest validity of the thesis advanced and the determination of the Argentine Govenment to perfect and preserve all the attributes inherently bound with the exercise of national sovereignty made it advisable to formulate its policy regarding the sea spaces and their beds as described above.

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(93) See, I UNITED NATIONS LEGISLATIVE SERIES, 11 (1951).

(94) Id,. at 16.

(95) Id,. at 3.

(96) Id., at 4. As to the background of the decree, see, AUSTIN, supra note 15, at 105-110, 167.

(97) This is illustrated by the fact that the subsequent declarations of the Latin American States cited it and some of them apparently modelled themselves on it.

(98) This is understandable, because Argentina has a broad geological continental shelf area and its resort to the geological unity of continental shelf with the mainland may also be attributed to and influenced by, its claims to the Antarctic. See, Young, supra note 87, at 853.

(99) This assertion was considered as incorrect. See, MOUTON, supra note 18, at 75; Young, supra note 87, at 853; Waldock, supra note 52, at 129-30

In its operative part, the Decree accordingly declared that the Argentine epicontinental sea and continental shelf were subject to the sovereign power of the Argentine nation. However, it stated that for purpose of navigation the character of waters situated in the Argentine epicontinental sea above the Argentine continental shelf remained unaffected.

Thus, the fishery rights of third parties were totally disregarded (100). The area it claimed as the territory was not defined in mathemathical or geographical terms except that the geological definition of the continental shelf cauched in vague terms could indicate any seaward limit.

The Argentine Decree differed from earlier declarations, in particular, from the Truman Proclamation in that it claimed not only the resources of the seabed and subsoil of the high seas contiguous to its coasts, but also it claimed and, in fact, considered as territory the seabed and subsoil as such, including the overlying waters. In short, it was nothing but almost an extension of the territorial waters (101). Only the right to navigation remained free. The living and non-living resources of the seabed and subsoil as well as of the water column were appropriated.

In fact, the United States and United Kingdom protested against the Argentine ocean policy described above. The US stated in its note to theArgentine Government that the Decree in question provided for sovereignty over the continental shelf and over the adjacent seas and that it failed to recognize the rights and interests of the United States in the high seas off the coast of Argentina. Therefore, the note concluded, the Decree was not compatible with international law (102).

d - Chile, Presidential Declaration concerning the continental shelf. 23 June 1947.

The Chilean Declaration (103), having asserted that the previously declared proclamations of other governments had categorically proclaimed their sovereignties respectively over their continental shelves and over the adjacent seas to the extent neccessary to preserve for themselves the natural riches belonging to them (104), it found manifestly convenient that Chile should issue a similar proclamation of sovereignty (105).

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(100) See, GARCIA-AMADOR, supra note 87, at 79.

(101) See, Waldock, supra note 52 at 130; Lauterpacht, supra note 59, at 387.

(102) See, I UNITED NATIONS LEGISLATIVE SERIES, 131 (1951); Waldock, supra note 52, at 131

(103) I UNITED NATIONS LEGISLATIVE SERIES, 6-7 (1951).

(104) This assertion was found as incorrect by the US itself, when the latter protested against the Chilean Decree particularly on the ground that assertion of sovereignty over the seabed and superjacent waters of the high seas was not compatible with international law and that thus the Decree differed from the Truman Proclamation. See, id., at 7. Neither did the commentators share the view of the Chilean Government. See, Young, supra note 87, at 853; MOUTON, supra note 18, at 83; Brierly, **Summary Records of the 69th Meeting of the International Law Commission, 2nd session, I YILC (1950)**; Waldock, supra note 52, at 131.

(105) Austin is of the view that the sovereignty over the continental shelf was unlimited, while that over the superjacent waters was limited to the purposes specified. See, AUSTIN, supra note 15, at 112.

It found justification for such proclamation not only in the fact that Chile possessed and had under exploitation natural resources essential to life of its nation and contained the continental shelf, but also in its topography and in the narrowness of its boundaries which made the life of its nation linked to the sea more than any other state. It also asserted that an international consensus recognized the right of **every nation to consider its national territory and adjacent extension of epicontinental sea and the continental shelf.**

Basing itself on those justifications, the Declaration stated that the Chilean Government **confirmed** and **proclaimed its national sovereignty over all the continental shelf adjacent to its coast, whatever might be their depth below the sea,** and claimed consequently all the riches therein contained. The Declaration also declared the national sovereignty over the adjacent seas regardless of their depths and to the extent neccessary to preserve, protect and exploit the living natural resources. Thus, it placed under the national jurisdiction the fishing activities in general and whaling activities in particular.

The area over which the national sovereignty was declared as being within the parameter bounded by the coasts and a mathematical parallel out to the sea at a distance of 200 miles from the coasts. Thus, Chile was the first state to establish the seaward boundary of its continental shelf at a 200 mile distance from the coast (106).

The Declaration finally stated that it preserved the fishing rights of the third states on the basis of reciprocity and that the right of navigation on the high seas would not be affected (107).

The Chilean decree is subject to the same criticism as the Argentine Decree. It confirmed and proclaimed the sovereignty over the seabed and waters of the high seas, which was, and perhaps still is, a derogation from the established rules of international law concerning the high seas freedom (108). United States and United Kingdom felt obliged to protest against those aspects of the Decree as damaging their interests in violation of the above mentioned principles of international law (109).

The Chilean Decree also differed from the Argentine Decree in that it set up maritime zones extending from the coasts to a 200 mile distance and that it did not rely, in justification of its offshore claims, on geological factors. As a matter of fact,

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(106) See, Hollic, supra note 56, at 495.

(107) Waldock considered the use of term continental shelf in the Chilean Decree as a catchword to cover the expansion of territorial waters and the creation of whaling and other fishing monopolies in the high seas. See supra note 52 at 131.

(108) Oppenheim-Lauterpacht expressed the view that these assertions had no foundation in international law. See, INTERNATIONAL LAW, A TREATISE, 632 (eighth ed. 1963).

(109) See, 1 UNITED NATIONS LEGISLATIVE SERIES, 7 (1951); Waldock, supra note 52, at 131.

the use of the term continental shelf in the Decree was not anything but a synonym for the seabed (or submarine area) as Chile does have little or no geological continental shelf. As Garcia-Amador puts it:

"[the] appropriation of continental shelf or the seabed and subsoil off the adjacent submarine areas is not exactly the direct object of the claim but rather a consequence of the extension of state competence over this broad area of the sea (110)."

To put it more concretely, the real rason lying behind the Decree was the rich living resources of the Pacific Ocean along the Chilean coasts. It was mainly the interests of the whaling industry and the other commercially important species of living resources which led Chile to claim sovereignty over the vast spaces of the sea (111). The Chilean whaling industry which was at its infancy stage by the time the Second World War ended, found itself threatened by the efficient long distance water fishing fleets of the states which had just released their ships from the war obligations and were in dire need of full scale whaling (112). The eventuality that the Chilean Government might participate in the forthcoming international whaling conferences which would bring restrictions on the pelagic whaling activities added to the concerns of the whaling industry and the latter sought to move the government to take unilateral actions which would protect the said industry (113). Those efforts persuaded the Chilean President to take action and the Declaration of Panama of 1939 seemingly provided a good precedent for setting the outer limit at the 200 mile line as it allegedly provided a 200 neutral mile zone during the second World War in which hostile actions of belligerent powers were prohibited. Thus, the choice of the 200 mile zone was allegedly based on an international precedent, although a 50 or 100 mile zone could have met the needs of the whaling industry (114). It is interesting that the 200 mile limit was later grabbed firmly by the Latin American states, although it had no magic or rational explanation, except that it was based wrongly on an irrelevant precedent.

Thus, it is clear that the main interest of Chile was with the living resources of the sea (115) and its reference to the Truman Proclamation and the term continental shelf were part of an effort to justify on precedents and practice otherwise hardly defendible unilateral claims to the high seas. However, the fact that Truman Proclamations, when read together, encouraged the Chilean Government seems to be clear.

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(110) GARCIA-AMADOR, **supra** note 87, at 99.

(111) See, Waldock, **supra** note 52, at 131; Hollick, **supra** note 56, at 494.

(112) **id.**, at 497.

(113) **id.**, at 498.

(114) In fact, the Declaration was misinterpreted and its range varied between 300 and 500 miles. See, DEPARTMENT OF STATE BULLETIN , 331-33 (1939).

(115) See, AUSTIN, **supra** note 15, at 170-171.

e - Peru, Presidential Decree of 1 August, 1947

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The Peruvian Presidential Decree, (116) closely following the combined pattern of the Chilean and Argentine models laid claim both to the continental shelf contiguous to the Peruvian coasts and to the waters covering it.

The Decree recited that **"the continental submerged shelf form one entire morphological and geological unit with the continent"** and that the shelf contained certain natural resources that must be proclaimed as the natural heritage of Peru (117). It found it neccessary to protect, maintain and establish a control of fisheries and other natural resources in the continental waters which covered the submerged shelf so that those resources could be exploited continuously to the interest of the country.

The Decree also emphasised the importance of protecting and maintaining the fishery resources for the survival of the guano birds which leave fertilizer on the islands off the Peruvian coasts and which live on the fishery resources.

The Decree continued to state that the right to **proclaim sovereignty and national jurisdiction over the entire extension of the submerged shelf** as well as over the continental waters covering it had been claimed by other states. Thus, it sought justification for the extension of offshore jurisdiction in the state practice as well (118).

Acting on the foregoing justification, the Decree extended, in the operative part, sovereignty and jurisdiction of Peru to the contiguous continental shelf as well as to the overlying waters, regardless of the depth of water and of the extension of the actual shelf, the tentative seaward limit being an imaginary parallel out to the sea at a distance of 200 mile from the shores.

The Peruvian Decree, thus, used the term "continental shelf" as an amalgamation of the seabed and superjacent waters. It did not preserve the probable rights of third states, maintaining only the right to navigation of all nations.

Like Chile, the main occupation of Peru was with the fishing resources of the adjacent high sea and not with the resources of an almost non-existent continental shelf. To have a better understanding of the underlying reasons of the Peruvian policy, one needs to know the significance of the fishery resources to that country.

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(116) See, I UNITED NATIONS LEGISLATIVE SERIES, 16-17 (1951).

(117) Peruvian continental shelf is relatively wider (about 75 miles) along the northern part of its coast and it is narrower in the south. See, MOUTON, supra note 18, at 79.

(118) As to validity of this assertion see, the comments made on the Chilean and Argentine decrees above.

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The Peruvian Humboldt Current which flows along the coast of Peru, Chile and Ecuador is very rich in living resources. It comes from the depths of the sea and brings with it the detritus carried down by the rivers. Thus, the nitruits and phosphates, brought into the Pacific area constantly stirred by the current and a nice environment is created for the living resources (119). Consequently, the Humboldt Current is abundant in immense biological wealth.

The livelihood of the Peruvian people, on the other hand, mainly depends, due to the low rainfall and aridity of the coasts, on the sea resources and the guano birds the survival of which in turn is dependent on the sea resources.

It was for those reasons that the Peruvian Government, availing itself of the opportunity offered by the Truman Proclamations, issued the Decree in question to exclude foreign fishing fleets from the contiguous sea spaces and monopolize the resources therein (120). Consequently, it is fair to conclude, with Austin, that the real motivation behind and rationale underlying that Decree were economic factors and neccessity (121).

Perhaps, it was for those obvious reasons that the US protested against that policy as infringing its interests and as not conforming to the Truman Proclamations (122).

f - Guatemala

Guatemala declared in the Petroleum Law of 30 August 1949 that all deposits or natural resources of petroleum within the land or sea boundaries of the country up to the extremity of the continental shelf would be the property of the nation, and the direct dominion over them was inalienable and imprescriptible (123).

g - Costa Rican Regulations

The political constitution of Costa Rica of 7 November, 1949 and a decree law dated 2 November 1949 followed in the foot steps of the Chilean decree and extended the national jurisdiction to the adjacent submarine areas as well as the overlying waters of the high seas, extending 200 miles from the shores (124). Sovereignty was **proclaimed and confirmed** over the said areas regardless of the depth of water and the extent of the jurisdictional maritime area was apparently determined by the necessity of preserving the natural resources of the area.

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(119) See, MOUTON, **supra** note 18, at 184.
(120) See, Hollick, **supra** note 56. at 499.
(121) See, AUSTIN, **supra** note 15, at 184.
(122) See, I UNITED NATIONS LEGISLATIVE SERIES, 17 (1951).
(123) See, I UNITED NATIONS LEGISLATIVE SERIES, 10 (1951). Later in 1956, a new constitution was adopted and some other provisions concerning continental shelf were inserted therein. AUSTIN, **supra** note 15, at 125-26, 179.
(124) See, I UNITED NATIONS LEGISLATIVE SERIES, 9,300 (1951).

It is clearly noticeable that reference to the morphological and geological features of the seabed are absent in the national regulations of Costa Rica. Probably, the continental shelf was used in those instruments as a base for wider claims (125). Clearly, the accent was on the living resources. On the other hand, the said instruments purported to declare an existing right, by simply **confirming and proclaiming them.**

h - Honduran Regulations

Honduras was no exception in making excessive claims to the adjacent parts of the high seas. Unlike other Latin American States, the Honduran claims were embodied in a number of instruments (126). The Presidential Decree of 28 January 1950, which was approved by the National Congress on 17 May 1951, stating that **the continental shelf formed with the landmass a single morphological and geological unit** (127), extended the national jurisdiction and sovereignty to the adjacent submarine areas as well as superjacent waters of the high seas. As an additional justification, it also relied on the state practice as indicative of established customary law authorizing such extension of offshore jurisdiction as it realized.

Honduras was the fourth Latin American State to establish a 200 mile one, both in the Atlantic and the Pacific Oceans.

Although Honduras referred to the geological and geomorphological factors in support of its claims, the 200 mile seaward limit it set could hardly be explained on the basis of them. In fact, it is extremely doubtful that the geological continental shelf of Honduras extends for 200 miles in the Pacific. Moreover, the claims to sovereignty over the high sea areas were excessive by any standard. Therefore, the criticism levelled against the policy declarations on which it relied are equally applicable to it.

i - Brazil, Decree No 28840, integrating into national territory the adjoining parts of the continental shelf, 8 November, 1950

The Brazilian Decree (128) would seem to have proceeded mainly on a geological basis in its claims to the continental shelf. It stated that the continental

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(125) See, AUSTIN, **supra** note 15, at 117.

(126) See, I UNITED NATIONS LEGISLATIVE SERIES, 11 (1951).

(127) **Id.**, at 302. See, also a decree amending the Code Civil, bearing the date 7 March 1950. **id.**, at 301. Later, in 1957, a Congressional Decree was issued which provided that the seabed and subsoil of the continental shelf, the continental terrace and other submarine areas adjacent to the territory of Honduras but outside its territorial waters, extending to a depth of 200 metres or beyond that, to where the depth of the superjacent waters admitted exploitation of the natural resources of the said areas, were subject to the jurisdiction of Honduras. UNITED NATIONS LEGISLATIVE SERIES, SUPPLEMENT TO LAWS AND REGULATIONS ON THE REGIME OF HIGH SEAS (VOL. I AND II) AND LAWS CONCERNING THE NATIONALITY OF SHIPS, 10 (1959).

(128) See, I UNITED NATIONS LEGISLATIVE SERIES, 299 (1951).

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shelf contiguous to the continent and islands and extending beneath the high seas was in reality **submerged territory and constituted one geological unit with the adjacent land.** Thus, from that premise it proceeded to the fact that the ever-increasing probability of the natural resources being found in that submerged land was responsible for the proclamation of sovereignty, dominion or jurisdiction over the continental shelf.

However, in a further effort to support its claim to the seabed, it relied on the practice of other states.

Acting on these premises, the Decree declared that the continental shelf which adjoined the continental and insular territory of Brazil **was incorporated into that territory.**

Though the Decree did not define the continental shelf in numerical terms, the Foreign Ministry of Brazil later made it known that the outer limit of the continental shelf was between 180 and 200 metres in depth (129).

Brazil apparently sought justification for its claims in the morphological and geological characters of the submarine areas concerned. The latter was considered as a submerged part of the dry land. The declaration purported, accordingly, to activate or put into use a part of the territory which had not been in use up to then. On the other hand, the declaration of sovereignty, as opposed to the control and jurisdiction, over the continental shelf which was incorporated into the territory was a step going farther than theTruman Proclamation (130).

j - Salvadoran Regulations

The Political Constitution of 7 September 1950 of El Slavador provided in its article 7 that the territory of the Republic included the adjacent seas to a distance of two hundred miles from the coast and the corresponding air space, subsoil and continental shelf (131). Although it stated that the freedom of navigation on the high seas was recognized, the claim, in fact, amounted to an extension of the territorial waters. The US and the United Kingdom protested against the said article of the Constitution as violating the relevant rules of international law (132).

More importantly, the representatives of that country later made it very clear that they in fact extended the territorial waters, with a view to defending the economic interests of the country (133). On one occassion, it was said on behalf of that country that:

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(129) See, AUSTIN, **supra** note 15, at 111.
(130) **id.**, at 110.
(131) I UNITED NATIONS LEGISLATIVE SERIES, 300 (1951).
(132) See, I UNITED NATIONS LEGISLATIVE SERIES, 300-301 (1951); A statement to that effect in Fisheries Case (United Kingdom v. Norway), IV I.C.J.REPORTS OF JUDGMENTS, ORDERS AND ADVISORY OPINIONS, 596-97 (1951).
(133) See, statement by Mr.Lima, UNITED NATIONS DOCUMENT: A/CONF. 13/19, p.74.

"They could no longer admit as a basis of international relations, principles which permitted the major economic powers to deprive the less developed nations of their legitimate natural resources" (134).

k - Nicaragua

Political Constitution of 1950 of Nicaragua defined the national territory as comprising, **inter alia**, the territorial waters and the continental shelf (135).

l - Ecuador

The Decree concerning the limits of Territorial Waters of 1950 declared the continental shelf contiguous to the coasts of Ecuador and all of the natural resources found therein as belonging to the state and set its outer limit at 200 metre isobath (136). The Decree apparently extended the national jurisdiction to the fishing resources lying in the zones corresponding to the area of the continental shelf.

m - Venezuela

Venezuela adopted, in 1956, by legislation, the definition of the continental shelf as developed by the International Law Commission, that is, the double criterion of the 200m depth or the exploitability of the natural resources (137). The legislation further stated that channels, depressions or irregularities in the seabed of the continental shelf would not constitute a break in the continuity of the shelf, and that the banks would be comprised in the former.

B - The British Practice

a - Gulf of Paria Treaty

The first example of the Britsh practice with respect to large submarine areas of the high seas is provided by the Gulf of Paria Treaty which we have studied above (138).

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(134) **Id.**, at 79.

(135) I UNITED NATIONS LEGISLATIVE SERIES, 15 (1951).

(136) Decree Concerning the Limits of the Territorial Sea, 6 November, 1950, in ST/LEG/SER. B/8, at 9.

(137) **See, Act of 27 July 1956 Concerning the Territorial Sea, Continental Shelf, Fishery Protection and Airspace,** reprinted in UNITED NATIONS LEGISLATIVE SERIES, NATIONAL LEGISLATION AND TREATIES RELATING TO THE TERRITORIAL SEA, THE CONTIGUOUS ZONE, THE CONTINENTAL SHELF, THE HIGH SEAS, AND TO FISHING AND CONSERVATION OF THE LIVING RESOURCES OF THE SEA (ST/LEG/SER. B/15), 472 (1970).

(138) **See, supra,** II,4.

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b - Practice Relating to the Colonies

The British government issued, on 26 November 1948, two Orders in Council altering the boundaries of the colonies of Bahama and Jamaica respectively to include the continental shelves appertaining to those countries (139).

The orders bearing the same date and almost in identical terms, unlike the Truman Proclamation, did not give any reason for the extension of the boundaries. Instead, they simply stated that it was desirable to extend the boundaries of the colonies concerned so as to include the continental shelf contiguous to their coasts.

Both orders, however, maintained the character as high seas of the superjacent waters.

Later, further Orders in Council were issued to extend the boundaries of the British Honduras and of the Falkland Islands to include the areas of the continental shelves contiguous to the coasts of the territories in question (140). Apparently, a 100 fathom isobath contour was used in setting the outer limits of the continental shelf around the Falkland Islands, while no seaward boundaries were set in the case of the Biritsh Honduras. Again, the status of the overlying waters were left unaffected. Similar orders were issued for other colonies as well (141).

c - Arab States under the Protection of the United Kingdom

The Gulf States under the protection of the United Kingdom, namely, Abu Dhabi, Ajman, Bahrein, Dubai, Kuwait, Qatar, Ras al Khawaik, Sharjah, Umm al Qaiwain issued proclamations, all in June 1949, concerning the exploration and exploitation of the seabed and subsoil of the Persian Gulf (142). The proclamations which were identical in their language and effects could be summarized as follows:

The preambles, after stating that valuable resources underlay parts of the Persian Gulf off the coasts of the sheikhdoms concerned, found it desirable that the exploitation of those resources should be limited in the interests of protection

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(139) I UNITED NATIONS LEGISLATIVE SERIES, 304-305 (1951). For comments on the subject see Waldock, **supra** note 52, at 131; Lauterpacht, **supra** note 59, at 376; MOUTON, **supra** note 18, at 258; Young, R., **Further Claims to Areas Beneath the High Seas**, 43 AJIL 790 (1949); AUSTIN, **supra** note 15, at 66.

(140) See, British Honduras (Alteration of Boundaries) Order in Council, 9 October, 1950, and Falkland Islands (Continental Shelf) Order in Council, 21 December, 1950, **reprinted in** I UNITED NATIONS LEGISLATIVE SERIES, 305 (1951).

(141) See, Sarawak (Alteration of Boundaries) Order in Council, 1954, **reproduced in** UNITED NATIONS LEGISLATIVE SERIES, SUPPLEMENT, 16 (1959).

(142) Abu Dhabi, 10 June 1949, I UNITED NATIONS LEGISLATIVE SERIES, 23 (1951); Ajman. 20 June, 1949, **id.**, at 23-24; Bahrein, 5 June 1949, **id.**, at 24-25; Dubai, 14 June, 1949, **id.**, at 25,26; Kuwait, 12, June 1949, **id.**, at 26; Qatar, 8 June 1949, **id.**, at 27; Ras al-Keimah, 17 June 1949, **id.**, at 27-28; Sharjach, 16 June 1949, **id.**, at 28-29; Umm al-Kaiwain, 20 June 1949, **id.**, at 29.
For comment on those declarations see, Waldock, **supra** note 59. at 135; Young, **supra** note 139 at 790; AUSTIN, **supra** note 15, at 66.

conservation and orderly development. They further stated that it would be just that the coastal states should control and administer the seabed and subsoil adjacent to coast but extending to a reasonable distance therefrom.

The proclamations apparently sought to justify these national claims on the basis of state practice; many of the references contained in the Truman Proclamation were absent.

In their operative parts, they declared the seabed and subsoil lying beneath the high sea of the Persian Gulf but contiguous to countries of the sheikedoms concerned as appertaining to those countries and subject to control and jurisdiction. They further declared that where the seabed areas overlapped the areas belonging to other neighbouring countries, the dividing lines would be drawn between them on the basis of agreements in accordance with the equitable principles.

Finally, they made it clear that the character as high seas of the waters of the Persian Gulf would not be affected and the traditional pearl fishing rights would be respected.

As is gleaned from the terms of the proclamations, none of them used the term continental shelf, for the obvious reason that the seabed of the Persian Gulf is not continental shelf in geological sense (143). They declared, not only resources, but also the seabed and subsoil itself as appertaining to their countries. It was like an annexation of new territories.

Conclusion to the British Practice: the British practice as outlined above, indicates that the UK Government preferred a pragmatic view of the continental shelf doctrine. In all its actions, bilateral or unilateral, it always aimed at achieving economic benefits in the first place. In the cases of annexations in the Gulf of Paria and the Persian Gulf, no mention was made of the term continental shelf; the oil-bearing seabed areas were simply appropriated. In the cases of Jamaica, British Honduras, and Falkland Islands, the orders in council referred to the term continental shelf. In the first cases, non-mention of the term continental shelf in the orders might be the result of the fact that the seabed areas in question were not continental shelf in geological sense. However, the British actions were suggestive of acquisition by occupation, though in pysical sense no effective occupation took place. They amounted to nothing other than sovereignty over the said areas (144).

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(143) **See,** Young, **supra** note 139, at 790.
(144) **See,** Lauterpacht, **supra** note 59, at 387.

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C - Practice of other countries

a - Saudi Arabia

The Saudi Arabian Royal Pronouncement whereby it claimed the seabed of the Persian Gulf which is contiguous to its coast came in 28 May 1949 (145). The Pronouncement apparently was modelled on the Truman Proclamation (146). Its preamble, after having stated that valuable resources might underlie parts of the Persian Gulf off its coasts, and that prudent utilization and conservation of those resources required the exercise of jurisdiction over them, suggested that it **was just and reasonable** that the jurisdiction in question should be exercised by the coastal state. In justification of that view, it recited two reasons stated in the Truman Proclamation, but it did not mention of the term continental shelf or of the fact that the claimed submarine areas were in fact the natural extension of the territory. Neither did it mention of the possibility of the resources contained in the continental shelf being a seaward extension of a pool or deposit of minerals or oil situated in the land territory.

The Pronouncement, declared in its operative part, that the subsoil and seabed areas of the Gulf contiguous to the coasts of Saudi Arabia but outside its territorial waters as appertained to the Saudi Kingdom and were subject to its **jurisdiction and control.** It left unaffected the legal status of the overlying waters and the pearl fishing rights in the area.

Finally, it left the seaward limits of the claimed submarine areas to be determined by agreement with the neighbouring states **on the basis of equitable principles.**

In short, it was a carefully worded and balanced unilateral policy declaration, taking into account all the relevant factors of the region and the prevailing view of the subject in the world. By not making any claims to the superjacent waters, it was more in accordance with international law than the Truman Proclamation.

b - Pakistan

In a declaration dated 9 March 1950, the Governor-General of Pakistan declared that the seabed along the coast of Pakistan extending to one hundred fathom contour into the high seas would be **included in the territory of Pakistan** (147).

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(145) See, Royal Pronouncement concerning the Policy of the Kingdom of Saudi Arabia, 28 May, 1949, **reprinted in** I UNITED NATIONS LEGISLATIVE SERIES, 22 (1951). For comments on it, see, Young, R., **Saudi Arabian Offshore Legislation,** 43 AJIL 530 (1949); Waldock, **supra** note 52, at 133; Selak, **supra** note 52, at 675; Lauterpacht, **supra** note 59, at 370,380.

(146) See, Young, **supra** note 145, at 531.

(147) See, Declaration by Governor- General, 9 March, 1950, **reprinted in** I UNITED NATIONS LEGISLATIVE SERIES, 303 (1951).

Thus, the declaration avoided using the term continental shelf, though it set the outer limit at 100 fathom contour line which is generally considered as the outer limit of the geological continental shelf (148).

The declaration did not give any further details as to whether the Pakistani Government would use sovereignty, or a resource-oriented jurisdiction, over the claimed seabed areas. However, inclusion of the said areas into the territory suggested that the former view was taken (149).

c - Philippines

The Philippines Petroleum Act of 1949 provided that all natural deposits or occurances of petroleum or gas found on the continental shelf belonged to the state (150).

The Act obviously provided for exercise of **jurisdiction, not sovereignty,** over the natural resources of the seabed and not over the latter as such (151).

d - Israeli Regulations

The Israeli Government issued a proclamation in 1952, after ILC had produced its first draft articles on the continental shelf, whereby "the seabed and subsoil of **the submarine areas** contiguous to the coasts of Israel and outside the territorial waters, to the extent that the depth of superjacent waters admits of the exploitation of the natural resources of these areas" (emphasis added) was included in the territory of the state of Israel.. (152) The character as high seas of the superjacent waters was maintained.

The Israeli Proclamation, apparently, relied on the international law as reflected, by the practice of the states, and in the ILC draft articles for justification of extension of its offshore jurisdiction.

The originality of the Proclamation was that it did not mention of the continental shelf, but of the submarine areas, as it has a very narrow geological continental shelf around its coasts. Secondly, it picked up the exploitability criterion which ILC developed in 1951, as a seaward limit to its shelf.

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(148) See, **supra,** note 147, at. 19.

(149) See, Lauterpacht, **supra** note 59, at 388; **But see,** AUSTIN, **supra** note 15, at 71-2, n.60.

(150) See, Petroleum Act of 1949, enacted by Republic Act No 387, 18 June, 1949, **reprinted in** I UNITED NATIONS LEGISLATIVE SERIES, 19 (1951).

(151) For further details see, AUSTIN, **supra** note 15, at 70.

(152) See, Proclamation concerning Submarine Areas, 3 August, 1952 and Submarine Areas Law , No 21, 513,1953, 10 February, 1953, **reprinted in** UNITED NATIONS LEGISLATIVE SERIES, SUPPLEMENT, 14 (1959).

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e - Australian Proclamation

Australia, one year after it had enacted legislations for sedentary fisheries in 1952 (153), issued two separate proclamations in 1953, one with regard to its continental shelf, the other to that of the Trust Territory of New Guinea, (154) in hope that the Proclamations would help its ongoing struggle to halt Japan which had been allegedly exceedingly exploiting the pearl fisheries in the areas in close vicinity of its coasts, (155) as the sedentary fisheries by that time had been included by ILC in the continental shelf rights (156). Having stated that international law recognized the exercise by the coastal state of sovereign rights over the seabed and subsoil of the continental shelf contiguous to its coast for the purpose of exploitation of its natural resources, the proclamations respectively declared that Australia had the sovereign rights over the sea bed areas contiguous to its coasts, and that there existed the same rights over the shelf areas contiguous to the coasts of New Guinea, for the same purposes as specified above.

f - India Proclamation concerning the Continental Shelf, 30 August. 1955

The Indian Proclamation, after having recited that under international practice every coastal state had sovereign rights over the seabed and subsoil of the continental shelf contiguous to its coasts, for the purpose of exploiting its resources, declared that India had and always had had full and exclusive sovereign rights over the seabed and subsoil of the continental shelf contiguous to its territory but beyond the territorial waters (157).

g - Portugal, Act 2080 relating the Continenal Shelf, 21 March, 1956

The Portuguese Act provided that the seabed and subsoil of the platform adjacent to the Portuguese mainland and islands but beyond the territorial waters **belonged to the public domain of the state** (158).

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(153) See, Pearl Fisheries Act of 1952, reprinted in UNITED NATIONS LEGISLATIVE SERIES, SUPPLEMENT TO THE LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS (VOLUME I AND II) AND LAWS CONCERNING THE NATIONALITY OF SHIPS (ST/LEG/SER. B/8,4 (1959).

(154) Id. at 3-4.

(155) See, O'connell, supra p. II, n. 19, at 186-188

(156) The ILC, after long debates, had decided that the coastal state should exercise sovereign rights over the continental shelf areas for purpose of exploring and exploiting "natural resources", as opposed to the "mineral resources," in order to include the sedentary fisheries in the continental shelf rights and it accordingly drafted article 2. See, Report of the International Law Commission to the General Assembly, DOC. A/2458, reprinted in II YILC 201, 214 para. 70 (1953).

(157) See, UNITED NATIONS LEGISLATIVE SERIES, SUPPLEMENT, 14 (1959).

(158) See, id., at 16.

Apparently, it set the seaward limit of the shelf at the 200 metre depth line, beyond which it prohibited granting any concessions to any persons, although it did not dismiss the possibility of the fact that other outer limits could be set by special legislation.

h - Republic of Korea

The Presidential Proclamation of 1952 extended the national sovereignty of Korea to the adjacent shelf as well as to the adjacent seas overlying the former, to protect all the living and non-living resources, found on or beneath the seabed or in the water column (159). The Proclamation determined the limits of the maritime zone placed under the national jurisdiction, regardless of the depth of the water, in accordance with the coordinates given in the Proclamation.

3 - Regional Regulations

A - Santiago Declaration

Shortly after the issuance of the unilateral declarations which we outlined above three Latin American States, namely Chile, Ecuador, and Peru, met in 1952, in Santiago and signed an agreement, popularly known as the Santiago Declaration, (160) whereby they repeated the claims which they had made through the unilateral declarations (161). The Declaration was ratified by all the three states and Costa Rica acceded to it. By Declaration, they repeated that they possessed sovereignty and jurisdiction over a maritime zone extending, with its seabed and water column, up to 200 miles from the shore. The only originality with the Declaration was that the parties undertook the obligation that they would cooperate, in form of conclusion of new treaties, to give effect to the principles contained in the Declaration. Pursuant to that undertaking, in 1954, they signed a supplementary agreement, (162) whereby they pledged to help each other in application of the policy principles on which they agreed.

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(159) **See, Presidential Proclamation of Sovereignty over Adjacent Seas**, 18 January, 1952, reprinted in UNITED NATIONS LEGISLATIVE SERIES, SUPPLEMENT TO LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS (ST/LEG/SER. B/8), p.14.

(160) **See, Declaration of the Maritime Zone**, in Lay-Churchill-Nordquist (eds.), I NEW DIRECTIONS IN THE LAW OF THE SEA, DOCUMENTS, 231 (1973).

(161) For comments on the Declaration see, Garcia-Amador, THE EXPLOITATION AND CONSERVATION OF THE SEA RESOURCES, 99 (1963); O'Connell, I THE INTERNATIONAL LAW OF THE SEA, 553 (1982); Attard, D.J., THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, 69,76 (1987); Morris, M.A., **Brazilian Ocean Policy in Historical Perspective**, 10 JOURNAL OF MARITIME & COMMERCE, 391, 354-55 (1978).

(162) **Agreement Supplementary to the Declaration of Sovereignty over the Maritime Zone of Two Hundred Miles**, reprinted in Lay-Churchill-Nordquist, **supra** note 160, at 333.

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B - Ciudad Trujillo Conference

The Inter-American Specialized Conference on Conservation of Natural Resources: the Continental Shelf and Marine Waters which met, with representation of 19 states, in Ciudad Trujillo (Dominican Republic), between March 25 and 28, 1956, passed a resolution on the legal status of submarine areas, which was to be a subject of much discussion during the subsequent years (163). The Resolution as adopted by the Conference partly read as follows:

1. The seabed and subsoil of the continental shelf, (164) continental terrace, (165) or other submarine areas, adjacent to the coastal state, outside the area of the territorial sea, and to a depth of 200 metres, or beyond that limit, where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil, appertain exclusively to that state and are subject to its jurisdiction and control.

2. Agreement does not exist among the states here represented with respect to the judicial regime of waters which cover the said submarine areas, nor with respect to the problem of whether certain living resources belong to the seabed or the superjacent waters.

Conclusions:

The following conclusions seem to stand out of the preceding study of the early state practice:

As a general concept, the continental shelf attracted, and gained, from the very beginning, the approval of all the states whose legislative actions have been studied above. They all agreed, in general, that the coastal state should extend its national jurisdiction to a part of submarine areas beneath the high seas but contiguous to the coast, which they called continental shelf. However, their agreement could not go farther than that. First, they did not mean the same thing by the expression continental shelf. For US, UK, Mexico, Brazil, Nicaragua, India, Guatemala, Pakistan, Israel and Saudi Arabia, the object of the continental shelf was the seabed

(163) See, Final Act, Inter-American Specialized Conference on Conservation of Natural Resources: The Continental Shelf and Marine Waters, (Ciudad Trujillo, March 1956). For comments on the Resolution see, Oxman, B.H., The Preparation of Article 1 of the Convention on the Continental Shelf, 3 JOURNAL OF MARITIME LAW & COMMERCE, 445 (1971-72); Garcia-Amador, supra note 161, at 107; Finlay, L.W., The Outer Limit of the Continental Shelf: A Rejoinder to Prof. Louis Henkin, 64 AJIL, 43-47 (1970); Anand, R.P., LEGAL REGIME OF THE SEABED AND DEVELOPING COUNTRIES, 48 (1975).

(164) The continental shelf was defined as follows: Scientifically, the term "continental shelf" is understood to be that portion of the continent or island which is covered by waters up to the point of declivity of the slope or the edge of the shelf.

(165) The Continental terrace was defined as: that portion of the submerged landmass that forms the shelf and slope.

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and subsoil of the submarine areas of the high seas beyond the territorial waters but contiguous to the coast, and, consequently, the legal status of the superjacent waters was not to be affected. For Chile, Peru, Costa Rica, Panama, Argentina, Ecuador, Honduras, El Salvador, the continenal shelf was not only the submarine areas as described above, but also the waters covering them (epicontinental sea). They extended their national jurisdiction both to non-living and living resources of the parts of the high seas which they designated as the continental shelf.

The disagreement among the states was also obvious with regard to the seaward limits of their continental shelves. While the US, Mexico, Brazil, Pakistan, Ecuador, Portugal, the UK (partly), set the outer limits of their continental shelves at the 200 metre (100 fathom) depth line, Peru, Chile, Costa Rica, Honduras (until 1957), El Salvador, preferred a 200 mile distance limit. Argentina, Saudi Arabia, Arab States under the protection of the UK, Philippines, India, Panama, Guatemala, Nicaragua, and, reasonably speaking, Australia did not specify any outer limits. Israel, Honduras (in 1957 and together with 200m. depth) and Republic of Korea adopted the exploitability criterion.

A further point of disagreement was about the degree of power to be used over the newly acquired maritime areas. The US, Saudi Arabia, Arab Countries under British protection, Philippines, Mexico claimed only control and jurisdiction over the said areas, while Argentina, Chile, Peru, Guatemala (dominion), Costa Rica, Honduras, Nicaragua, Brazil, UK, Republic of Korea, Portugal (dominion) and, perhaps, Pakistan claimed sovereignty. On the other hand, Australia and India, incorporating the ILC's formula, preferred the term sovereign rights.

Again, while the U.S. made claims only to the resources of the continental shelf and not to the seabed as such, the others flatly made claims to the latter.

However, all the claims were at one that the continental shelf rights were exclusive to the coastal state and that third states could not make any claims to them.

Apparently, majority of states resorted to the notion of contiguity as supported on geological identity of the contiguous land and submarine areas as a criterion of acquisition of monopoly over the latter. Those which were not in a position to make arguments on the basis of physical factors, based their claims on the economic necessities coupled with contiguity in sense of nearness, which also constituted a ground for those states to strenghten their claims on basis of security considerations.

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IV- SCHOLARLY OPINIONS ON THE LEGAL STATUS OF THE SEABED AND SUBSOIL OF THE HIGH SEAS

1- General remarks about terms res communis and res nullius

The national claims to the submarine areas beyond the territorial waters are evocative of territoral acquisitions, though they are not necessarily identical. Aquisition of a new thing (res) is, in a sense, nothing but establishment of a new relationship between (or among) the subjects of the law, which may at the same time terminate an already existing one. Whom had the acquired right belonged before it was acquired by the new owner? Is the thing in question capable of acquisition? If so, what kinds of conditions are required to be met by the potential new owners in their bids to acquire it in law? These and similar other questions could always be asked and should be answered in any viable legal system, if it is to establish and maintain a rational order among its subjects. The terms **res communis** and **res nullius** are products of such a necessity.

These terms have their origins in Roman Law, but they are used in international law as well (1).

The tem **res communis** or **res extra commercium** as it is sometimes used, refers to a commons; a land owned by all the commonwealth, which, in principle, is not susceptible of individual appropriation and possession.

The term **res nullius,** on the other hand, refers to the property of nobody;a no man's land, but it is capable of being reduced to individual possession.

As a result, a thing (res) of the first category could be acquired only by prescription or establishment of a historical title against the whole community, while one of the second category could be acquired by any first coming individual with a single act of occupation.

If we put the matter in other way, we could say that prescription and occupation as methods of acquisition in a territorial setting differ from each other in a few respects: First, occupation is a method of acquiring territory, which is **res nullius,** that is unowned but capable of possession (2), while prescription is a method of acquiring territory, which is subject to sovereignty of other state(s) (3). So the first difference lies in the quality of the territory to be acquired. Secondly, in order to establish a title by prescription, the claimant state should be in peaceful possession

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(1) See, OPPENHEIM - LAUTERPACHT, INTERNATIONAL LAW,A TREATISE, 589 (eighth ed., sixth impression, 1962); SMITH , **supra** parag. II, note 12, at 81.

(2) OPPENHEIM - LAUTERPACHT, **supra** note 1, at 555.

(3) See, Johnson, D.H.N., **Acquisitive Prescription in International Law,** 27 BYIL 322, 349, 350 (1950).

of the territory in question for a fairly long period of time with the implied or express acquiescence of other state(s) to whose sovereignty the territory in question was originally subject (4), whereas in the case of occupation, the unowned territory is occupied and the occupation is made effective as a condition of acquisition of title without the consent of other state(s) (5). So the second difference lies in the ways in which the title to the thing (res) is acquired. Thirdly, occupation is only a method of acquiring title to land (whether submerged or emerged), while prescription is a means of acquiring various kinds of rights (6). For example only through prescription a state may acquire rights over the sea expanses wider than territorial waters or over bays which do not fit the conventional definitons in their geographical dimensions (7). So the third difference lies in the fact that the rights in question do not belong to the same category. Fourthly, acquisition through occupation is in accordance with the rule of law, while acquisition by prescription is in derogation of the existing law (8). The acquistion is defective originally but is cured as the time passes by the acquiescence of other state(s) with rival interests (9) in the long usage and enjoyment of the thing in question (10). So the fourth difference lies in relations in which the two methods stand to international law.

2- Differing scholarly opinions on the legal status of the submarine areas of the high seas

When the International Law Commission (ILC) began to study in 1950 the legal regime of continental shelf, there was not agreement among the scholars on the

(4) OPPENHEIM - LAUTERPACHT say in this respect that: the basis of prescription in international law is nothing else than general recognition of a fact, however unlawful in its origin, on the part of the states, See, **supra** note 1, at 576.

(5) Even notification of occupation is not required under international law, OPPENHEIM - LAUTERPACHT , **supra** note 1, at 559.

(6) See, Johnson, **supra** note 3, at 349.

(7) See, GIDEL, III LE DROIT INTERNATIONAL PUBLIC DE LA MER, 621 (1934). The waters over which such exclusive rights are obtained are called **historic waters** which the International Court of Justice described as meaning "waters which are treated as internal waters but which could not have that character were it not for the existence of an historical title."See, **Fisheries Case (United Kingdom v. Norway)**, I.C.J., REPORTS AND JUDGMENTS, 116 (1951).

(8) Johnson, **supra** note 3, at 353.

(9) Thus, it differs from **usucaplo** of Roman law which required bona fide possession. See, OPPENHEIM - LATERPACHT, **supra** note 1, at 576. Oppenheim - Luterpacht go on to define the prescription "as the acquisition of sovereignty over a territory through continuous and undisturbed excercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with the international order". **id.** See, also, HALL, INTERNATIONAL LAW, 143, 144 (Higgins, 8 th. ed 1924).

(10) The states which have acquiesced in actual possession by another state of a part of the high seas would be barred from making adverse claims against such a possession, though that would not be the case for states which have protested against it. Johnson, **supra** note 3, at 350; A letter by American Secretary of State (Mr. Seward) to Mr. Tsrs of Spain, dated 10 August 1863, **reprinted in** MOORE, V DIGEST OF INTERNATIONAL LAW, 710.

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legal status of the submarine areas beyond the territorial waters. The writers of high standing were advancing different theories about it. However, a few aspects of the subject remained outside the disagreement: first, no one ever questioned the full sovereignty of the coastal state over its territorial waters (11). Secondly, no one ever doubted about the freedom of high seas. It was clear to every one that the high seas were not and could not be put under the sovereignty of any individual state, without the permission of the international community (12). Likewise, there was no no doubt that the high seas freedom applied to the waters of the high seas. However, when it came to the legal status of seabed component of the same, the views varied a lot. First of all, there was a basic disagreement as to whether the waters and the seabed and subsoil of the high seas constituted as an indivisible whole. Some writers such as Gidel (13) and Higgins and Colombos (14) expressed the view that the bed of high seas could not be separated from and treated independently of the waters above it. Thus, they argued that both the seabed and overlying waters were subject to the same regime. Consequently, the seabed was equally free to all nations. Exclusive rights for the individual states could be acquired only through prescription or acquiescence of other states (15). For example, Higgins and Colombos said that

> The same reason for maintaining it [waters of high seas] unappropiated in the interests of the freedom of navigation apply, with equal force, to the bed of the sea. Exceptionally, on grounds based on historical and prescriptive considerations it has been generally admitted that a limited portion of the bed of the open sea is capable of occupation by individual states for well delimited purposes, and entitled to recognition by other states. This is notably the case of pearl fisheries (16).

Consequently, if this theory were right, the whole concept of the continental shelf would be in conflict with international law. That, in turn, would render almost all the resources of the submarine areas of the high seas inaccessible to exclusive individual exploitation (17).

On the other hand, Mouton considered that a distinction should be made between the seabed and the water column on one hand and the subsoil thereof on the other, on the ground that the first two had much in common (18). He called

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(11) See, supra Parag. II, p.26.
(12) See, GIDEL, I LE DROIT INTERNATIONAL DE LA MER, 498-500 (1932-34).
(13) Id., at 498-500.
(14) INTERNATIONAL LAW OF THE SEA, 592 2nd.ed. 1951).
(15) For an exposition of this doctrine see, also, Lord Asquit of Bishopstone, **Award on Petroleum Ltd.v. Sheik of Abu Dhabi, 1951, reprinted in** ILR 144,155 (1951).
(16) See, supra Parag II, note 12, at 55.
(17) See, Waldock, **The Legal Basis of Claims to the Continental Shelf,** 36 GROTIOUS SOCIETY, TRANSACTIONS FOR THE YEAR 1950, 136 (1950).

the historic rights of the coastal states to the sedentary fisheries in the high seas as an exception, which should never serve as a basis for occupation of the seabed of the high seas. In his opinion, the occupation of seabed would interfere with the rights of other states, but occupation of the subsoil would not. However, distinguishing between the ownership of the seabed from the ownership of the resources contained therein, he sided with the view that the natural resources could be appropriated by the coastal state while the seabed would remain under the regime of the high seas (19). The reasons he advanced for appropriation by the coastal states, as opposed to other states, were apparently security considerations of the former rather than the contiguity of the submarine areas concerned (20).

O'connell, writing in 1955, well after the ILC produced its draft articles and decided on the legal status of continental shelf, expressed the view that prescription, as traditionally perceived, had no place in the regime of the sea. He considered it very difficult that there could be a "prescriptive right to seabed either as a **res nullius** or as a **res communis** "because of the vagueness of the persons against whom the adverse interest could arise (21).

On the other hand, a majority of writers represented by Fauchille (22), Westlake (23), Hurst (24), and H.A.Smith (25) advanced the view that the seabed was not an inseparable part of the sea, and though latter **res communis**, the former was **res nullius**, as the term was understood in the Roman law. These writers, accordingly, argued that sovereignty could be acquired over the seabed, in contrast to the sea, by effective occupation, without the consent of other states being required (26). However, it is clear, at least from the works of some writers (27), that what they had in mind was a small portion of the seabed and not a gigantic submerged area.

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(18) See, MOUTON, supra parag II. note 18, at 283.

(19) See, id., at 285.

(20) Id.

(21) See, O'connell, **Sedentary Fisheries and the Australian Continental Shelf**, 49 AJIL 189 (1955).

(22) See, I TRAITE DE DROIT INTERNATIONAL PUBLIC, Part II, 19 (1925).

(23) See, I INTERNATIONAL LAW 187 (1904).

(24) See, **Whose is the Bed of the Sea?** BYIL, 34 (1923 - 24); 32 ANNUAIRE DE L' INSTITUT DE DROIT INTERNATIONAL 160 (1925).

(25) See, II GREAT BRITAIN AND THE LAW OF NATIONS, 122 (1938).

(26) See, also Johnson,supra note 3, at 353, where he comes to the conclusion that the better view de lege ferenda of the status of the seabed is that it may be occupied by the coastal state. For further comments see, **Feith , Rights to Sea Bed and Its Subsoil**, INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FOURTY - FOURTH CONFERENCE, Copenhagen, 125 (1950).

(27) See, SMITH, supra p.11, note 12, at 82; Lauterpacht, supra Parag. II, note 59, at 402; Judge Oda's dissenting opinion in **Tunisia / Libya Continental Shelf Case**, I.C.J. REPORTS OF JUDGMENTS, 1982,at 175.

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Another controversial issue was whether the seabed and subsoil of the high seas were different in their legal status. Some writers considered the legal status of the seabed to be totally different from that of its subsoil, while others were of the opinion that a difference between the two was out of question (28). Thus, Higgins and Colombos said in favour of the former view that:

> 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 (29).

Oppenheim-Lauterpacht, favouring the latter view, explained that:

> There has been a tendency in the past to assume that the surface of the bed upon which the open sea rests must be likened in legal condition to the waters of the open sea themselves. But when regard is had to the arguments which brought about the abandonment of the former claims to the waters of the open sea... it must surely be conceded that these reasons do not apply to the surface of the seabed or to its subsoil (30).

But, whatever might be their views on the distinction between the legal status of the seabed and that of subsoil, practically all the writers considered that the subsoil of the sea was a res nullius, and consequently could be occupied by individual states and be reduced to possession by deriving mines or piercing tunnels from the shore (31). Reason for such agreement was that activities started from the shores into the subsoil would not obstruct the navigation or fishing in the water column. Whereas in the case of the exploitation of the seabed the activities would have to take place through the water column and consequently the interference with the high seas freedom was inevitable (32).

Tha writers supporting the appropriation of the seabed as well as the subsoil by way of occupation were aware of and, in fact, acknowledged the importance of the freedom of the high seas, but they thought that that consideration could be met by giving a superior place to the feedom of high seas as compared with the right to exploit the resources of the sea bottom(33).

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(28) See, Feith, Report, INTERNATIONAL LAW ASSOCIATION, FOURTY - THIRD CONFERENCE, Brussels, 184 - 85 (1948).

(29) See, supra, note 14, at 55.

(30) See, supra note 1, at 575.

(31) See, Feith's report, supra note 28, at 185. Hyde wrote in 1947 that "the subsoil appurtenant to the coast of a state and extending therefrom into an area beneath the high seas is doubtlessly susceptible to acquisition by that state...." I INTERNATIONAL LAW, 467 - 68 (1947).

(32) See, Feith's report, supra note, 28, at 185; Lauterpacht, supra Parag. I note 59, at 401.

(33) See, for example,Waldock, supra, note 17, at 137.

However, the theory of occupation was found defective and weak in a few other respects. First, the theory proceeded on a "first come, first serve" basis. A state very far from the seabed areas could, under that theory, occupy and grab the areas in question, disregarding the interests of the adjacent state. Technologically developed states might occupy the seabeds off the coasts of the under - developed states where "They had no business" (34). The under - developed coastal states would not be able to appropriate the contiguous seabed areas, and would have to tolerate their being acquired and exploited by other technologically developed states. That would, in turn, generate frictions between the members of the international community and would dash the economic expectations and security interests of the coastal states (35). Secondly, under the occupation theory which identifies the seabed with the land for purpose of acquisition, title to land could only be acquired if the occupation was effective (36). Thus, the question arose as to whether the seabed could be occupied effectively. The early practice had showed that only small portions of the seabed could be occupied. But would that be sufficient to claim huge seabed areas which could only be partly occupied?

Knowing these deficiensies of the theory, its proponents advanced further arguments to sustain it. It was argued, on the bases of the cases of Island of Palmas, Eastern Greenland and Cliperton Island that the actual settlement or exploitation was not a **sine qua non** of the effective occupation (37). The occupation, in their view, was the assumption of sovereignty rather than an actual appropriation of property and a display of sovereignty of such a degree as the circumstances of the territory demanded was enough. Accordingly, they proceeded to say that by its nature sovereignty over the submerged land did not call for such effective occupation as a dry land would call for (38). Thus, they renounced the requisite of an effective occupation in favour of a notional one. It was here that they gave a crucial place to the proximity as an element strenghtening the idea of notional effectiveness. Consequently, they claimed, a proclamation by the coastal state of the national jurisdiction over contiguous continental shelf would be considered an initial act of appropriation and as a first step towards occupation (39). In other words, the proclamation was considered as creating an inchoate title to the contiguous seabed areas, to be completed by action of occupation (40).

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(34) Feith described the **res nullius** theory as the law of jungle. See **supra** note 28, at 173.

(35) See, Young, **Legal Status of Submarine Areas Beneath the High Seas**, 46 AJIL 230 (1951); The award of Lord Asquit of Bihopstone in the Petroleum Development Ltd. , **supra** note 15, at 156.

(36) See, OPPENHEIM - LAUTERPACHT, **supra note 1, at 557.**

(37) See, Waldock, **supra** note 17, at 141.

(38) Lauterpacht, too, was of the view that the effective occupation was not an invariable and rigid condition of acquistion of territorial sovereignty, though he took this view to eliminate the occuptaion theory, not to sustain it. **See, supra Parag. I** note 59, at 415 - 16.

(39) See, Waldock, **supra** note 17, at 142 - 48; Johnson, **supra** note 3, at 353 where he accepted the view as the better de lege ferenda view.

(40) Lauterpacht criticised this line of thought as follows; To say that the proclamation consitutes occupation or the first step to occupation giving an inchoate title is, in fact, to deny that the occupation is necessary. See, **supra** note 38, at 418 .

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Although this new variant of the theory of occupation condemned the geographical contiguity as an absolute basis of territorial acquisition, in the case of the continental shelf claims, it considered that what conferred on the coastal state the inchoate title to the contiguous submarine areas was not the geographical contiguity as such but the contiguity as complemented by the physical unity of the submerged and dry land (41). The proponents of this new theory purported to explain the Truman Proclamation on the same basis. In spite of all new refinements, the theory did not and, in fact, could not shut the door to the possibility that the seabeds off the coasts of one state could be occupied by some other states, the only guarantee advanced being that the coastal state was in a better position to effect such an occupation (42).

Criticising these aspects of the theory, O'connell observed that the **res nullius** theory was not necessary either to establish checks on extravagant claims or to permit a distinction between the seabed and subsoil. He pointed out that the line between the effective occupation and paper claims at times became blurred and that a distinction between an inchoate title and an effective occupation consequently seemed artificial, so far as the claims to the continental shelf were concerned. (43)

In view of the inadequacy of the theories described above to accommodate the security and economic interests of the coastal state and those of the international community, there arose a need for a better explanation and justification of potential extension of the jurisdiction of the coastal states. In recognition of that fact what we may reasonably call **the ipso jure jurisdiction theory** was introduced to explain and perhaps to legitimize the **fait accomplis** by unilateral declarations of states. (44) As it seemed impossible and unwise to reverse the ongoing trend, the right thing was to find an **ex post facto** explanation and a formula for the **de facto** situation. According to this latest theory, which apparently based itself on the alleged geological and geographical unity of the submerged and emergent land, the seabed and subsoil of high seas was neither **res communis** nor **res nullius.** Lauterpacht who championed this theory commented that:

> For, it has been shown, there is no principile of international law - and certainly no principle of international practice - which makes the submarine areas share automatically the status of the high seas. Unlike the latter, they are not **res omnium communis.** To that extent, they can, consistently with rules of international law in the matter of acquisition of territorial title, become subject to the sovereignty of the state, -though not of every state. They are not **res nullius** (45).

(41) See, Waldock, **supra** note 17, at 141 - 42.

(42) See, Young, **supra** note 35, at 230.

(43) See, O'connell, **supra** note 21, at 195 - 96.

(44) See, Lauterpacht, **supra** note 38, at 376. For other supporters of the doctrine see, O'connell, **supra** parag I. note 2, at 472.

(45) See, **supra** note 38, at 414.

In his view the doctrine was not new; it had established itself by the positive acts of states. The unilateral acts of states, including those of great maritime powers, were not protested by other states and therefore they should be viewed as a declaration of titles acquired under international law, rather than constituting their sources. As the legal basis, he advanced a combination of reasonableness, fairness, contiguity, and practice of state (46).

O'connell, on the other hand, was of the view that the continental shelf doctrine was a generic one, independent of occupation and prescription. However, unlike Lauterpacht, he based the legal basis of the doctrine on the necessity of providing a satisfactory basis for reconciliation of conflicting claims arising from the national claims to seabed and their exploitation and on the notion of contiguity (47).

The distinguishing feature of this theory is that it considers that the continental shelf appertain **ipso jure** to the coastal state, without any occupation or even proclamation being needed. Thus, just as the coastal states have the territorial waters without any need to occupy it or to make any declaration to make claims to it, so the continental shelf attaches to the coastal states as a result of their having coasts bordering the shelf (48).

As indicated before, in this theory is inherent the notion of contiguity as based on geographical and geological unity of the submarine areas with the land territory. The thrust of the doctrine is that continental shelf is an appurtenant of the land and consequently it is part of something which is already possessed and owned by the state execising sovereignty over the land territory.

Mouton, pointing to this aspect of the doctrine, found it simply unacceptable. He wondered how the continental shelf which was relatively a new concept, could be considered as conferring rights which had existed before people became aware of their existence. Relying on the Feith's report to the Copenhagen Conference of ILA, in 1950, he concluded that it was a new concept and not a recognized rule of international law (49).

Lord Asquit of Bishopstone, on the other hand, said in his award in the Petroleum Development Ltd. case,that the doctrine was not a part of international law, although it was reasonable as de **lege ferenda** law (50).

Conclusion :

From the brief study we have undertaken of the views of the writers on international law with regard to the legal status of the seabed beyond the territorial waters, it seems fair to draw the following conclusions:

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(46) **Id.,** at 394, 418 - 19, 431 - 32.
(47) **See, supra** note 21, at 196.
(48) **See,** Young **supra,** note 35, at 231.
(49) **See,** MOUTON **supra** , note 18, at 269 - 70.
(50) **See, supra** note 15, at 133.

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There was a unanimity among the writers that the waters of the high seas could not be appropriated by any individual state. They were also at one that the subsoil of the submarine areas of the high seas could be acquired by individual states by way of occupation, deriving mines or piercing tunnels from the shore. The reason being that such an acquisition would not interfere with the high seas freedom. Likewise, it was undisputably recognized that the seabed and subsoil of the territorial waters was in every respect subject to the sovereignty of the coastal sate.

On the legal status of the seabed areas beyond territorial waters, on the other hand, the writers were in total disagreement. They advanced and supported various theories. But writers supporting the **res nullius** and **ipso jure jurisdiction** theories constituted the majority, as opposed to those favouring the **res communis** theory. That was so, not because the **res communis** theory was weaker than the others in its theoretical explanation, but simply because its application and acceptance would have prevented the states from exploiting the resources of the seabed, something which they were resolved not to accept. Thus, the other two theories, in addition to the theoretical explanations they provided, had, on their side the economic needs and impulse to exploit the resojurces in question.

Feith, as the Rapporteur of the Committee on the Rights to Sea - Bed and Its Subsoil of International Law Association, came to the conclusion in his reports in 1948 and 1950 respectively that there was no rule of international law with respect to the legal regime of the continental shelf .In sharp contrast to the Feith's report, Lauterpacht concluded, in his article in 1950, that there was a rule of international law vesting sovereignty **ipso jure** in the coastal state over the continental shelf rights. On the other hand, it is clear from the Copenhagen report of Feith, based on replies received from many scholars in response to a questionnaire sent to them before the report was prepared, that scholars were not in agreement as to the legal status of the continental shelf. However, the report in question contained proposals for consideration of the conference which were based on the **res nullius** and **ipso jure jurisdiction** theories. In his introductory report, Feith said that the **res communis** theory satisfied only a few people, and consequently that theory was not submitted as an alternative solution. Between the two remaining theories they seemed to have put more emphasis on the **res nullius** theory, while the **ipso jure jurusdiction** theory was suggested as embodying law de **lege ferenda.**

Finally, Lord Asquit of Bishopstone discussed the subject in his award mentioned above and categorically concluded that there was no rule of international law on the subject.

This brings us to the conclusion that the scholarly opinions of that time were suggestive of the fact that no established rule of international law existed governing the subject.

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V- THE FIRST CONVENTIONAL REGULATON OF THE REGIME OF THE CONTINENTAL SHELF (GENEVA CONVENTION)

Introduction

As we have already seen, the Truman Proclamation was emulated and even sometimes exceeded by other states in making national claims to the maritime spaces beyond the territoral waters (1). The scope and nature of the unilateral national ocean policies being determined by varying national interests closely connected with the physical conditions of the individual regions, it was highly likely that the new encroachment on the high seas freedom would take tremendous **de facto** dimensions which it could be very difficult to undo unless international community took action to stem the ever-increasing tide of unfettered appropriations of the high seas (2). It was out of recognition of that fact that the ILC included the subject of the continental shelf in its list of subjects for codification and elected at its first session J.P.A. Francois as its special rapporteur to study the topic of the regime of the high seas in general and the question of regulation of the continental shelf, in particular.

Conscious of the seriousness and urgency of the task it faced, the Commission developed and codified, under its own rules, the legal regime of the continental shelf between 1950 and 1956, producing, among others, a set of draft articles to serve as a basis of a future multilateral convention (3). It was on the basis of those draft articles that the Geneva Convention on the Law of the Sea which was convened, in 1958, by the United Nations General Assembly to codify the law of the sea in general, adopted, on 29 April 1958, together with other three conventions, the Convention on the Continental Shelf (hereafter to be cited as the Geneva

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(1) See, **supra** Parag. III.

(2) Special rapporteur of the ILC Francois emphasised that point at the 66 th. meeting of the Commission in the following words:

It [the Commission] should not wait until a maltitude of regulations had given international law an orientation incompatible with the interests of mankind, it was more difficult to ammend the law that had already been established by states, than to guide it into the desired channel by the enunciation of certain rules or principles. I YILC, 215 (1950).

(3) The work of the Commission on this topic and many other relevant documents are reprinted in YILC, 1950, vols. I and II; 1951 vols. I and II; 1953 vols. I and II; and 1956, vols I and II. The work of the Commission will further be analysed and assessed , in detail, below as a part of the preparatory work of the Geneva Convention on the Continental Shelf. See, **infra**, Parag. V, 2, A.

Convention) (4). It was opened for the signatures of states on the same date and it came into force, in accordance with its article 11, on 10 June 1964. It is still in force and, as of 31 December 1985, 54 states were parties to it (5).

However, shortly after its conclusion, it became clear that the Convention failed to meet the aspirations and ambitions, if not needs, of the international community and, in fact, it was overtaken by the rapid development of the marine technology. Especially, the ambiguity surrounding the definition of the seaward limits of the continental shelf in article 1 of the Convention led to various states to extend arbitrarily their offshore jurisdictions which, in turn, caused anxiety among the developing and land locked countries with respect to the future of the oceans. Echoing those concerns, Malta appealed to the General Assembly, in 1967, for revision or replacement of the Convention with a view to establishing a new regime providing certainty for the limits of the national jurisdiction and establishing an international regime for the areas beyond (6). That appeal was given a welcome reception by the international community in general and, as a result, the General Assembly established an **Ad Hoc Committee** in 1968 to study various subjects relating to the law of the sea (7). Later, **the Ad Hoc Committee** was replaced by the **United Nations Sea - Bed Committee** which made preparations for the convocation of the Third United Nations Conference on the Law of the Sea, which was convened by the General Assembly in 1974. After long and laborious work of the Conference, the United Nations Convention on the Law of the Sea was concluded and signed in 1982

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(4) For the text see, Convention on the Continental Shelf, done at Geneva, 29 April, 1958, 499 UNTS, p. 311. The other conventions concluded by the Conference are: Convention on the Territorial Sea and Contiguous Zone, in force 10 September, 1964; Convention on Fishing and Conservation of the Living Resources of the High Seas, in force, 20 March, 1966; and Covention on the High Seas, in force, 30 September, 1962.

(5) The signatories were as follows: Albania (1964), Australia (1963), Bulgaria (1962) , Byelorussian SSR (1961), Canada (1970), Colombia (1962), Costa Rica (1972), Cyprus (1974), Czechoslovakia (1961), D. Kampuchia (1968), Denmark (1963), Dominican Republic (1964), Fiji (1971), Finland (1965), France (1965), German Democratic Republic (1965), Greece (1972), Guatemala (1961) Haiti (1960), Israel (1961), Jamaica (1965), Kenya (1969), Lesotho (1973), Madacascar (1962), Malawi (1965), Malaysia (1960), Malta (1961), Mauritius (1970), Mexico (1966), Netherlands (1966), N. Zeland (1965), Nigeria (1971), Norway (1971), Poland (1962), Portugal (1963), Romania (1961), Senegal (1961), Sierra Leone (1966), Solomon Islands (1981), S. Africa (1963), Spain (1971), Swaziland (1970), Sweden (1966), Switzerland (1966), Thailand (1968), Tonga (1971), Trinidad and Tobago (1968), Uganda (1964), Ukranian SSR (1961), USSR (1960), UK (1964), USA (1961), Venezuela (1961), Yugoslavia (1966). See, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY - GENERAL, Status as at 31 December 1985, 696 (1986).

(6) See, infra VII, 1, 2.

(7) See, infra VII, 1, b, c.

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in Montego Bay, Jamaica (hereafter to be cited as Montego Bay Convention). It has a chapter on the continental shelf and has also introduced the new institution of the exclusive economic zone (EEZ) into the field of international law. Consequently, the new definition of the continental shelf which is influenced by that of EEZ is radically different from the definition adopted in the Geneva Convention. The Montego Bay Convention incorporating many other parts of the Geneva Convention is, moreover, intended to replace the Geneva Convention for the states parties to both of them. But the Montego Bay Convention has not entered into force yet and probably it will not do so in the near future. This makes us face two parallel regimes which partly overlap one another.

The Geneva Convention, apart from being the first and only multilateral convention on the subject in force and having served as basis for the conclusion of the Montego Bay Convention, provides other reasons for its careful examination: First, the question of whether any part of it ever constituted or still constitutes a part of customary international law is very important; because a positive or negative answer to that question would radically affect the question of acquired rights, so far as the new and old regimes differ from one another. Secondly, the customary rules of international law relating to the continental shelf could hardly be explained without a good knowledge of the Geneva Convention, especially its preparatory works. Thirdly, a better understanding of the provisions of the Montego Bay Convention relating to the continental shelf requires a fair understanding of the Geneva Convention, too, so far as those provisions incorporated from the former are concerned. Therefore, we will deal with the basic rules, definitions and concepts which are creations of the Geneva Convention and which are of some relevance to many problems relating to the continental shelf.

1- General Framework of Geneva Convention

The Convention is a relatively short document, consisting of 15 articles, only 7 of which relate to the substance (8). Article 1 defines for the purpose of the Convention the continental shelf as referring

(8) Among other, see, Whiteman, M.M., **Conference on the Law of the Sea: Convention on the Continental Shelf**, 52 AJIL 629 (1958); 4 DIGEST OF INTERNATIONAL LAW, 903 (1965); Dean, A.H., **The Law of the Sea Conference 1958 - 1960, and its Aftermath**, in Alexander, ed., THE LAW OF THE SEA: OFFSHORE BOUNDARIES AND ZONES 244 (1967); Geneva Convention on the Continental Shelf, 41 TUL. L. REV. 419 (1967); Gutteridge, J.A.C., **The 1958 Geneva Convention on the Continental Shelf**, 35 BYIL 102 (1958); Oda, S., **The Geneva Conventions on the Law of the Sea: Some Suggestions for Their Revisions**, I NATURAL RESOURCES LAWYER, 103 (1968); Oda, **Proposals for Revising the Convention on the Continental Shelf**, 7 COLUM. J. TRANSNAT. L. 1 (1968); MC DOUGAL -BURKE, THE PUBLIC ORDER OF THE OCEANS, 669-731 (1963); BOWETT, B.D., THE LAW OF THE SEA, 33-43 (1967); BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW, 139-148 (1978); ANDRASSY, J., THE INTERNATIONAL LAW AND THE RESOURCES OF THE SEA, 49 (1970; KOLODKIN, A.L., THE WORLD

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a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres, or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;

b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

This legal definition clearly differs from the geological definition of the continental shelf in a few respects: first, the legal continental shelf extends from the outer limit of the territorial waters, while the geological continental shelf extends from the coastline, a difference we have indicated before (9). Secondly, the outer limit of the legal shelf is either the 200 metre isobath contour, which approximately corresponds to the outer limit of the geological shelf, or the line which would be determined according to the technological capacity to exploit the natural resources of the submarine areas, which has nothing to do with the geological shelf.

This definition has its aim to determine the geographical extent of the continental shelf but the nature and extent of the rights of the coastal state over the said areas which are definitely related to the former are defined by the Article 2:

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

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

OCEANS 45-55 (1974); ANAND, R.P., LEGAL REGIME OF THE SEA-BED AND THE DEVELOPING COUNTRIES, 31 (1975); HENKIN, L., THE LAW FOR THE MINERAL RESOURCES 14-24 (1968); KNIGHT, G., THE LAW OF THE SEA; CASES AND DOCUMENTS, AND READINGS, 9-11 (1980); O' CONNELL, D.P., I INTERNATIONAL LAW OF THE SEA, 472-507 (1982); PAZARCI, H., LA DELIMITATION DU PLATEAU CONTINENTAL ET LES ILES, 8 (1982); CELIK, E.F., II MILLETLERARASI HUKUK, (1982); BROWN, E.D., THE LEGAL REGIME OF HYDROSPACE, (1971); Brown, **The Present Regime of the Exploration and Exploitation of the Sea-bed Resources in International Legislation: An Evaluation,** in SYMPOSIUM ON THE REGIME OF THE SEA-BED (ROME SYMPOSIUM), 241 (1970); TOLUNER, S., MILLETLERARASI HUKUK DERSLERİ, 177 (1984); Krueger, R., **The Convention on the Continental Shelf and the Need for Its Revision and Some Comments Regarding the Regime for the Lands Beyond,** I NAT. RES. LAWYER, 1 (1968). Ely, N., **A Symposium on Limits and Conflicting Uses of the Continental Shelf,** in Alexander ed., LAW OF THE SEA: OFFSHORE BOUNDARIES AND ZONES, 174 (1967).

(9) **See, supra** I.

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3. The rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

The rights as described above are qualified by the epithet "sovereign" and they are limited, in scope, to the purposes specified therein. They are exclusive to the coastal state and all potential claims by third states are excluded. The mode of acquisition is very original; occupation or any kind of proclamation is not necessary for acquistion of continental shelf rights. They belong **ipso jure** and **ab initio** to the coastal state (10):

The natural resources to which these rights relate are defined by the paragraph 4 of Article 2 as follows:

> The natural resources referred to in these Articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil (11)

Surely, the Geneva Convention, within the area defined and for the purposes specified, is an encroachment on the high seas freedoms. It has created two kinds of new relationships: one between the neighbouring coastal states, and the other between the coastal state (s) and the international community.

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(10) See, generally, Penic, F.V.W., **The Legal Character of the Right to Explore and Exploit the Natural Resources of the Continental Shelf.** 22 SAN DIEGO LAW REVIEW, 765 (1985); Pazarcı, **supra** note 8, at 19; Griffin, W.L., **The Emerging Law of the Ocean Space,** I INT'L LAWYER, 566 (1966); Oda, S., **Proposals for Revising the Geneva Convention on the Continental Shelf,** 7 COLUMB. J. TRANSNAT. L. 18-23 (1968); Oda, Dissenting Opinion in **Continental Shelf (Tunisia/Libyan Arab Jamahiriya).** JUDGMENT, ICJ. REPORTS, 218-20 (1982); Toluner, **supra** note 8, at 218-20; McDOUGAL-BURKE, **supra** note 8, at 691; O' CONNELL. **supra** note 8; **North Sea Continental Shelf Cases,** JUDGMENT, ICJ. REPORTS, 22 (1969); WHITEMAN, 4 DIGEST OF INTERNATIONAL LAW, 856-58 (1965); **Conference on the Law of the Sea: Convention on the Continental Shelf,** 52 AJIL, 635-38 (1958); Gutteridge, **supra** note 8 at, 111-19; Zedalis, R.J., **Foreign Military Use of Another State's Continental Shelf and International Law of the Sea,** 16 RUTGERS LAW JOURNAL, 1 (1984); Petrowski, L.C., **Military Use of the Ocean Space and the Continental Shelf,** 7 COLUMB. J. TRANSNAT. L. 279 (1968).

(11) See, Oda, COLUM. J. TRANSNAT. L. pp. 10-18; Dissenting Opinion in **Continental Shelf (Tunisia/Libyan Arab Jamahiriya).** JUDGEMENT, ICJ. REPORTS, 197-209 (1982); WHITEMAN, DIGEST, pp. 858 - 63; Conference, pp 636-40; Gutteridge, **supra** note 8, at 117-19.

As it is evident from its text, Article 1 defines the continental shelf in general terms and for the purposes of the Convention. It indicates the object and locus of the continental shelf rights. For the coastal states facing wide oceans without any neighbouring countries opposite them, the 200 metre depth or the exploitability criterion as contained in Article 1 may even serve as a delimitatory criterion, the seaward limit of the continental shelf of the particular state being at the same time the boundary of its national jurisdiction towards the international community. However, where two or more opposite or adjacent states abut on the same continental shelf, what is important is the relationship between these neighbouring states, and Article 1 does not help. Then, the question what **amount** of the continental shelf is to go to which coastal state is not answered (12). It is Article 6 which is designed to meet such difficulties:

> 1. Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite each other, the boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary line is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each state is measured.
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> 2. Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest point of the baselines from which the breadth of the territorial sea of each state is measured (13).

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(12) **Compare:** BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW, 142 (1978).

(13) For the legislative history of the Article see, ILC's draft articles: draft article 7 produced in 1951, **Report of the International Law Commission covering the work of its third session 16 May-27 July, 1951, reprinted in** II YILC 143 (1951); revised draft article 7 produced in 1953, and essentially maintained in the eighth session in 1956, the **Report of the International Law Commission covering the work of its fifth session, 1 June-14 August, 1953,** reprinted in II YILC, 213 (1953); the Commentary of the Commission on the 1953 draft article, id., at 216. For the preparatory work of the Geneva Conference see, II U.N. CONFERENCE ON THE LAW OF THE SEA, PLENARY MEETINGS, p. 142; Summary records of the Committee IV of the Conference regarding Article 6 (based on the draft article 72 (previously article 7, renumbered 72 in 1956 of the ILC) see, VI U.N. CONFERENCE ON THE LAW OF THE SEA -FOURTH COMMITTEE (CONTINENTAL SHELF), pp. 91-98. For scholarly comments see, WHITEMAN, DIGEST, 903-920; Conference, 650-54;

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Thus in cases where two or more opposite or adjacent states border on the same continuous continental shelf, the delimitation of the latter would be effected by agreement. If the parties fail to reach an agreement, the second step would be to find out whether there is any special circumstances in the delimitation area, such as presence of islands or unusual configuration of the coasts, which would require a negotiated line. In the absence of such special circumstances, the boundary line would be the median line, in the case of opposite states, and equidistant line, in the case of adjacent states.

Subject to further study of the subject, it seems fair to say tentatively that while Article 1 indicates the general object and locus of the continental shelf rights, and Article 2 the rationale and nature of the rights, it is Article 6 which in concrete terms determines the exact and individual share of the continental shelf for the neighbouring states. Therefore, the entitlement of states to the continental shelf is determined not only by Article 1, but also by the other above mentioned Articles.

Despite the presence of the the above -mentioned Articles, describing the geographical scope of the continental shelf and the nature of the rights which the coastal states are entitled to exercise, the new relationship created between the coastal states on one hand and the international community, on the other, by the emergence of the continental shelf is dealt with by Articles 3, 4 and 5. Article 3 provides that:

> The rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters (14).

However, the Convention apparently concedes that the legal status of the superjacent waters as high seas would, to a certain extent, be affected.

Gutteridge, supra note 8, at 119-20; Hodgson-Smith, **Boundaries of Economic Zone**, in Miles-Gambles, eds. LAW OF THE SEA: CONFERENCE OUTCOMES AND PROBLEMS OF IMPLEMENTATION, Proceedings of Law of The Sea Institute, Tenth Annual Conference, June 22 - 25, 1976, 183 - 188 (1977); Oda, COLUM. J. TRANSNAT L. pp. 23 - 30; Dissenting Opinion in **Continental Shelf (Tunisia / Libyan Arab Jamahiriya)**. JUDGMENT, ICJ. REPORTS, 184 - 90 (1982); **Knight**, supra note 8 at 6-18; TOLUNER, supra note 8, at 182-85; McDOUGAL-BURKE, supra note 8, at 724-30; II O'CONNEL, INTERNATIONAL LAW OF THE SEA, 684-85 (1984); JAGOTA, MARITIME BOUNDARIES, 50-57 (1985); Griffin, **supra note 10**, at 576; Young, R., **in Symposium on Limits and Conflicting Uses of the Continental Shelf**, in Alexander ed., LAW OF THE SEA : OFFSHORE BOUNDARIES AND ZONES, 179 (1967).

(14) For comments and further details see, McDOUGAL-BURKE, **supra note 8**, at 693; WHITEMAN DIGEST, pp. 871-82; VI UN CONFERENCE ON THE LAW OF THE SEA-FOURTH COMMITTEE (CONTINENTAL SHELF), pp. 72-3; 75-8

First, the traditional high seas freedom and right of laying or maintaining submarine cable or pipelines on the seabed of the high seas which states had enjoyed from time immemorial could be affected by the right of the coastal state to take reasonable measures for exploration and exploitation of the continental shelf (15).

Secondly, the exploration of the continental shelf and exploitation of its resources may result in **justifiable** interference with the navigation, fishing or conservation of the living resources of the sea (Article 5).

Thirdly, the coastal state is allowed to construct or maintain or operate on the continental shelf installations and other devices necessary for the exploration of the continental shelf and exploitation of its resources. It is equally allowed to establish safety zones extending to a distance of not exceeding 500 metres around the said installations and exercise jurisdiction over them (16). However, they do not have the status of islands. Neither are they allowed to have any territorial waters or to affect the territorial waters of the coastal state which constructed them. Moreover, they could not be established where they would interfere with the use of recognized sea lanes essential to international navigation.

Finally, it is no longer as free for the international community to do research concerning the continental shelf as it had been before the Convention was concluded. In principle, the previous consent of the coastal state is needed. However, the coastal state shall not normally withhold its consent if a qualified institution submits a request to make a purely scientific research as to the physical or biological characteristics of the continental shelf. Besides, the coastal state is entitled to participate or to be represented in the research and the results of the research should be published (17).

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(15) Article 4. For comments and details see, McDOUGAL-BURKE, **supra** note 8, at 704; WHITEMAN, DIGEST, at 882 - 88; Conference, at 642 - 43. For the summary records of the Eighth Session of the ILC, see, I YILC 150, 277 (1956). Article 4 (based on the draft article 70 of ILC) was considered by the Fourth Committee of the Conference, See, VI UN CONFERENCE ON THE LAW OF THE SEA - FOURTH COMMITTEE (CONTINENTAL SHELF), pp. 78 - 81.

(16) For comments on the Truman Proclamation regarding its provisions on the status of the superjacent waters, see, Borchard, **Resources of the Continental Shelf,** 40 AJIL 53, 55 (1946); **Vallat, Continental Shelf,** XXII BYIL 333, 338 (1946). For the legislative history of and comments on Article 5 see, Mc DOUGAL - BURKE **supra** note 8, at 721; TOLUNER, **supra** note 8, at 219-22; Griffin, supra note 8, at 577 - 78; Oda, COLUM. J. TRANSNAT. L. at 19 - 23; WHITEMAN, DIGEST, at 888 - 903; summary records of the meetings of ILC in 1956 (eighth session), I YILC 150 - 51, 277 (1956); the Commentary of the Commission on the draft Article 1"1, II YILC, 299 - 300 (1956); debates on the subject at the Fourth Committee of the Conference, VI U.N. CONFERENCE ON THE LAW OF THE SEA - FOURTH COMMITTEE (CONTINENTAL SHELF) pp. 81 - 91.

(17) See, Schaefer, M.B., **The Changing Law of the Sea-Effects on Freedom of Scientific Investigation.** in Alexander ed. LAW OF THE SEA: THE FUTURE OF THE SEA'S RESOURCES, Proceedings of the Second Annual Conference of the Law of the Sea Institute, 26-29 June 29, 1967, Kingston, Rhode Island, 113-18 (1967); Goldie, L.F.E., **Submarine Zones of Special Jurisdiction under the High Seas-Some Military Aspects,** in Alexander ed., LAW OF THE SEA, 100, 106 (1967). McDOUGAL-BURKE, **supra** note 8, at 701; Zedalis, **supra** note 8, at 31-33. For legislative history see, **supra** note 16.

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2. Some specific problems arising out of the interpretation of the Convention: Seaward Limits of the Continental Shelf

A- Statement of the Problem

It is beyond any doubt that the coastal state exercises sovereign rights over the seabed and subsoil of the submarine areas up to a depth of 200 metres for purpose of exploring it and exploiting its resources. But the exploitability criterion enables the coastal state to extend its jurisdiction to the submarine areas lying beyond that limit if they are exploitable (for the moment leaving aside the question of adjacency and its effect on the exploitability). However, the exploitability criterion is not defined in the Convention and that uncertainty has raised a few important questions of different natures. For that reason, shortly after the conclusion of the Convention, Article 1 became a subject of conroversy and very different interpretations among scholars as well as among states. The 200m depth and exploitability criteria in the article in question constituted the centerpiece of the debates during 1960s through mid- 1970s. The rapid development of marine technology, as is usually put, overtook the definition of the continental shelf which Article 1 provided, making it possible to exploit the resources of the submarine areas almost at any depth of water. Thus, 200m limit practically ceased to be a limit and the exploitability criterion remained the only one. That situation caused difficulties of interpretation. While some preferred to read the exploitability criterion in conjunction with such other elements of the definition as the depth criterion, the **adjacency** and term **continental shelf** and thus to restrict the outer limit of the continental shelf to the environs of the outer limit of the geological shelf (18), others went as far as to argue that the coastal states could, according to Article 6, apportion the world oceans among themselves at deepest trenches (19).

On the other hand, at a time when the debates about the possible interpretations of Article were at their peak, the International Court of Justice delivered its judgment in the North Sea Continental Shelf Cases in 1969 (20), which broug it new dimensions to the ongoing controversy over the definition of the continental shelf. Although lthe Court decided the case on the basis of customary international law, it was able to deal with some aspects of the Geneva Convention as well. Its immediate purpose was delimitation of a continuous continental shelf between the adjacent states and in response to an argument by Denmark and the Netherlands that the quidistance principle as contained in Article 6 of the Geneva Convention was a mandatory principle under customary law, it ruled that that was not the case. But it said that the rights of the coastal state were based on the sovereignty it exercised over the land territory of which the continental shelf was a natural prolongation under the sea. That principle, the Court said, was a principle of customary international law

(18) See, **infra**, V, 2, D, c, bb.
(19) See, **infra** V, 2, D, C, c, aa.
(20) See, North Sea Continental Shelf, Judgment, I. C. J., Reports, 3 (1969).

and was enshrined in Article 2 of the Geneva Convention (21). It also said, while examining the question of whether Article 6 was a part of customary law, that Articles 1 to 3 of the Geneva Convention had been considered at Geneva Conference as reflecting the received, or at least, emergent rules of international law (22).

Those findings of the Court led some scholars and governments alike to make various arguments either on the basis of the Geneva Convention or on that of customary law.

Some, understanding the natural prolongation concept in geological or geomorphological sense, argued that the natural prolongation, which, in fact, was nothing but the continental margin; constituted the seaward limit of the continental shelf (23).

Others argued, on the basis of **obiter dicta** of the Court that Articles 1 to 3 had been considered in 1958 as reflecting customary law, that the islands, regardless of their political status, size, geographical position and population, were, under customary international law, entitled to the same continental shelf as the mainland, simply ignoring Article 6 with its 'special circumstances' clause or equitable principle as developed in customary law (24).

Still others argued that by including the exploitability criterion in the definition of continental shelf in Article 1 the drafters of the Convention departed from the geological definition of the concept, that the Court could not have considered in 1969 the concept of natural prolongation as reflecting some geological or geomorpohological features, and that the natural prolongation should be understood as meaning the simple extension of the coastline or the sea frontage, regardless of any seabed irregularities (25).

For these reasons, we believe it would be worthwhile to make a detailed study of the preparatory work of the Convention, scholarly opinions, and the ICJ's judgment in order to arrive a fair knowledge of the questions which have been raised.

B- Drafting History of Article 1: Work of the International Law Commission

a- Background

As it has been indicated before, ILC had appointed Prof. Francois of the Netherlands as its Special Rapporteur, at its first session in 1949, to study the regime of the continental shelf as part of his study of the general regime of the high seas. Fran-

(21) See, infra VI, 1, B.
(22) See, infra VII, 1, D.
(23) See, infra VI, 3.
(24) This question will be a subject of a separate study.
(25) See, infra VI, 1, E, B.

çois prepared and submitted to the Commission, in 1950, his first report in which he gave a special treatment to the subject of the continental shelf (26). After having studied and analysed the scholarly opinions, the practice of states which consisted mostly of unilateral declarations and other related documents on the subject, he came to the conclusion that there did not exist any established rule of international law governing the continental shelf and that a great uncertainty existed in the practice of states as to the extent of the rights of the coastal states (27). He also noted that the 200 metre depth line which had been adopted by some states as being the outer limit of the continental shelf represented the maximum depth for exploitation of the resources of the seabed. In his opinion, adoption of the 200 metre depth line as the outer limit would give different states unequal areas of seabeds. He was, therefore, of the opinion that the term **continental shelf** should be discarded and a contiguous zone of a fixed breadth be given to coastal states instead (28). However, he asked the following question to the Commission, as a basis of discussions:

1. Must the recognition of rights regarding the exploitation of the subsoil of the sea and protection of the marine resources of the sea be linked to the presence of a continental shelf?

2. If so, what definition should be given to this continental shelf? Is it necessary to adopt a 200 metre depth of sea as the outer limit? (29)

The questions were not simple and the Commission was not writing on a clean slate; many states had already declared their policies of continental shelf. Various divergent and sometimes conflicting claims had to be dealt with. That difficulty was compounded by over-representation of certain interests in the Commission.

b- Interests involved and preoccupation of some members of the Commission

Before proceeding to see how the Commission responded to these questions, it would help to understand the debates of the Commission better if we had a fair knowledge of the interests involved and of the preoccupations with which some members of the Commission arrived in Geneva.

Two consummate, influental, and experienced members of the Commission, namely Hudson of the US and Brierly of the UK, were concerned about the geographical and geological position of the Persian Gulf, the seabed of which does not exceed 70 fathoms in depth, but which lacks a continental shelf in the geological sense. In other

(26) See, DOCUMENT A/CN. 4/17. **Report de J.P.A. Francois rapporteur special.** II YILC 36, 49 (1950).
(27) **id.**, at 51
(28) **Id.**,
(29) **id.**, parag. 124.

words, the Gulf's seabed does not have any geological break or any marked change in the gradient, still less any continental slope. It is a shallow, simple seabed contiguous to the coasts of a number of countries, most of which by that time were under the protection of the UK. The oil-bearing seabed of the Gulf was, therefore, a close concern of Brierly. Another Gulf state, Saudi Arabia in whose oil the US had interests was also the focus of concern for Hudson. So they both were aware of the fact that any definition of continental shelf based on geological features (contours) of the seabed could jeopardise the exploitation of the rich oil of the Gulf (30).

On the other hand, a geological definition of continental shelf would dash the hopes of the Latin American States that the Commission would provide their **de facto** claims to epicontinental sea and its seabed with a legal cover. So the members of the Commission from Latin America would defend those interests. In fact, they went a long way in that direction and in 1953 while the Commission was preparing the commentary to the draft articles, they quarelled with each other over how hard they had worked in advancing the case of Latin America (31).

Obviously, they were not the only members of the Commission who advanced their national interests or the interests of their regions. For example, Spiropoulos of Greece said, at one point of time, that "Greece had no continental shelf, and he had no strong feelings on the matter" (of limiting the seaward line of the continental shelf on the basis of depth) and he proposed to abstain from voting (32). Lauterpacht made a proposal with respect to the nature of continental shelf rights, introducing his government's proposal verbatim (33).

Although the members of the Commission are formally independent of their governments and serve in the capacity of members of the Commission, it is a reality that most of them also advise, or are employed by, their governments. That shou'd be taken into account by students of international law in their studies on the subject.

c- Formation of policy principles

When the Commission began considering the first question of François, two things became clear: (1) that it would not accept the **res communis theory** of the seabed areas beneath the high seas, and (2) that it would not adhere strictly to the ge-

(30) This concern they expressed a few times. For example, Hudson, in the second session, 66 th meeting and 67 th meeting, I YILC 214, 218,225 (1950). Brierly, id., at 222.

(31) Yepes wanted the commentary to include a statement to the effect that a definition of continental shelf according to the depth criterion adopted by the Commission (in 1953) was not consistent with the declarations of states which had been adopted since 1945 and that one member of the Commission (Yepes) considered that the germ of a veritable customary international law on the continental shelf was already apparent in those declarations [(I YILC 338 (1953)]. Alfaro opposed to the inclusion of that statement in the commentary on the ground that "it would place the other Latin American members in a very embarrassing position." id., at 340, parag. 30. See, also Cordova's statement, id.,at 339 parag. 25.

(32) See, the summary records of 338th meeting, I YILC, 135, parag. 93 (1956).

(33) See, I YILC 84 (1953).

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ological definition of continental shelf. Hudson's statement at the 66 th meeting was the self-evident proof of that policy. He said that:

> (t) he matter was one of great importance. He felt that in taking it up the Commission should be guided by a social philosophy. The continental shelf was not only a legal or juridical concept but also of economic and social significance. There were means of exploiting submarine resources for the benefit of mankind. The exploitation of resources was at the moment confined mainly to petroleum, but methods would be found of obtaining other minerals, foodstuffs etc. Undertakings for the exploitation of submarine resources would therefore increase rapidly in the future. It was said that mineral oil resources now under the exploitation would give out sooner or later. It would therefore be necessary to exploit submarine resources; but even if existing resources did not become exhausted, he did not imagine that that would prevent the establishment of concerns for the exploitation of the resources of the high seas.. (34).

He continued to state that "since there were resources underneath the high seas, the successful exploitation of which was already feasible, it should certainly not be prohibited by law" (35).

He further said that the best illustration of his argument was furnished by the Persian Gulf, where there was no continental shelf. Its waters were not deep; its seabed contained immense reserve of mineral oil. Lawyers had not right to prevent the exploitation of those resources for the benefit of mankind.

When one considers in retrospect, one sees that his statement was very carefully worded. It apparently expressed a predetermined policy, which set the goals for the Commission.

The statement received a cautious support from the other members. The Chairman (Scelle) pointed out that the scope of Hudson's statement went beyond the continental shelf proper (36). Hsu stated that the high seas were the property of the international community and, therefore, the development of the continental shelf resources should be entrusted to that body (37). Amado and François expressed their agreements with Hudson's statement (38).

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(34) See, summary records of the second session, 66 th meeting, 1 YILC 214 (1950)
(35) Id., at parag. 71s.
(36) Id., at parag. 74.
(37) Id., at parag. 82.
(38). Id., at 214, parag. 75 and at 215, parag. 78.

After some discussion of how to approach the problem, Hudson made his first proposal:

1. Control and jurisdiction over the seabed and subsoil of submarine areas outside the marginal sea may be exercised by a littoral state for the exploration and exploitation of the natural resources therein contained, to the extent to which such exploitation is feasible.

2. Such control and jurisdiction do not affect the right of free navigation of waters above such submarine areas, or the right of free fishing in such waters (39).

As is clear from the text, the proposal used the term submarine areas, while discarding the term continental shelf. However, the non-use of the term continental shelf had nothing to do with adopting an unlimited jurisdictional area. The motive behind it was to make it sure that the shallow waters, such as the Persian Gulf, were included in the areas over which the coastal state could exercise jurisdiction. Accordingly, the proposal made the seaward limit of the jurisdictional area dependent on the feasibility of exploitation. Technological capabilities would determine the seaward limit of the functional jurisdiction of the coastal state. But other members immediately opposed to it. One member thought that the definition went beyond the continental shelf (40). Others considered that the definition would permit states to go beyond the 200 metre depth line which they had not yet asked for (41). In fact, Hudson did not mean it. He acted on the asumption that it was practically impossible to exploit the seabed beyond the 200 metre depth, which was stated by François to be the maximum depth at which it would practically be possible to exploit the natural resources (42). Indeed, upon the criticism by the other members he amended his proposal to include the term continental shelf:

> Control and jurisdiction over the seabed and subsoil of submarine areas outside the marginal sea may be exercised by a littoral state for exploration and exploitation of the natural resources therein contained, **to the extent to which such areas are located on the continental shelf connected with its territory, including regions which may be assimilated to the continental shelf by reason of the shallowness of their waters** (emphasis added) (43).

The first part of the second proposal down to "therein contained" was same as the first part of the first proposal. That first part was voted seperately and adopted by 10 votes to 1 as a basis of discussions (44). Thus, the Commission recognized, for

(39) Id.., at 218, parag. 4.
(40) Scelle, id.. at 218, parag. 7.
(41) Cordova, id., at 219, parag. 15.
(42) This is understood from the exchange of views between Hudson and other members. id., at 219. parag. 16.
(43) Id., at 221, parag. 42.
(44) Id., at 221.

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the first time, the right of the coastal state to exercise control and jurisdiction over certain parts of the seabeds, the boundaries of which were not yet determined.

The second important move then came from Brierly who made a proposal to give further effect to the policy principle which Hudson had introduced:

"Control and jurisdiction do not depend on the presence of a continental shelf" (45).

That proposal caused uncertainty among the members. Apparently, it was excluding continental shelf proper from consideration, an idea with which some members expressed their disagreements. Brierly explained the purpose of his proposal as follows:

"As he already said, he felt that the right did not depend on the presence of a continental shelf. Certain countries not possesing a continental shelf might desire to exploit the marine subsoil and the number of such countries was fairly large. If, for technical reasons they were unable to exploit that subsoil, there was nothing to be done about it. On the other hand, there were regions where such exploitation was feasible and should be permitted to coastal state. Those areas required definition but not necessarily based on the presence of a continental shelf. If the Commission conferred a right of control and jurisdiction on countries possessing a continental shelf, it would be committing an injustice towards countries which were without one. For that reason, he had said and would repeat that the area over which the right could be exercised would need definition, but it need not depend on the existence of a continental shelf. It was of course difficult to define a continental shelf. One might say that where a continental shelf existed, it would be the limit of the submarine area envisaged in the text which the Commission just adopted. Where there was no continental shelf, the criterion could be the depth of water or number of miles (46)".

Stating that the Commission was not at that moment in a position to select either of the criteria, he proposed the following:

"The area for such control and jurisdiction will need definition but it need not depend on the existence of a continental shelf (47)".

Brierly's proposal which the Commission adopted, had the same purpose as the Hudson's proposal: to save the Persian Gulf oil and to include the shallow waters in the definition. Though his explanation paid lip service to the interests of the countries without a continental shelf, he did not mean that the coastal state should be given a fixed amount of seabed regardless of the depth of waters. But that part of his statement was later to be used by representatives from Latin America to claim continental shelf for Chile and Peru (48).

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(45) Id., at 222, parag. 53.
(46) Id., at 222-23, parag. 65.
(47) Id.,
(48) See, summary records of the 117th meeting of the Commission, I YILC 296 (1950).

However, it is clear from the work of the Commission in 1950 that the early policy decisions did not aim at extending national jurisdiction of the coastal state beyond the 200 metre depth, as it acted on the assumption that the 200 metre depth then constituted the maximum depth at which the exploitation would be possible. Consequently, those decisions cannot not be taken to argue today that the term continental shelf has not a restrictive effect on the seaward limit as provided in article 1 (49). The major reason for the Commission to depart from the geological continental shelf was to include the shallow waters in the definition of the shelf, not to extend further seaward the outer limit of the shelf.

The easy concessions which the Commission made to the Persian Gulf States encouraged the Latin American members of the Commission to make similar claims for Chile and Peru, when the Commission took up the second question of the Special Rapporteur.

Amado of Brazil did not miss the opportunity and introduced a proposal which would have given every state a 20 mile continental shelf, regardless of the characteristics of the seabed:

> In the event of the break in the continental shelf occuring at a distance less than 20 sea miles from the coast, sovereignty, together with control and exclusive right of exploitation, would be prolonged to 20 sea miles from the coast (50).

In introducing the proposal he said that the proposal based on the distance had its aim to provide the countries without a continental shelf with rights over a limited area and that the proposal was a product of elaborate studies on the subject (51).

It is interesting that the proposal did not generate any comments and, in fact, it seemed that members were far apart from reaching a decision on the seaward limits. Some members even suggested that it was impossible to fix an outer limit and that states should be free to fix it for themselves (52).

So, at the end of the 67th meeting, the Commission adopted only two basic policy principles on the basis of which the Rapporteur was instructed to prepare his draft articles for the next session:

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(49) Contra: see, Hutchinson, **Seaward Limit to Continental Shelf in Customary International Law**, 56 BYIL 111 (1985).

(50) See, I YILC 224 (1950). (That proposal had been originally introduced by the French Branch of International Law Association which had, allegedly, prepared it to meet the opposition of the Latin American States to term continental shelf, communicated to the Branch through diplomatic channels. See, Feith, in THE INTERNATIONAL LAW ASSOCIATION, FORTY-FOURTH CONFERENCE, Copenhagen, 94 (1950).

(51) I YILC 224 (1950).

(52) For example, Scelle, **id.**, at 225, parag. 100; Spiropoulos, **id.**, at 225, parag. 104, 109.

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1. The principle that the coastal state could exercise control and jurisdiction over certain areas of seabed and subsoil of the submarine areas beyond the territorial waters for the purpose of exploitation of the natural resources contained therein.

2. The principle that such a control and jurisdiction did not depend on the presence of a geological continental shelf.

However, although the members were in agreement (with the exception of Scelle and perhaps Hsu) as to the first principle, the second principle remained in ambiguity, except that it was accepted that the shallow waters could be included in the areas to be exploited by the coastal state. But in its report to the General Assembly, the Commission used the following language:

> "It would be unjust to countries having no continental shelf if the granting of the right in question [right to exercise control and jurisdiction over submarine areas beyond the territorial waters] were made dependent on the existence of a continental shelf (53)".

But in spite of conscientious attempts by some members to discard the term continental shelf, the other members of the Commission persistently maintained it.

Another aspect of the 1950 meetings was the introduction of the 200 metre depth criterion, exploitability criterion and the distance criterion which were to keep the members busy throughout the whole period of its debates on the subject.

d- The first draft articles of the Commission and the first definition of the continental shelf based on exploitability criterion

aa- 200 metre criterion initially adopted

The Rapporteur submitted his second report to the Commission in 1951 (54). As had been instructed, he drafted a set of articles in his report, reflecting the policy decisions of the Commission adopted in 1950. The draft article 1 defined the continental shelf as follows:

> "The continental shelf is constituted legally by the bed and subsoil of the seabed regions situated off the coast, where the depth of water does not exceed 200 metres (55)".

As is clear from the text, the definition contained the term continental shelf, the use of which had been questioned in the discussions of the preceding year and the seaward limit of the shelf was set at the 200 metre depth. Accordingly, the continen

(53) II YILC 384 (1950).
(54) See, DOCUMENT A/CN4/42 **Deuxieme rapport de M.J.P.A. Francois, rapporteur special,** reprinted in II YILC 75, 99 (1951).
(55) **id.,** at 102.

tal shelf was not the bed of any seabed regions but of those situated off the coast, an element emphasising a loose concept of contiguity.

To this definition, the reaction in the Commission was generally favorable. Most of the members put emphasis on the wording rather than delimitation criterion (56). The only substantial opposition to the 200 metre depth criterion came from Yepes who protested that the definition was a return to the geological definition and that it did not take into account the interests of the shelf-locked states (57). The statements of Hudson and Francois made in defence of the depth criterion are interesting as illustrating its meaning. Hudson said, in replying to Yepes, that the US was in the same position as regards certain parts of its Pacific coast. The situation did not at the moment give rise to any practical problems in regard to exploitation of resources of the seabed, as it was not possible yet to exploit at waters deeper than 200 metres (58). Françios argued that the definition was provisional and it would be revised when the technological progress permitted the exploitation of seabeds at a depth of water deeper than 200 metres. He also added that the new definition departed from the strict geological concept of continental shelf (59).

bb- Distance principle rejected

At a time when one might expect that the debate over the depth criterion was coming to an end, Hudson started a new discussion by referring to the distance principle as adopted by the French Branch of ILA and resuggested by Richard Young in an article published in AJIL in 1951 (60). That statement encouraged el-Khory to introduce a proposal based on maximum and minimum distances from the coast:

> Legally, the continental shelf is constituted by the seabed and subsoil of the submarine regions situated off the territorial waters, to a minimum distance of x miles, irrespective of the depth of water and to a maximum depth of..., irrespective of the length of distance (61).

François objected to the proposal on the grounds that it was not possible to work the seabed where the depth of water exceeded 200 metres and that the distance proposal would extend the national jurisdiction to the areas where there did not exist any continental shelf (62).

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(56) Hudson stated that the draft article was not clear as to whether the seabed and subsoil in question remained entirely outside the territorial waters. Geologically, the continental shelf stretched from the shore to the point where the seabed dropped abruptly to the ocean depths. Therefore, a legal definition had to make it clear that the continental shelf lay outside the territorial waters. See, I YILC, 267 (1951). The draft article was accordingly ammended. Id., at 269.

(57) Id., at 270.

(58) Id., at 270.

(59) Id.

(60) Id., at 271.

(61) Id., at 271.

(62) Id., at 272, paras. 76-77.

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Hudson immediately proposed an amendment to the text of the François' draft article that the words "contiguous to" should replace the words "off situated" (63).

Yepes wanted to be sure that Hudson's proposal took account of the notion of contiguity (64).

Alfaro also remarked that the notion of contiguity was absolutely necessary (65).

In fact, in reply to a question posed by Scelle inquiring about the fate of seabed areas separated from the coast by deep channels (66), some other members stated that the contiguity or adjacency of the shelf to the coast was an essential element (67).

On the other hand, the feelings of other members as to the distance principle were mixed and eventually the proposal was rejected by a clear majority (68).

Brierly put his view on the record that the distance principle did not make sense and Chile did not have the continental shelf (69).

Finally, the draft article prepared by François and amended in the Commission was voted and adopted:

> As here used, the term "continental shelf" refers to the seabed and subsoil of the submarine areas contiguous to the coast but outside the areas of the marginal seas where the depth of superjacent waters does not exceed 200 metres (70).

cc- First adoption of the exploitability criterion

The definition we have just outlined above did not survive the following meeting of the Commission. At the 117th meeting, Yepes came up with a new proposal, the effect of which was to change the definition already adopted:

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(64) Id., parag. 81.

(65) Id., parag. 83.

(66) With regard to Young's article mentioned above, Scelle said that a special case of a mountain rising out of the high seas at a certain distance from the coast of a state from which it was separated by a deep depression occured to him. He asked whether the state in question could make a claim to the mountain as forming part of its continental shelf. Id., at 271, para. 67.

(67) Amado remarked that the continental shelf could only be adjacent to a coastal state. Id., at 271, parag. 69. Cordova said that the continental shelf was nothing more than an extension of the continent beneath the sea. It must, in consequence, be adjacent to the land, or else it could not be called continental shelf. Id., at 271, parag. 70.

(68) By 7 votes to 1 and 7 to 2 respectively, Id., at 273.

(69) Id., at 273, parag. 109.

(70) Id., at 273.

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> The rights of control and jurisdiction referred to in the present chapter belong, up to a distance of 20 miles beyond the coast, to all coastal states, even if they do not possess a continental shelf in the geological sense (71).

He invoked, for justification, on a statement which Briercly had made, in the 66th meeting, and later incorporated in the Commission's report to the General Assembly effect that the coastal state could exercise control and jurisdiction over the contiguous seabed areas, regardless of the existence of a continental shelf.

Briercly immediately replied that by his statement he had intended that the shallow waters not constituting a geological shelf should be included in the area to be exploited by the coastal state, and that he had never thought that unfavorable conditions imposed by the nature on some states should be remedied by legal enactments (72). His statement generated a hot debate among the members, partly based on emotions and revealing national interests involved.

Scelle, probably the most unbiased member of the Commission, protested that by making an exception for countries with shallow waters without reason, the continental shelf regime enacted by the Commission apparently was serving special interests, instead of corresponding to a legal concept or to a scientific fact (73).

Hudson replied that 200 metre depth line was accepted as conforming to a special geological formation and it was impossible to work seabed beyond that depth (74).

François' reply to Scelle was more interesting. He said that the 200 metre depth line was not arbitrary. The continental shelf could not extend beyond the 200 metre depth, as the area beyond was the continental slope. He also repeated that the 200 metre depth line was subject to revision if the occasion arose (75).

Cordova played the victom's part, saying that the Commission was favoring some specific interests by making exceptions for countries with shallow waters (76).

Meanwhile, Hsu made an amendment (77) to the Yepes' proposal and the proposal as thus amended by Hsu was voted and adopted by 6 votes to 5 (78).

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(71) Id., at 296.
(72) Id., at 297, parag. 45.
(73) Id., at 297-98, parag. 47.
(74) Id., at 298, parag. 48.
(75) Id., at 298, parag. 53.
(76) Id., at 298, parag. 54.
(77) Id., at 298, parag. 62.
(78) Id., at 299.

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Some members surprised by the new definition argued that the same principle having been adopted by a larger majority at the previous meeting, the standing of the latter text was dubious (79). Besides, on further reflection, Yepes understood that the text as adopted was not reflecting what he had intended by his original proposal and apparently he withdrew his vote (80).

The way out was to form a sub-committee which consisted of Hudson, Francois, Yepes, and Cordova. Some times later, the Commission was informed that the subcommittee had unanimously reached an agreement on the definition of the ontinental shelf, which read as follow:

> As here used, the term "continental shelf" refers to the seabed and subsoil of the submarine areas contiguous to the coast, but outside the areas of the territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil (81).

That was how the exploitability criterion came into being. The commentary of the Commission on that article explained the definition as follows:

> It [the definition] departs from the geological concept of the term. 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.

Another reason which the commentary gave for not having adopted a geological definition was:

> [t] he fact that the existence of continental shelf in the geological sense might be questioned in respect of submarine areas where the depth of the sea would nevertheless permit exploitation of the submarine areas in the same way as if there were a continental shelf, could not justify the application of a discriminitory legal system to these shallow waters (82).

As to the retention of the term "continental shelf" in preference to the "submarine areas" the commentary said that:

It was decided to retain the term "continental shelf" because it is in current use and because the term "submarine areas" used alone would give no indication of the nature of the submarine areas in question (83).

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(79) Namely, Hudson and Francois, Id., at 299, parag. 68, 70.
(80) Id., at 299, parag. 79.
(81) Id., at 346.
(82) II YILC 141 (1951)
(83) Id., at 141, parag. 3.

The commentary made it also clear that the term "continental shelf" as used in the text referred not only to the continents as such but also to the islands, to which such submarine areas were contiguous (84).

With regard to the seaward limits of the continental shelf, the commentary explained why the Commission did not choose the depth criterion:

> The Commission considered the possiblity 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 near future might make it possible to exploit resources of the seabed at a depth of over 200 metres. Moreover, the continental shelf might well include submarine areas lying at a depth of over 200 metres but capable of being exploited by means of installations erected in neighbouring areas where the depth does not exceed this limit (85).

The commentary made it also clear that " areas in which exploitation is not technically possible by reason of the depth of the waters are excluded from the continental shelf here referred to" (86).

Finally, the commentary concluded that the continental shelf referred to in Article 1 was limited to the submarine areas outside the territorial waters and that waters covering the seabed areas were not thereby affected (87).

Conclusions:

1. Despite the contrary contentions, the term "continental sheif" was preferred to the term "submarine areas", because it indicated the nature of the submarine areas. Thus, it continued to have a restrictive effect on the seaward limits, even in a definition which clearly departed from the geological concept of continental shelf.

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(84) Id., at 141, parag. 4.
(85) Id., at 141, parag. 6.
(86) Id., at 141, parag. 5.
(87) Id., at 141, parag 9, 10.

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2.The exploitability criterion was not intended to be unlimited. It was rather intended to include such areas beyond the 200 m. depth as could be exploited by means of installations erected in neighbouring areas where depth of the waters did not exceed that limit. Probably, those areas beyond the 200 m. depth but lying on the upper part of the slope were intended. Consequently, there is no indication that they intended the basis of slope to be included in the areas to be exploited.

e- The reactions of the Governments to the first draft articles: substitution of the 200 metre depth criterion for the exploitability criterion

Out of eighteen governments which had commented on the draft articles of the Commission prepared in 1951 (88), Norway (89), Sweden (90), Belgium (91), and Israel (92) suggested that the term "continental shelf" should be replaced by the term "submarine areas". Chile (93), Israel (94), Denmark (95), Syria (96), and the US (97) expressed their agreements, either explicitly or implicitly, to the definition of the continental shelf as based on the exploitability criterion.

Yugoslavia (on the basis of the el-Khory's proposal at the 113th meeting) (98), Norway (on the basis of proximity) (99) and Chile (seemingly on the basis of contiguity) (100) advocated a zone of fixed breadth.

On the other hand, Belgium (101), Brazil (102), Ecuador (103), Egypt (104), France (300 metre) (105), and the Netherlands did not object to the exploitability criterion but preferred a 200 metre depth criterion) (106); Union of South Africa (107), and the UK (108) considered the exploitability criterion as being too flexible and wanted a fixed seaward limit.

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(88) For the comments of the Governments see, II YILC 241 (1953).
(89) Id., at 261.
(90) Id., at 264.
(91) Id., at 241
(92) Id., at 258.
(93) Id., at 243. However, Chile also put the outer limit of its continental shelf at a 200 mile distance from the coast.Id., at 244.
(94) Id., at 258.
(95) Id., at 246.
(96) Syria expressed its agreement to the whole work of the Commission, Id., at 265.
(97) Id., at 268.
(98) Id., at 268-69.
(99) Id., at 261.
(100) Id., at 244.
(101) Id., at 241
(102) Id., at 242.
(103) Id., at 247.
(104) Id., at 249.
(105) Id. at 249.
(106) Id., at 260
(107) Id., at 265
(108) Id., at 266.

Acting on the basis of the message he received from the governments, François revised the draft Article 1 and adopted the 200 metre depth as the seaward limit, excluding the exploitability criterion (109).

aa. Debate on the terminology

The question of terminology was raised immediately after the debates were begun on the new draft article. Some members suggested that the term "continental shelf" should be replaced by the term "submarine areas" (110). Alfaro made a proposal to that effect (111). However, it met with an unfavorable reaction from the other members. Kozhevnikov said that the term "continental shelf" was satisfactory, since it more clearly conveyed the restrictive nature of the concept. The term "submarine areas" might be taken to mean any area (112). François considered that the term "continental shelf" was preferable because it expressed the notion of contiguity to the coast. A submarine area might be in the middle of the ocean (113). Lauterpacht was of the opinion that the term "submarine areas" was not self-explanatory in English. He would prefer the term "continental shelf" if the latter was described properly (114). In the end, Alfaro's proposal was rejected and the term continental shelf retained.

bb. Further elaboration of the depth criterion

To the newly revised draft article first reaction came from Yepes (115), Sandstrom (116), and Scelle (117) who urged that the exploitability criterion should be maintained. Yepes repeated that adoption of the 200 m depth criterion would be a return to the geological concept of the continental shelf. François replied to Yepes that his definition was not the same as the geological definition of the concept, because a geological definition was based on the configuration of the seabed and would mean that in the absence of certain geological conditions there would be no continental shelf (118). Yepes, not being satisfied, made a new proposal incorporating the 1951 draft article based on exploitability criterion and extending the continental shelf rights

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(109) See, DOCUMENT A/CN.4/60, id., at 46.
(110) see, Hsu, I YILC, 73 (1951); Yepes, id., at 75; Alfaro, id., at 76.
(111) Id., at 76, parag. 46.
(112) Id., at 76, parag. 43.
(113) Id., at 77.
(114) Id., parag. 49.
(115) Id., at 73.
(116) Id., at 73, parag. 71.
(117) Scelle was against setting a fixed limit to the shelf, not the 200 metre depth criterion as such. id., at 73, parag. 73.
(118) Id., at 75, parag. 16.

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to islands as well (119). Kozhevnikov made a proposal based purely on geological characteristics of the seabed:

> As here used, the term continental shelf means seabed and subsoil of the submarine areas contiguous to the coast, but lying outside the area of the territorial waters, up to the line where the steep slope of the seabed begins (120).

François countered that his proposal was a return to the geological shelf which the Commission had rejected. But Zaurek supported the Kozhevnikov's proposal on the ground that the abyssal declivity set in only at a depth of 400 or 500 metres. It was reasonable to suppose that certain types of exploitation might become possible at such depths and it would be inconvenient if such exploitation were to be precluded simply because the depth exceeded the limit by a few metres (121). The expression "steep slope" not being clear to some other members (122), the proposal was rejected.

Faris el-Khory proposed a definition which included depth, distance and exploitability elements (123). Kozhevnikov, Yepes, François and Zaurek expressed their opposition to the distance priciple as being not in conformity to the concept of the continental shelf (124). Yepes' and el-Khory's proposals were consequently rejected.

On the merits of the 200 metre depth criterion a few statements were made. The Commission discussed other alternative proposals. Spiriopoulos remarked that it was arbitrary. Lauterpacht replied that it was not, because the 200 metre depth was generally considered as coinciding with the geological concept of the continental shelf and with the boundary of the actually exploitable area (125).

cc. Meaning of the words "contiguous to the coast"

On the other hand, Lauterpacht raised, in criticism to the depth criterion, the question of a narrow channel more than 200 metres in depth contiguous to the coast and shallow waters further out (126), a question which could probably be encountered under any criterion. Referring to the Norwegian Trough in the North Sea, he said that under the 200 m depth criterion, Norway would have no continental shelf beyond the Trough. He recalled that the UK Government, in its observations, was clearly opposed to alloting coastal states a submarine plateu separated from their coastlines by a channel over 200 metres in depth (127).

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(119) **id.**, at 75, parag. 17.
(120) **id.**, at 74, parag. 40.
(121) **id.**, at 77.
(122) For example, Spiropoulos and Yepes, **id.**
(123) **id.**, at 81.
(124) **id.**, at 81-82.
(125) **id.**, at 82.
(126) **id.**, at 74.
(127) For the observation in question see, II YILC 267 (1953).

It is pertinent to recall here that the Norwegian Government had advocated the contrary view in its observations on the draft articles:

In Article 1 it is said that the term "continental shelf" refers to the seabed and subsoil of the submarine areas contiguous to the coast. What is precisely meant with the expression "contiguous to the coast"? This is for instance the case outside the coast of Norway. Along the southern and western coast of Norway stretches a rather narrow belt of deep water. On the outer side of the narrow belt the North Sea as a whole is rather shallow with depths inferior to 200 metres. It would be obviously most unfair if Denmark, Germany, the Netherlands and the United Kingdom should share between them the whole North Sea, while Norway should be excluded because of the above mentioned belt of deep waters (128).

Norway, accordingly, asked for a definition which would cover the unfair situation thus described. In fact, it was in favor of a definition which would give the coastal state those parts of the seabed nearer to its coasts (a reference to the distance principle).

Lauterpacht, knowledgable of those conflicting interests, proposed the following formula:

> While the depth of 200 metres as a limit of the continental shelf must be regarded as the general rule, it is a rule which is subject to equitable modifications in cases in which in proximity of the coast, the separation of the continental shelf from the contiguous sea by a depth greater than 200 metres does not represent the general geographical configuration of the submarine area in question (129).

François replied that, problem of contiguity, when there was a deep channel near the coast, would remain whether or not a depth of 200 m was fixed. He correctly considered that the problem was how to interpret the words "contiguous to the coast." His own view was that the expression did not preclude the submerged area separated from the coast by a narrow channel more than 200 metres in depth from being considered, in certain circumstances, as "contiguous to the coast" (130).

Alfaro suggested that the continental shelf should be defined not as contiguous to the coast but as a projection or prolongation of the coast into the sea (131).

The context in which the two debates took place is not suggesting that the term "contiguous to the coast" was used in terms of proximity. Its immediate aim was the position of the shallow areas seaward of a deep trench lying parallel to the

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(128) Id., at 261.
(129) I YILC 74 (1953).
(130) Id., at 74, para. 12; 78, para. 66.
(131) Id., at 81.

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coast but deeper than 200 metres. However, the debates show that the term "contiguous to the coast" was intended to restrict the seaward limit. It did not refer to "that which lay next"; it rather referred to the dimensions. That was why some members were concerned to make the position of the Norwegian Trough clear. Neither did it mean absolute proximity. Otherwise, the question would not have arisen.

In fact, those discussions did not prevent the Rapporteur's draft article from being adopted by 7 votes to 4, with 2 abstentions (132).

Thus, the definition as adopted in 1951 was amended to read as follows:

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

The commentary on the draft article gave the following reasons for the change:

> The Commission, following the considerations adduced by the special rapporteur in the light of observations of certain governments, has come to the conclusion that the text previously adopted does not satisfy the requirement of certainty and that it is calculated to give rise to disputes. On the other hand, the limit of two hundred metres - a limit which is at present sufficient for all practical needs - has been fixed because it is that depth that the continental shelf in the geological sense, generally, comes to an end. It is there that the continental slope begins and falls steeply to a great depth. The text thus adopted is not wholly arbitrary for, as already stated, it takes into account the practical possibilities, so far as they can be foreseen at present, of exploration and exploitation (133).

As to the notion of contiguity, the commentary repeated the terms of the Lauterpacht's proposal and concluded that the submarine areas less than 200 metres in depth, situated in close proximity to the coast but separated from it by a narrow channel deeper than 200 metres should be considered as contiguous to the coast (134).

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(132) Id.,

(133) II YILC 213 (1953).

(134) However, with the proviso that the state relying on such exceptions would have to prove that an equitable alteration of the general rule should be effected. Id., at 214.

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Conclusions:

The strict geological concept of continental shelf was rejected. Thus, the shallow areas less than 200 m. in depth were considered as continental shelf for purpose of legal definition, whether or not they met the requirements of geological definition of continental shelf. The proposals based on distance from the coast or on exploitability criterion were also rejected. That shows how deeply the Commission was commited to the idea of a natural relationship between the land territory and the submerged land. The deliberations of the Commission in 1953 do not lend themselves to an interpretation that the submarine areas beyond the 200 metres were ever thought to be under the jurisdiction of the coastal state. The term "continental shelf" was deliberately maintained as showing the nature of the seabed areas in question, just as the words "contiguous to the coast" were inserted in the article to qualify the nature of submarine areas.

f. Final definition: adoption of the two - pronged definition

The struggle over or the showdown on the outer limit of the continental shelf reached its climax in the 357 th meeting of the Commission in 1956 when Garcia - Amador made a proposal (135) to change the draft article 1 on the basis of a resolution adopted by **Inter - American Special Conference at Ciudad Trujillo** in March 1956 (136) (shortly before the Convention got to work on the subject). The proposal opened with a preamble stressing the geological unity of the continental shelf with the land territory and provided for a few alternative criteria for the outer limit of the submarine areas subject to the national jurisdiction:

> 1. As used in these articles, the expression "submarine areas" refers to the soil and subsoil of the submarine areas, **continental and insular terrace**, or other submarine areas, adjacent to the coastal state outside the territorial sea, to a depth of 200 metres or beyond that limit where the depth of superjacent waters admits of the exploitation of the natural resoruces of the said areas (emphasis added).
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> 2. In other articles, the expression "submarine areas" would be substituted for the expression "continental shelf". (137)

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(135) See, I YILC 130 (1956).

(136) See, **Final Act of the Inter American Specialized Conference on "Conservation of Natural Resources: Continental Shelf and Marine Waters"** (Ciudad Trujillo, March 15 - 28, 1956). For comments see, Garcia - Amador, THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA, 107 - 108 (1963); Finlay, L.W., **The Outer Limit of the Continental Shelf**, 64 AJIL 42, 43 (1970); Oxman, B.H., **The Preparation of Article 1 of the Convention on the Continental Shelf**, 3 JOUR. MARIT. & COM. 445 (1971 - 72).

(137) I YILC 131 (1956)

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As is clear from the text, the first striking part of the proposal was the substitution of the term "submarine areas" for the term" continental shelf". Secondly, The term "continental and insular terrace" was included in the definition. Thus, the whole continental margine would have been put under the national jurisdiction. Thirdly, the term "other submarine areas" was not defined. Finally, the expoitability criterion which the Commission had abandoned in 1953 was reintroduced as an alternative solution. Consequently, it was only natural that the new proposal would generate a hot debate in the Commission.

aa. The 200 metre depth criterion and the words "contiguous to the coast" intended to restirct exploitability criterion

The discussions among the members concerning the position of the 200 m. criterion in relation to the adoption of the exploitability criterion was very instructive. François, while opposing the term "continental and insular terrace" or "other submarine areas", did not consider the G.Amador's second alternative proposal extending maritime jurisdiction of the coastal state to the areas beyond the 200 m depth on the basis of the exploitabilty of the natural resources as being objectionable in itself. But he thought that the contingency of the exploitability in such areas was so remote that he doubted the necessity of putting it in the artice. (138)

Amado, who was one of the supporters of the new proposal, remarked that François' explanation showed that the only difference between the two approaches was one of timing and that was not a reason why the exploitability criterion should not be adopted. (139) François' reply to that observation was more interesting. He said that the 200 metre depth criterion was fixed in order to prevent each state from claiming a continental shelf of whatever size it wished. But, he added, G. Amador's criterion would cause interpretations that there was no limit to the continental shelf. (140)

Faris el - Khory also said that the Commission should not allow the continental shelf to be extended indefinetely by dispensing with 200m. depth limit. (141)

These are clear indications that the 200 m criterion was considered to be the main criterion conditioning the exploitability one.

Garcia - Amador himself made such statements as suggesting that the exploitability criterion was not intended to be unlimited. He said that his proposal, in fact, did not involve a new principle; it only gave effect to an idea adopted in the fifth session and recognized by the Ciudad Trujillo Conference that the coastal state should

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(138) id. at 132.
(139) id., at 138.
(140)id. at 138, parags. 23 - 24.
(141) id., at 137.

have the right to the resources of the adjacet areas which owing to the geographical configuration of the seabed could not be considered as forming part of the continental shelf. (142) He also emphasised the restrictive effect of the adjacency on the exploitability criterion, saying that the words "adjacent to the coastal state" in his proposal placed a very clear limitation on the submarine areas covered by the aritcle in question. The adjacent areas ended, he said, at the point where the slope down to the ocean began which was not more than 25 miles from the coast. (143)

During the same meeting he further said that:

> The fundamental question was whether coastal states had exclusive rights of exploitation of the seabed only up to a certain depth. By adding the term "continental terrace" to the delimitation in Article 1, the Commission would be granting coastal states the exclusive rights of exploitation up to a greater depth than 200 metres for the foot of the terrace was generally at a depth of 500 metres. (144)

On the other hand, Garcia - Amador's main supporter, Fitzmaurice, opposed to the 200 m depth criterion and saw no reasons why the coastal states's rights should not extend beyond that limit, on the condition that the areas to be exploited should be within the reasonable proximity of the coast. (145)

It was after that debate that the exploitability criterion was adopted by the Commission by 7 votes to 5, with 3 abstentions (146), while the concepts such as "continental and insular terrace" and "other submarine areas" did not find any favour with the members. (147) In view of such a negative climate, Garcia - Amador said that he would not press for that part of his proposal, as under the exploitability criterion the areas beyond the 200 m depth which would have been covered by the term continental terrace would, anyhow, be subject to the national jurisdiction under the exploitability criterion. (148)

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(142) Id. at 135.

(143) Id., at 135, parag. 95. In 1969, Garcia - Amador sent a letter to Finlay that he had not made such a statement, and that probably it was a case of error of translation. The text of the letter is reproduced in Alexander (ed.), LAW OF THE SEA - NATIONAL POLICY RECOMMENDATIONS, 170 (1970).

(144) I YILC, 136 (1956)

(145) Id., at 134, parag. 81 and 135 para. 90.

(146) Id. at 139.

(147) For example see, François, Id., at 132; Salamanca, Id., at 133; Krylov, Id., at 134. But see, Fitzmaurice, Id., at 134, parag. 81.

(148) He said that " there was no escaping the fact that his proposed addition to article 1, which had been adopted, referred to the areas beyond the continental shelf. See, Id.,

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bb. Proposal regarding terminology assailed

The part of the proposal concerning substitution of the term "submarine areas" for the term "continental shelf" also generated a heated debate. The rapporteur vigorously opposed to the proposal and recalled that similar proposals had been rejected by the Commission in previous sessions. He repeated that the term "continental shelf" had been made familiar by wide usage and had a perfectly clear connotation there was no reason for a change. (149)

Salamanca emphasised that the term "continental shelf" referred to a definite area, while the term "submarine areas" covered many things. (150)

Pal gave a very judicial reasioning for retention of the term "continental shelf" by describing it as an extension of the territory of the coastal state and thus giving a preferential right to the former on the basis of that connection. He continued to say that the submarine areas which were not the extention of the territory were **res communis**. So, he concluded that the term "continental shelf" brought out that physical connection mentioned above and pressed for its retention. (151)

Sandstrom, Zaurek, Padillo Nervo, Krylov, for one reason or other, favored the retention of the term. (152)

On the other hand, Fitzmaurice joined Garcia - Amador for the substitution of the term "submarine areas" for the term "continental shelf". (153) One of the reasons which he explained for such a move was that the term "continental shelf" was regarded by some as a geographically definable horizontal projection of the territory and, therefore, that notion could encourage some states to lay claims to the superjacent waters. (154) Another reason was that the areas over which the coastal state would have sovereign rights extended, with the adoption of the exploitability criterion, beyond the 200 m depth, and, therefore, it was not appropriate to maintain the term "continental shelf" which would not cover those areas. (155)

However, the majority of the members were so determined not to change it that Garcia - Amador was talked of withdrawing that part of his proposal after the exploitability criterion was adopted.

(149) **Id.**, at 132.
(150) **Id.**, at 133.
(151) **Id.**, at 133 - 34.
(152) **Id.**, at 133 - 34.
(153) **Id.**, at 134 parag. 80; 135 parag. 90; 136 - 37 parags. 9, 10, 11.
(154) **Id.**, at 137, parag. 11.
(155) **Id.**, at 141.

cc Addition of the 200 metre depth criterion to the exploitability criterion

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After it was understood that the Commission would not adopt any further part of the Garcia - Amador's proposal, Sandstrom proposed that the 200 metre depth criterion as adopted in 1953 should be added to the exploitability criterion. His proposal was adopted by 9 votes to 3, with 3 abstentions, and the final draft article thus was completed. (156)

G.Amador said that he voted against the proposal because it disregarded the fact that there remained areas beyond the 200 m depth which did not form part of (geological) continental shelf. (157)

Fitzmaurice urged that it should be stated in the commentary that the term "continental shelf" was used as a term of convenience, not covering the areas beyond the 200 m depth. (158)

Commentary on that article (renumbered as 67) after having outlined the evolution of the article, stated that:

> Certain members thought that the article adopted in 1953 should be modified while agreeing that in the present circumstances the limit adopted is in keeping with the practical needs, they disapproved of the provision prohibiting the exploitation of the continental shelf at a depth greater than 200 metres even if such exploitation was a practial possibility. They thought that in the latter case the right to exploit should not be made subject to prior alteration of the limit adopted. Meanwhile, maintaining of the limit 200 metres in this article as the normal limit corresponding to present needs they wished to recognize forthwith the right to exceed that limit if the exploitation of the seabed or subsoil at a depth greater than 200 metres proved technically possible. It was therefore proposed that the following words should be added to the article: "or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." In the opinion of certain members, this addition would also have the advantage of not encouraging the belief that up to 200 metres depth there is a fixed zone where rights of sovereignty other than those stated in article 68 below can be excercised. Other members contested the usefulness of the addition, which in their opinion unjustifiably and dangerously impaired the stabilty of the limit adopted... (159)

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(156) **Id.**, at 140.
(157) **Id.**, at 140.
(158) **Id.**, at 141.
(159) **See, Report of the International law Commission Covering the work of its eighth session**, 23 April - 4 July, 1956, **reprinted in** 1 YILC, 296 (1956).

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The commentary also added that the sense in which the "continental shelf" was used departed to some extent from the geological concept, which became necessary "in view of the inclusion of exploitable areas beyond the depth of 200 metres." (160)

The commentary also repeated some parts of the previous commentaries on the same article but as to the "speical cases in which submerged areas of a depth less than 200 metres, situated fairly close to the coast are separated from the part of the continental shelf adjacent to the coast by a narrow channel deeper than 200 metres", it stated that" such shallow areas could be considered as adjacent to that part of the shelf". However, the state relying on that exception, the commentary continued, "was under the burden of establishing its claim to an equitable modification of the rule." (161)

Conclusion:

The members of the Commission knew and intended that 200m line would be exceeded in the future when the technological development permitted the exploitation of the resources at a depth of over 200m. But the general feeling was that such a development was a remote possibility, and, therefore, they considered the 200m. criterion as the main criterion, and the exploitability as an exception.

The adjacency was intended to place a clear limit on the exploitability criterion. Even proponents of the latter thought that after the adoption of the addition "continental and insular terrace", the areas which would be subject to the jurisdiction of the coastal state would end at the foot of the slope which, in turn, was not farther than 25 miles from the shore.

The resolution of the Ciudad Trujillo Conference was not fully incorporated into Article 1. The exploitability criterion was not something new to the Commission. It had been adopted in 1951 and abandoned in 1953. The Commission adopted the criterion in question in its own way; the Ciudad Trujillo Conference did not add any originality to it. The other parts of the proposal were not even voted. The fact that Garcia - Amador said that the adoption of the exploitability criterion extended the jurisdiction of the coastal state beyond the 200 m depth line and thus covered the continental terrace should not readily be taken as proving that the term continental terrace was incorporated into the definition. But it could safely be said that even the extremist proponents of the exploitability criterion did not contemplate extention of jurisdiction beyond the outer limit of the continental terrace.

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(160) id., at 297, parag. 5.
(161) id., at 297, parag. 8.

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C - Geneva Conference

a - Background

The International Law Commission had recommended, in its report to the General Assembly covering the work of its eighth session, 23 April - 4 July 1956, that the General Assembly summon a conference of plenipotentaries to examine various aspects of the law of the sea and to embody the results of its work in one or more international conventions, as the case might be. (1) The General Assembly, acting on that recommendation, adopted, on 21 February, 1957, the Resolution 1105 (XI) whereby the Secretary - General was instructed to convene an international conference on the law of the sea. (2) The Secretary - General acting pursuant to the Resolution convened the Conference in question at Geneva on February 24, 1958, with the representation of 86 nations. (3) The Conference organized itself into four committees, the fourth of which was put in charge of dealing with studying the subject of the continental shelf on the basis of the draft articles which had been prepared by the ILC. Besides, the Fourth Committee had before it a memorandom by the UNESCO relating to the scientific aspects of the continental shelf. (4) .

b- Observations and proposed amendments by the Covernments

In the Conference, many states were able to express their views on the suject. Before proceeding to outline those views, let's point out that it is clear from the summary records of the Fourth Committe that the general concept of continental shelf met with an overwhelming support of the governmental representatives. Germany, Monaco and Japan aside, (5) no representative questioned the validity of the

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(1) **See, Report of the International Law Commission covering the work of its eighth session, 23 April - 4 July, 1956,** reprinted in II YILC 256 (1956)

(2) General Assembly, 11th session, OFFICIAL RECORDS, Supp. No 17 (A/3572).

(3) **See, Final Act of the United Nations Conference on the Law of the Sea (Geneva, February 24 April 27, 1958,** A/CONF. 13 / L. 58.

(4) **See, UNESCO's Secretariat Memorandum on Scientific Considerations Relating to the Continental Shelf,** A / CONF. 13/2 and Add.; reprinted in I UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS.

(5) Those countries argued at the beginning that the seabed beyond the territorial waters was and should be subject to the freedom of the high seas and, therefore, could not be appropriated by coastal states. A memorandum prepared by Germany concerning draft articles 67 to 73 stated that policy in the following words:

According to international law in force, the coastal state has no rights over the continental shelf beyond the outer limit of its territorial sea. Accordingly, any one is free to explore and exploit the subsoil of the sea outside the territorial sea, provided that such activity does not unduly hamper other activities on the high seas... VI UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, FOURTH COMMITTEE (CONTINENTAL SHELF), p. 126.

Likewise, Tsuruoka of Japan said that "although the need to exploit the resources of the continental shelf for the benefit of mankind was generally recognized, Japan found it difficult to admit that it was neccessary to vest a monopoly of rights in the coastal state...." id., at 14.

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concept. (6) But later on, they, too, abandoned their original position and made proposals on the substance of the subject. However, that does not mean that all the other states were in complete agreement on the other aspects of the continental shelf. The disagreement was obvious, in particular, on outer limits. The participating states certainly did not consider Article 67 (Article 1 of the Convention) as reflecting or crystallizing received or at least emergent customary international law. True, there was a considerable number of states which considered that the concept o the continental shelf as being part of international law. (7) But that was related only to the validity of the general concept which was also based on the popular concept of natural prolongation. (8) More importantly, as many states stated, explicitly or implicitly, that the concept of the continental shelf was new and that it needed regulation, not being part of the existing international law. (9) This is understood from the official statements of the conferees in the Fourth Committee. While some representatives clearly observed that the double - criterion in Article 67 as adopted by the Com-

(6) Judge Oda pointed, in his dissenting opinion in the Tunisia / Libya Continental Shelf case, to this important aspect of the debates of the Conference. See, JUDGEMENT, I.C.J. REPORTS, 181 (1982)

(7) Apparently, Argentina, UNCLOS I, p. 3; Philippines, id., at 8; Yugoslavia, id., at 11; Ceylon, id., at 13; Mexico, id., at 14; Portugal, id., at 15; Chile, id., at 16; Israel, id., at 17; US, id., at 19; USSR, id., at 20; Cuba, id., at 25; Venezuela, id., at 21; Australia, id., at 28.

(8) For example, the Yugoslavian representative, in response to the statement of the representative of F.R. of Germany that the exploitation of the resources of the seabed beyond the territorial waters was open to every one, said that the continental shelf was based on the general principles of international law, emphasising the validity of the general concept of continental shelf. Id., at 11. Otherwise, how can one explain the Yugoslavian efforts to change Article 67. The Philiippine representative said that Article 68, concerning the legal basis and the nature of the rights of the coastal state, should be regarded as declaratory of the sovereign rights of the coastal states, which was inherent in the sovereignty of the latter. id., at 8. The Mexican representative apparnetly based the concept of continental shelf on the customary international law, but he also emphasised that the continental shelf was a part of the land territory. Id., at 14. The Portuguese representative made a similar statement.Id., at 15. The Cuban representative argued that the continental shelf was part of international law, on the basis of state practice. id., 25. But the state practice of the time was not uniform enough to form a rule on the seaward limit. The US representative's reference to the international law was related more to the Truman Proclamation than to Article 67.Id., at 19.

(9) For example, the Swedish representative said that the recent tendency of states to claim sovereignty over the continental shelf outside the territorial waters was not consistent with the existing international law. Id., at 3. The Spanish representative said that he hoped that the Conference would not let slip the opportunity for establishing the new concept of the continental shelf as part of international law. id., at 7. The French representative said that the Fourth Committee was fortunate because it "had the opportunity of legislating in a field not previously regulated by international law."id., at 22. The Turkish representative pointed out that his delegation would accept articles 67 to 73 as basis of discussions, and that the concept of the continental shelf being new in international law, the "view that the articles prepared by the International Law Commission already formed part of positive international law was invalidated by well- known arbitration decisions". Id., at 12. The Greek representative observed that the concept of the continental shelf was new and therefore it was not regulated by customary law., id., at 6. See, also, China, id., at 4; Norway. id., at 4; Colombia, id., at 9; Lebanon, id., at 14; Italy, id., at 16; Peru, id., at 10; and of course Germany, Monaco and Japan, to which reference was made before.

mission caused confusion, and the exploitability criterion destroyed the stability, Latin American States, as might be expected, remained loyal to that criterion (10), and this time they had on their side new allies such as Korea (11) and Ghana. (12) In fact, most of the states favouring the exploitability criterion preferred it in conjunction with the depth criterion, that is, they preferred the Commission's text. Only Korea went beyond even what the Latin American States wanted and proposed that the depth criterion should be deleted from the text. (13)

In contrast, France and Lebanon, proposed that the exploitability criterion should be deleted from the text. (14) The French representative observed that "if accepted, that criterion would be both imprecise and variable. It would be imprecise, because it would not be clear whether the seabed, and subsoil below it, off the coast of a gven state which could be exploited by mankind as a whole should be taken into account, or only that part which the coastal state itself was able to exploit. It would be variable, beacuse the areas concerned would be doubtlessly increase in extent with further technical progress, and it was plain that such progress would materialize. It was a dangerous practice to lay down rules which soon stand in need of modification." (15) Pakistani representative observed that" the effect of the inclusion in Article 67 of the exploitability of the natural resources of the maritime areas concerned was to abolish any definite limit to the continental shelf" and he suggested that it should be deleted. (16) The French proposal could not succeed and was rejected by 48 votes to 12, with 7 abstentions. (17) Meanwhile, the UK and the Netherlands initially introduced separate proposals based on 550 metre depth criterion as the seaward limit. (18) India introduced its own proposal incorporating 1000 metre depth criteri-

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(10) See, Colombian Republic, UNCLOS I, Official Records, Vol. VI, p. 9; Colombia, id., at 10; Chile, id., at 16; Venezuela, id., at 21,34; Cuba, id., at 25; El Salvador, id., at 33.

(11) id., at 23.32.

(12) id., at 11.

(13) id., at 32. Ghana was also for the deletion of the 200m depth criterion and vigorously supported the Korean proposal. id., at 11, 37.

(14) See, DOCUMENT A/ CONF. 13/C4 / L. 7 and A/CONF. 13/C. 4/L. 8, reprinted in id., at 28-29. The Greek representative supported the French - Lebanese proposal and observed that his delegation would prefer to establish an outer limit on the basis of depth. id., at 6. The Tunisian representative said that the best criterion for defining the continental shelf was the 200m isobath which was in accordance both with the geological configuration of the seabed and the availability of the resources. id., at 21. The US representative first supported the 200m depth criterion: She accepted the depth of 200 metres, with precise equivalent indicated in fathom, as an appropriate definition of the limit of the continental shelf, but intimated doubts about the wisdom of adopting the additional criterion of possible exploitation. id., at 19. But later on, she changed her mind to support the exploitability criterion.

(15) id., at 31-32; For similar views of representative of Lebanon see, id at 14, 28, 34.

(16) id., at 19.

(17) id., at 47.

(18) See, DOC: A/CONF. 13/C. 4/L. 24 Rev. 1 and A/CONF. 13/C. 4/L. 19, id., at 132 and 131 respectively.

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on. (19) Later on, the UK and the Netherlands' proposals were joined together, (20) and India revised its proposal to adopt 500m depth criterion. (21) Sweden also introduced a proposal of the same effect. (22) Upon further, negotiations, however, the UK, the Netherlands, and Sweden withdrew their proposals in favour of the Indian proposal and all the representatives speaking for that proposal indicated that the exploitabilitiy criterion was ambiguous and open- ended and that their object was to put a definite limit to the continental shelf to be exploited by the coastal state. Mouton observed that the depth of 550 m was nearer to the deepest edge of the continental shelf and thus the proposal would cover submarine areas beyond the geological continental shelf, including the whole continental terrace. (23) Gutteridge of the UK said that the dual criterion of depth of water and possible exploitation laid down in the Commission draft article would give rise to uncertainty. But the proposal they sponsored, she said, would obviate the uncertainties and would allow states to work the seabed up to where the continental slope ended generally. That was probably the limit of exploitation of the seabed in the foreseeable future. (24)

However, the revised Indian proposal incorporating those of the UK, the Netherlands and Sweden failed to receive enough votes to pass through the Fourth Committee, being rejected by 31 votes to 21, with 16 abstentions. (25)

On the other hand, many other proposals were made but they were rejected. Yugoslavia made a proposal providing for a combination of depth and distance criteria (26) but it did no help. It was rejected more heavily. (27)

Canada, which is a wide margin state, submitted an amendment based on the 200 metre depth and geological characteristics of the seabed. (28) It would have allowed the coastal state to work the seabed and subsoil of the submarine areas extend-

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(19) DOC: A / CONF. 13/C. 4/L. 29. id., at 134.
(20) DOC: A / CONF. 13/C. 4/L. 32. Id., at 135.
(21) DOC: A / CONF. 13/C. 4/L. 29 Rev. id., at 135.
(22) DOC: A / CONF. 13/C. 4/L.33. Id., at 136.
(23) id., at 6,35.
(24) id., at 136.
(25) id., at 47.
(26) DOC: A / CONF. 13/C. 4/L.15. The proposal provided that:

> 1. For the purpose of these articles, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres but only up to a boundary line not exceeding beyond 100 miles from the outer limit of the territorial sea. Local occurances of submarine gorges, valleys, depressions, and ravines, shall not be taken into account in this area of 100 miles, provided they are within the outer limit of the continental shelf as described in the preceding sentence.
>
> 2. Where such a depth is greater, the continental shelf stretches only up to a boundary line not exceeding beyond 50 miles in the direction of the high seas from the outer limit of the territorial sea. id., at 129.

(27) By 39 votes to 2, with 12 abstentions. id., at 47.
(28) DOC: CONF. 13/C. 4/L. 30, id., at 135.

ing from the shore to the point where "a substantial break in grade occurs leading to abyssal depth or where there is no such substantial break in grade, to the point at which the depth of the superjacent water reaches 200 metres". Later on, it revised its proposal to replace "200 metres" with "550 metres". (29) But it failed to pass through the Committee, being rejected by 39 votes to 16, with 12 abstentions. (30)

F.R. of Germany reintroduced the Canad's original proposal (the one providing for 200 metre depth criterion); but that, too, was rejected by 45 votes to 4, with 18 abstentions. (31) Panama made a similar but more detailed proposal, which would have allowed the coastal state to exploit the resources of the whole continental margin, that is, continental shelf and continental slope but excluding the great depths of the oceanic basins. (32) In introducing his proposal, the Panamian representative said that it would provide a sound limit to the areas to be exploited. He further observed that if the Commission's text "were accepted for legal purposes, it might well be that, if in twenty-five years' time technological progress should make it possible to exploit resources at depth of more than 3000 metres, some states would claim that that area was not a part of continental shelf." (33) However, the Panamian proposal could not succeed, either. It was rejected by 38 votes to 4, with 26 abstentions. (34)

On the other hand, the Korean proposal mentioned above, suggesting that the 200 metre depth criterion be deleted, was voted to be rejected by 42 votes to 13, with 13 abstentions. (35)

Thus, the Committee seemed to be determined to maintain the Commission's draft article which had taken so much time to formulate and which was apparently a compromise formula for which states would vote. That mood was explained by the US representative in the following words:

> The United States was inclined to favour the text prepared by the International Law Commission, which was the outcome of careful consideration over a very long period. (36)

The only exception was a proposal by Philippines providing for inclusion of a paragraph in the Article on the status of the islands, which the Committee adopted by 31 votes to 10, with 25 abstentions (37), 35 states thus remaining non-committed.

The Committee finally voted and adopted the Commission's text with the addition of the Philippine proposal by 51 votes to 9, with 10 abstentions. (38)

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(29) DOC: A/ CONF. 13/C. 4/L. 12, id. at 46.
(30) Id.
(31) Id.
(32) DOC: A / CONF. 13/C. 4/L. 4., Id., at 127.
(33) Id., at 5.
(34) Id., at 47.
(35) Id.,
(36) Id., at 40
(37) Id., at 47.
(38) Id., at 47.

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In the plenary session, Yugoslavia reintroduced its proposal which had been rejected at the Fourth Committee, and it was again rejected by 53 votes to 3, with 11 abstentions. (39)

France made a final attempt to remove the exploitability criterion from the text and requested a separate vote on it. But it did not help; the new proposal too was rejected, by 48 vote to 20, with 2 abstentions. (40) Thus, Article 67 as amended by the Philippine proposal was adopted by the Conference by 51 votes to 5, with 10 abstentions. (41) It was renamed as Article 1 of the Convention.

c. Evaluation: was the rules on the seaward limits of the continental shelf considered as part of customary law?

During the debates in the Conference it became clear that there was almost a unanimous agreement among the states on the validity and acceptance of the concept of the continental shelf in general. In other words, States were at one that the coastal state should have the right to exploit the natural resources of the submarine areas beyond its territorial waters but contiguous to its coast. However, the same unanimity was absent on the question of whether the islands should have the continental shelf. In fact, it could not have been otherwise, the question being predominantly related to delimitation.

On the seaward limits of the shelf there was much more disagreement. In the Fourth Committee, 42 states voted against the Korean proposal which would have retained the exploitability criterion as the sole seaward limit. Only 13 states voted for it while 13 abstained. The French - Lebanese proposal which would have retained only the 200 metre depth criterion was also rejected by 48 votes, while only 12 states favored it.

(39) II UNCLOS I, OFFICIAL RECORDS, P. 3.

(40) Id., at 13.

In favour: Honduras, Hungary, Iceland, India, Indonesia, Iran, Irak, Ireland, Israel, Republic of Korea, Liberia, Federation of Malaya, Mexico, Morocco, Peru, Philippines, Poland, Roumania, Saudi Arabia, Thailand, Tunisia, Ukranian Soviet Socialist Republic,Union of South Africa, Union of Soviet Socialist Republics, United Arab Republic, United States of America, Uruguay, Venezuela, Afganistan, Albania, Argentina, Australia, Bolivia, Brazil, Bulgaria, Burma, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Czechoslovakia, Dominican Republic, Ecuador, El Salvador, Ghana, Guatemala.

Against:Italy, Japan, Monaco, Netherlands, New Zeland, Norway , Pakistan, Portugal, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, Yugoslavia, Belgium, Byelorussian Soviet Socialist Republic, Denmark, Finland, France, Federal Republic of Germany, Greece.

Abstention: Lebanon, Spain.

(41) Id., at 13.

In the Plenary Session, the reintroduced French proposal was again rejected, this time, by 48 votes to 20, with 2 abstentions.

The Indian proposal based on 550 metre depth of water test received as many as 21 votes, while the Canadian proposal based on geological features and depth of water received only 16 votes.

The Panamian proposal which would have put the whole continental margin under the national jurisdiction was also rejected by 38 votes to 4, with 26 abstentions.

These numerical results clearly show that neither of the proposed criterion gained the support of the participating states. But the Commission's text received a tremendous support (51 votes). Is this an indication that the double - criteria commanded a unanimous conviction of the participants that what was embodied in Article 1 was what they considered as the prevailing international law governing the subject? The answer to this question should be given in the light of the debates in the Fourth Committee which were outlined above and should be "no". Beacause the final vote simply indicates an **ad interim compromise**. (42) Nothing more than that. Most of states voted for it simply beacuse it was better to have a flawed convention than none.

Secondly, they voted for the article in question because under the double - criteria arrangement each would be able to act according to the desired criterion, not being obliged to apply both of them at the same time. It is highly likely that the Latin American states voted for the article simply for the sake of the exploitability criterion, while pro-depth criterion states had also a choice to make. Therefore, Article 1 constituted a compromise among the participants; it was not declaratory of a rule on which they were in full agreement.

Thirdly, the fact that both the depth and exploitability criteria were rejected seperately does not mean that they were treated equally. The numerical results could be misleading. One has to go beyond the actual voting and analyse the motives behind the actions of the governments. Many representatives made it clear that the seabed beyond the 200 metre depth would be exploited in the near future. That was why they proposed the 550 m depth criterion which they said corresponded to the base of the slope. Thus, the 200m depth criterion was considered as being temporary. Those arguing for the exploitability criterion, in fact, argued for the exploitability criterion, in fact, argued for the exploitation of the seabed beyond 200m depth. Thus, it is clear that all the proposals for amendments included and went beyond the 200m depth line. In other words, the 200 m depth criterion was the minimum area over which the coastal state would exercise its jurisdiction. The opponents of it did not want it alone, because it fell short of giving them all they wanted. But what they wanted always included it. If this proposition is right, then it would follow that the 200m criterion was then a part of general law.

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(42) See, BROWN, E.D., THE LEGAL REGIME OF HYDROSPACE, 14 (1971).

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On the other hand, the representatives were aware of the fact that the exploitability criterion contained no definite limit. It depended on the technological capability of exploiting the resoruces of the seabed. The exact seaward limit was not specified although a limit was intended. No one ever said that the coastal states cou'd apportion among themselves the world oceans. But as to the uncertainty there was no doubt. To some governments, the exploitability criterion "contained the seeds of uncertainty". (43) It was so vague and ambiguous and "had certain inherent dangers". (44) To others, the Commission's text" might be compared to a traffic regulation under which vehicles could travel at 100 kilometres or at the maximum speed of the vehicle." (45)

After adoption of Article 67 (Article 1 of the Convention) and while the Article 68 was being discussed, Muhch of F.R. Germany said that 'the text of article 67 adopted by the Committee had deprived the continental shelf of practical limits.' (46) Gutteridge of the UK said that "since the indefinite possible exploitation clause in the text for article 1 adopted by the Committee made it uncertain what were the areas to which the rights mentioned in Article 68 related, it was necessary to lay down in Article 68 a limit to these rights..." (47) Garcia - Amador who championed the criterion in question said that the continental shelf area over which the coastal state would exercise its jurisdiction was not exactly defined. (48) However, this does not mean that it was considered that the seaward boundary could extend to the middle of oceans. The US representative who change her position from supporting the 200m depth criterion as the sole limit to defending the Commission's text, said that:

> "While appreciating those delegations' desire for precision, she doubted whether, in an age of rapid scientific progress it would be wise to limit the area of exploitation in that way".

But she also explained that "exploitation could not, however, continue indefinetely towards the middle of oceans; the continental shelf fell away steeply and rapidly, so that exploitation beyond a certain limit would not be an economic proposition". (49) Even Latin American States which fought for retention of the exploitability criterion stated on several occassions that the continental shelf was a natural prolongation of the land territory. They referred to the principle of continuity or contiguity which apparently excluded the deep ocean floors. For example, the Dominican representative said that: "the thought underlying the Article (Article 67) was that the continental shelf was a prolongation of the land and therefore was subject to the consideration of contiguity or proximity. Exploitation beyond the point at which

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(43) For example, Viet Nam, UNCLOS I, vol. VI, p. 24.
(44) For example, Tunisia, Id., at 21.
(45) Guatemala, Id., at 38.
(46) Id., at 60.
(47) Id., at 68.
(48) Id., at 52.
(49) Id., at 40.

the relationship of the proximity ended might be based on occupation." (50) Representative of Venezuela pointed out that according to the scientific evidence the continental shelf was a continuation of the territory and that his delegation accordingly considered that the natural resources occuring in the continental shelf belonged to the coastal state." (51) The Representative of El Salvador said that the submarine areas adjacent to the coast which were susceptible of exploitation formed part of the territory of the coastal state, regardless of their geological configuration. He accordingly wanted the continental slope be included in the jurisdictional area. (52) Last but not least, almost all the Latin American States which defended the exploitability criterion cited in support the resolution of the Ciudad Trujillo Conference (53) which clearly referred to the geological features of the submerged land. Thus, it seems fair to conclude that the participating states did not intend the seaward limit to be extended to the middle of oceans. This is understandable from the emphasis they put on the concept of natural prolongation. It is true that they dispensed partly with the geological shelf but there is not enough evidence to conclude that they wanted to, for once and all, put whole continental margin under the national jurisdiction. In fact the Panamian proposal which would have done so, was resoundedly rejected. However, it would seem to follow that at least some governments, supporting the 550m depth or exploitability, intended the submarine areas extending to the basis of slope to be put under the jurisdiction of the coastal state if and when the resources of the area became exploitable as a result of technological development.

(50) Id., at 9.
(51) Id., at 21.
(52) Id., at 23,24.
(53) For example, Panama, Id., at 5, 32; Dominican Republic, at 9; Colombia, at 10, 40; Mexico, at 15; Cuba, at 25; Chile, at 31; Venezuela, at 34.

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D. Scholarly Opinions

a. Meaning of Exploitability: Test of Technological Capability.

The question of how far beyond the 200m depth line the coastal state could extend its resource jurisdiction under the exploitability criterion generated, during 1960s and early 1970s, a considerable number of publications by various writers. (1) In the following paragraphs we shall outline their views, with a view to clarify the position of the criterion in question in the customary international law.

Apart from the basic question of whether the exploitability criterion is subject to any restriction other than technological capability, and thus, is unlimited or unchecked in extending the national jurisdiction of the coastal state, there are some ambiguity as to its application in other respects. For example, what does exploitation mean? Does it mean mere pyhsical recovery of a certain amount of certain minerals from the bed of the sea? Or does it mean recovery in commercial quentities? Will the recovery of a certain mineral from a certain part of submarine areas vest the coastal state with "sovereign rights" over that part for purpose of exploitation of all the other natural resoruces as well? As Prof.Goldie once well put it, will the extraction of oil and gas from the subsoil of a certain submarine area give the coastal state jurisdiction over the same area for the purpose of exploitation of sedendary fisheries? And finally,

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(1) In addition to the publications cited in **supra** V, note 8, **see**, ODA, S., INTERNATIONAL CONTROL OF SEA RESOURCES, 167 (1963); Oda, **International Law of the Resources of the Sea**, II ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE, 357, 439 (1969); Oda, Dissenting opinion in **Continental Shelf Cases (Tunisia-Libyan Arab Jamahiriya) Judgement I.C.J., Reports**, 173 (1982); Brown, E.D., **The Outer Limit of the Continental Shelf**, 13 JURIDICAL REVIEW, 111 (1968); BROWN, **The Present Regime of the Exploration and Exploitation of Sea - Bed Resources in International Law and in National Legislation: An Evaluation**, in Sztucky (ed.) SYMPOSIUM ON THE INTERNATIONAL REGIME OF THE SEABED (Rome) 241 (1970); Brown, **Report on the Legal Regime of Deep Sea Mining**, 26-27 (ILA British Branch, Committee on Deep Sea Mining, 1968); Finlay, L.W., **The Outer Limit of the Continental Shelf, A Rejoinder to Professor Louis Henkin**, 64 AJIL 42 (1970) Henkin, **A Reply to Mr. Finlay**, id., at 62; Paper, in Alexander (ed.), LAW OF THE SEA, NATIONAL POLICY RECOMMENDATIONS, PROCEEDINGS, Law of the Sea Institute, 171 (1970); Oxman, B.H., **The Preparation of Article 1 of the Convention of the Continental Shelf**, III JOURNAL OF MARITIME LAW AND COMMERCE, 245, 445, 683 (1971 - 72); Denorme, R., **The Seaward Limit of the Continental Shelf**, in Alexander (ed.) LAW OF THE SEA, NATIONAL POLICY RECOMMENDATIONS, PROCEEDINGS, 263 (1970); Brownlie, I., **Recommendations on the limits of the continental Shelf and Related Matters**, id., at 133; Hedberg, H.D., **Limits of National Jurisdiction over Natural Resources of the Ocean Bottom**, id., at 159; Goldie, L.F.E., **International and Domestic Management Regimes for Coastal, Continental Shelf and Deep Ocean Mining Activities**, id., 226; exploitability test - interpretation and patentialites, 8 NAT. RES. JOUR. 434 (1968); Hutchinson, **The Seaward Limit to Continental Shelf Jurisdiction in Customary Law**, BYIL, 111 (1985)

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will the technological capability of the most advanced nation automatically extend the jurisdiction of all the other coastal states to the new depths which becames exploitable by the newly developed technology, though the latter are not in possesion of that technology? Or should each state depend on its own actual technological capacity for the purpose of extending its jurisdiction to new depths?

Article 1 does not provide any answer to these questions in general and to the question of whose technological capability would be taken to determine whether it has become possible to exploit the natural resources at deeper waters beyond 200 m depths in particular. As it would be expected, the possible solutions have been provided by commentators. (2) To their credit, one has to point out that, from the very begining, they were aware of the significance o fthe issue and had provided guidance well before the Geneva Convention was concluded. Majority of them advanced the view that the words, "where depth admits of the exploitation" in Article 1 should be interpreted in an objective way. If the technologically most advanced state had the technology to drill on the seabed at certain depth which had not been possible before, all the coastal states should be considered as being entitled to exercise sovereign rights over the submarine areas of the same depth.In other words, it was argued, an advance in marine technology in certain state allowing it to work the seabed at greater depths would automatically extend seaward the jurisdiction of every coastal state up to those new depths, whether or not the coastal state actually could exploit the resources at that depth (**objective test**).

Writing as early as 1952, Mouton said that "if the coastal state has not available the technological devices to drill at a certain depth, but other states have, that depth does admit of exploitation." (3)

Commenting on the Geneva Convention, Young clarified the point more clearly:

> Yet the criterion proposed in the present text introduces a continuing uncertainty about the precise extent of offshore claims, for the posibility of exploitation is a variable factor dependent on the state of technology at given time. The uncertainty would be less if the rule required, as the basis of rights, actual exploitation of the resources beyond the 200 metre line; but this is not the case. (4)

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(2) **See,** MOUTON, THE CONTINENTAL SHELF, 42 (1952); Young, R., **The Geneva Convention of the Continental Shelf: A First Impression,** 52 AJIL 733, 735 - 36 (1958); Franklin, THE LAW OF THE SEA: SOME RECENT DEVELOPMENTS (U.S. Naval War College, Blue Book Series, No 53 , 23 (1960); Dean, **supra** note 8, at 247; Goldie, **supra** note 1, at 445, 446; Oda, NAT. RES. LAW., at 106; COLUM. J. TRANSNAT. L., at 9; Krueger, **supra,** note 8, at 7; Anand, **supra** note 8, at 54; Andrassy, **supra** note 8, at 79 - 81.

(3) **See, supra** note 1, at 42.

(4) **See, supra** note 1, at 735.

Thus, Young would have preferred a rule requiring actual exploitation of the resources beyond the 200m line as a condition which the coastal state should meet before it was allowed to assert sovereign rights over the new areas. However, under article 2 which provides that the coastal state is entitled to sovereign rights over the continental shelf, irrespective of performance of any activity such as occupation or proclamation, he came to the conclusion that "every coastal state would seem entitled to assert rights off its shores out to the maximum depth for exploitation reached anywhere in the world, regardless of its own capabilities or of local conditions, other than depth which might prevent exploitation." (5)

Franklin expressed a similar view in the following words:

> This depth which admits of exploitation should be interpreted **absolutely** in terms of the most advanced technology in the world, and not **relatively** in terms of the particular technology of any one coastal state (emphasis added). (6)

Arthur H.Dean, having pointed out that the Article was susceptible of at least two interpretations, rejected the view which would require the technological capability of the coastal state to be decisive in making new claims, and explained that:

> The Convention was predicated on the notion that each nation, whether technologically advanced or not, has sovereign rights over its portion of the continental shelf. The Convention explicitly provides that its rights are not diminished by failure to exploit. (7)

He continued to say that the principle of the equality of nations compelled the conclusion that the definition of the "continental shelf" should be the same for each country, that the differences in technological expertise should not be reflected in boundary lines. (8)

Saying that coastal state itself did not need to exploit the resources of the continental shelf, and that it was free to grant that right to the technologically developed nations or their nationals, Oda observed that the exploitability of natural resources should be interpreted in terms of the most advanced technology in the world (9).

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(5) **id.**

(6) **See, supra** note 1, at 23.

(7) **See, supra** note 1, at 247.

(8) Dean further observed that the contrary view would open the door to the dispute: To say that the boundaries of the continental shelves vary according to each nation's technology would allow those boundaries to move laterally as well as seaward. A nation slower than its neighbours in developing its drilling facilities could thus find itself frozen out. **id.**, at 248.

(9) COLUM. J. TRANSNAT. L. at 9; NAT. RES. LAW, at 106.

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On the other hand, in 1965, United States Senate Committee on Commerce expressed the opposite view in its Report on the Marine Resources and Engineering Development Bill. It made a distinction, allegedly according to the Geneva Convention, between specific and immediate rights which, it was said, every coastal state had over the areas landward of the 200m depth line **and** prospective or potential rights which should be acquired only as a result of national effort and achievement. Under this view, the coastal state should depend on its own technological capability in order to extend its jurisdiction over the areas beyond the 200m depth line (**subjective test**). (10)

Northcutt Ely, too, once asked "if exploitation proves possible off state A, at a depth exceeding 200 metres, does this extend the jurisdiction of all coastal states around the world, somewhat like lowering the water in a bath tube?" And he replied that "this scarcely seems a result to have been deliberately sought." (11)

The effects of this last test would be to prevent the coastal state from extending its jurisdiction seaward over new submarine areas if it could not acquire the necessary technology to exploit the natural resources at greater depths. The coastal state would then have either to import that technology or to grant concessions or licences to the private concerns of technologically developed states to protect the natural resources lying beneath the seabed adjacent to its coast.

However, neither of the views outlined above requires actual exploitation of these sources; they refer to hypothetical situations,to abstract techological capability of the most advanced nation, in case of objective test, or to that of the coastal state, in case of subjective test. (12) The question of whether it is necessary to exploit the resources under the actual local climatic conditions has not been addressed by those views. (13)

On the other hand, Goldie considered the exploitability criterion as"allowing the coastal state no more than the power of asserting its jurisdiction **on** the shelf (i.e. on the landward side of the two hundred metre isobath) and which subsequently developed beyond that line." (14)

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(10) See, S. REPORT No 528, 89th. CONG. 1st. Sess. 11 (1965).

(11) **See, A Case for the Administration of Mineral Resources Underlying the High Seas by National Interests**, I NAT.RES. LAW., 82 (1968).

(12) Goldie, NAT.RES. LAW. at 447.

(13) According to Brown, the depth alone is no guide to exploitability. Climatic and tidal conditions will very often be important. Exploitability at 800 metres in a tropical gulf is no guarantee that the seabeds of the North Atlantic or of the Russian Arctic would be exploited at the same depth. THE LEGAL REGIME OF HYDROSPACE, 7-8 (1970).

In Andrassy's opinion, the mere fact that exploitation has been undertaken in one area at adepth of 150 metres, for example, is no proof that such exploitation would be possible in another area at the same depth. **See, supra note 8 at 81.** Henkin once said that a well exploitable at 400 m. in one place did not mean that all waters at 400 m. were everywhere exploitable. See, Discussion in Alexander (ed.) THE LAW OF THE SEA, NATIONAL POLICY RECOMMENDATIONS, 187 (1970).

(14) 8 NAT. RES JOUR. 447 (1968).

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The difference between the first two views and that of Goldie would seem to be that in the first cases the actual exploitation would not be required, and the coastal state would not have to prove that its resources on / under the submarine areas were actually exploited or became exploitable under the actual local conditions, while in the latter case the exploitation must have begun on the continental shelf area landward of the 200m depth line and subsequently developed beyond that line so that the coastal state could acquire powers over the areas beyond. Thus, this view would allow for the climatic and tidal conditions which vary considerably from place to place, and which might not permit certain coastal states to exploit the natural resources at certain places, while other coastal states could exploit at the same depth at other places with favorable local conditions.

On the other hand, some commentators argued that the mere physical recovery of a certain mineral from the seabed or capability of exploiting certain resources at a particular depth should not vest the coastal state with the sovereign rights over the submarine areas in question if the exploitation was not economically feasible. (15) By feasibility it was meant that if, in good faith, a socialist government, or a firm subsidized by a capitalistic government were to undertake exploitation of mineral resources at a cost which was far in excess of exploiting available land resources, that would meet the requirement of feasibility. (16)

Again, it was argued by Goldie that since different resources called for different techniques for exploitation, the exploitability criterion should be applied as a basis for extending the coastal state's sovereign rights over the exploitation of only such specific resources as were at that time exploitable. For example, he said, an application of the exploitability criterion which might well be relevant to taking oil and gas would be irrelevant to a claim to exercise the sovereign rights over the sedentary fisheries. (17)

Evaluation:

Although the significance of the question today is not high, an evaluation of the views outlined above would help a better understanding of the concept, specially its position vis a vis the customary law.

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(15) Brown, **Report on the Legal Regime of Deep Seabed Mining**, 7-8 (1969); ROME SYMPOSIUM, at 244; THE LEGAL REGIME OF HYDROSPACE, 7, 36 (1971). **But compare:** Anand, **supra** note 8, at 54. O'Connell says that "but this would introduce a multiplicity of variables which would deprieve the law of any standards whatsoever and it would not operate with equal fairness between states. "See, I INTERNATIONAL LAW OF THE SEA, 493 (1982).

(16) THE LEGAL REGIME OF HYDROSPACE, 7 (1971).On the other hand, Pardo argued at the U.N. Seabed Committee that the exploitability criterion had been formulated in 1958 in the light of the then available technology, and therefore it could not be disputed as establishing an elastic boundary. A/AC. 138/SC. I/SR. 7. p. 61. But see, Mr. Berman (UK), A/AC. 138/SC. 1/SR. 10, p. 110.

(17) **See, Goldie, The Contents of Davy Jone's Locker - A Proposed Regime for the Seabed and Subsoil**. 22 RUTGERS LAW REVIEW, 17. (1967)

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Adoption of the tests emphasising the actual exploitation would work against the technologically less developed states and might result in a return to the **res nullius** theory which the Commission and the Geneva Conference rejected. Although it is not that the coastal state would invite foreign capital and technology for exploitation of the natural resources at greater depths, (18) under the system offered by some scholars, making acquisition of sovereign rights over the submarine areas dependent on the actual exploitation, it would highly be risky to believe that the foreign technology would be available, because then the submarine areas beyond 200m line would remain outside the national jurisdiction unless they were actually exploited. Consequently, those areas would be either **res communis** or **res nullius**. In either case, the private concerns of the most developed states would not accept invitations from the less developed states to vest the latter with jurisdiction over submarine areas which they would otherwise have the right to exploit as **the res communis** or **res nullius**, whichever is accepted. Even if they accepted the invitations, they would do so for a great **quid pro qou**. The same is applicable to the importation of the technology, which, most of the times, the technology exporting states would consider as strategic.

These policy reasons aside, the drafting history of the Geneva Convention does not corroborate such a conclusion. The reasons lying behind the inclusion of the exploitabilty criterion in Article 1 and in fact the very reason for which the continental shelf rights were recognized to be subject **ipso jure** to the jurisdiction of the coastal state clearly would refute the actual exploitation criterion, so far as the submarine areas beyond the 200m line could be considered as **adjacent to** the coast and therefore continental shelf.

The question raised about economical feasibility of the exploitation, however, would seem to be theoretically plausable. (19) But practically it would not be of ar y great significance to any state. If the exploitation of certain mineral was considered as being not economically feasible, there is every reason to believe that no state would be interested in the area in question. The fact that the coastal state has declared certain area beyond 200m depth as its continental shelf would not do any good to it, as the only power conferred on the coastal state in that respect is limited to the exploration and exploitation of natural resources which, **ex hypothesi**, are not available in the area in question. Moreover, who would determine whether the exploitation of the area was economically feasible or not. (20) Unless there is a rule requiring the actual exploitation of the resources as a condition of securing and maintaining jurisdiction over the area, the coastal state would not have to prove the actual exploitation of the area, and still less its economic feasibility.

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(18) Oda's view that each state is free to grant concessions to technologically developed states or their nationls (COLUM. J. TRANSNAT. L., at 9) would hardly work under the actual exploitation regime.

(19) See, Brown **supra** note 15.

(20) The socialist state standard as proposed by Brown (**supra** note 15) is not satisfactory, being susceptible of subjective judgment.

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The suggestion by some commentators that the exploitation of certain minerals at certain depth beyond 200m depth should not give jurisdiction to the coastal state over all the other natural resources in the same area (21) founders on the fact that no one else would be entitled to assert rights over the rest of the natural resources if the area in question is still adjacent to the coast, because area being exploitable at least for one resource of the shelf would be subject **ipso jure** to jurisdiction of the coastal state. Assuming that the exploitation of gas and oil at certain depth did not vest sovereign rights with the coastal state over the sedentary fisheries in the same area, then who would have the right to exploit the latter. The answer could be that for purpose of exploitation of sedentary fisheries the regime of high seas would apply. That would be neither practical nor legally possible. It would not be practical, because nationals of other states would not be able to exploit the sedentary fisheries at that depth either. It would not be legally possible, for if they could exploit at that depth, then the area in question would become continental shelf for the purpose of exploitation of sedentary fisheries too, unless one rejected the objective test of exploitability. Besides, acceptance of multi-jurisdiction over the same area according to the kinds of resources would create chaos and frictions, not to mention the possibility that the coastal state at the same time might acquire the capability of exploitation of all the resources of the same area.

b. Distinction between exploration and exploitation with respect to acquisition of continental shelf rights

It is generally recognized that the exploratory acts, as opposed to the exploitation, carried out on the seabed beyond the 200m depth line do not create continental shelf rights; and coastal state cannot, on that basis, extend its jurisdiction to the areas beyond. (22)

However, the effect of this theoretically sound view depends, to a great extent, on the answer to the question whose technological capability should detemine the exploitability of resources of a certain area. As it has been indicated above, the dominant view is that it should be the technology of the most advanced nation. That is, the objective test is considered as decisive. The practical result of this interpretation would be that the submarine areas beyond the outer limit of the continental shelf could not be exploited by states other than the coastal state, because the exploratory activities resulting in exploitation would enable the coastal state to claim that the

(21) See, Goldie, **supra** note 17.

(22) See, Goldie, NAT. RES. JOUR., 448-50 (1968). Ambassador Pardo stated that fact in the U.N. Seabed committee as follows:
In that Convention, his delegation questioned the legality of the practice of indefinitely asserting national jurisdiction by grant of exclusive exploration licenses over areas not presently exploitable by the contemporary technology and not in close proximity to the coast. A/AC. 138/SC. 1/SR. 7. p.62.

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area beyond as its own continental shelf. (23) The seabed areas of the high seas would actually be transformed under its jurisdiction. Thus, under the objective test of exploitability the distinction between exploration and exploitation seems not to work in practice, and, as a result, a second category of **potential rights** has been claimed to exist. Garcia-amador stated, just after the conclusion of the Geneva Convention, that:

> There is now a distinction between the broad categories of submarine areas and also, as in the conclusion of Inter-American Conference, between two classes of rights: an existing right with regard to the continental shelf proper, and a potential right with respect to the other areas covered by the definition (Article 1). (24)

In short, under this theory, a state other than the coastal state has the right to explore the seabed areas beyond the outer limit of the continental shelf of the coastal state, in accordance with high seas freedom. But once they have established that the seabed is exploitable, the latter changes its status and goes under the jurisdiction of the coastal state, with the result that the explorers loose their freedoom of exploitation and the expected fruits of their activities. Apparently, this was the theoretical basis of the literal interpretation of Article 1 that, under the exploitability criterion, the coastal states could apportion the world oceans among themselves, a topic which is to be dealt with below.

c. Differing interpretations of exploitability criterion

aa. Literal Interpretation: exploitability alone determines the outer limits

According to one school of thought represented by Prof. Oda, (25) Article 1 should be interpreted liberally. The intention underlying it was promotion and encouragement of exploitation of the resources of the submarine areas by the coastal state wherever it became feasible. Therefore,the exploitability of the natural resources, regardless of distance from the coast, determines the seaward limit of the continental shelf. The continental shelf of each state continues indefinitely until it meets the shelf of some other states.

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(23) In Goldie's opinion, this approach is frought with difficulties as it would have a divesting effect on the already accomplished costly exploratory activities of foreign states beyond the national jurisdiction before it is discovered that the seabed is exploitable. Id., at 449.

(24) THE EXPLOITATION AND CONSERVATION OF THE SOURCES OF THE SEA, 111-12 (1959).

(25) See, Oda, S., INTERNATIONAL CONTROL OF SEA RESOURCES 167-68 (1962); Oda, 7 COLUM.J.TRANSNAT.L. 1,9 (1968); 1 NAT.RES. LAW. 103,106 (1968); Oda, **Dissenting Opinion in Continental shelf, (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports.** 183-84 (1982). See, also, Munch, F., **Die Internationale Secrechtskonference,** ARCHIV DES VOLKERRECHT, Bd. 8,180,206 (1959); Christy, P.T., **Alternative Regimes for Marine Resources Underlying the High Seas,** 1 NAT.RES.LA'V. 63 (1968).

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By this interpretation of article 1, which apparently does not attach any importance to the other elements contained in the definition (for example, adjacency, term "continental shelf", and the 200m depth criterion), all the oceans could be enclosed by the coastal states and thus they could be turned into "international lakes" over which the coastal states alone would exercise exclusive jurisdiction. As a result, a few states fronting on to the vast areas would apportion among themselves the whole seabed and subsoil of the oceans, which had, hitherto belonged to the international community. (26)

That view Prof. Oda expressed only two years before the Geneva Convention came into force. He said that the coastal state itself did not need to engage in the exploitation of the resources of the submarine areas, that each state was free to grant that right to the technologically developed nations or to their nationals. Therefore, in his opinion, the concept of exploitability should be interpreted in terms of the most advanced technoloy. Hence, the exploitation of submarine areas at any point must always be reserved to the coastal state. From this proposition, Prof. Oda proceeded to the conclusion that, under the Convention, all the submarine areas of the world had been theoretically divided among the coastal states at the deepest trenches.

But that was what Prof. Oda thought to be actual meaning of the Convention, and it did not constitute his view of what the law ought to be. He personally suggested that, **as de lege ferenda**, the regime of the ocean floor of the deep sea should be kept distinct from that of the continental shelf proper. (27)

Parallel to the Oda's theory, the Department of Interior of the United States put in practice, in 1961, a policy according to which the leasing authority of the US was extended as far seaward as the technological capacity could cope with the water depth. (28)

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(26) In his opinion, "such interpretation was perhaps not what the delegates at the Geneva conference actually thought they were confirming many delegates at the Conference simply and mistakenly considered the provision on exploitability" as meaning that the coastal state would be allowed to exploit submarine resources even where the depth of the superjacent waters exceeded 200 metres it should be noted, however, that at no point does this Convention prohibit the exploitation of submarine areas beyond the continental shelf. The concept of exploitability stems from correct belief that exploitation of submarine resources, though not heretofore allowed, became permissible only in terms of the concept of the continental shelf. COLUM.J.TRANSNAT.L. at 9; Dissenting opinion in **Continental Shelf (Tunisia/Libya), Judgment,** I.C.J. **Reports,** 183-84 (1982)

(27) COLUM.J.TRANSNAT.L., at 9-10.

(28) For further details see, **infra,** V,2,E,a.

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In the Ad Hoc Committee, various delegations referred to, even if not approved of, this interpretation of Article 1 as a fact. (29)

Althought that interpretation has not been adhered by many writers, its effects on the course of international legislative developement and on the practice of states have been considerable.

bb. Exploitability criterion restricted by other elements of the definition

On the other hand, many commentators expressed their disagreements with the above-mentioned literal interpretation of Article 1 either on legal grounds or for policy reasons, although they have clearly admitted that the definition of the continental shelf based on the expoitability criterion was open-ended. According to this school of thought, neither the members of ILC, nor the conferees at the Geneva Conference gave the pride of place to the exploitation criterion. The latter was included in article 1 as ancillary to the 200m depth criterion. The framers of the Convention thought that the maximum limit at which the exploitation was possible was the 200 metre depth of water, which they estimated would not be exceeded in the near future. Therefore, the exploitability criterion was not intented to be the major one; it was an exception to the basic criterion of depth in order to satisfy some states whose seabeds dropped off steeply to the ocean deeps from immediately near their coasts. The framers never foresaw the technological developments which have taken place recently. As the technological capability has reached a point that almost any part of the seabed could be exploited, the 200m depth criterion has ceased to be a limit to the shelf; the exploitability criterion has remained the only and dominant criterion. It has removed all the limits to the continental shelf which its authors put. The exploitability criterion has come to replace the depth criterion to which it was intended to be ancillary. That was not the result which was intended either by the ILC or by the Geneva Convention.

However, the writers challenging the international lakeconcept were divided into two major groups. One group, relying on the term continental shelf, adjacency, and existence of 200m depth criterion in Article 1, argued that a limit had been intended by the drafters of the Convention but they failed to show a precise limit. Other group, arguing on the bases of the drafting history of the Convention, geoghysical characteristics of the seabed, put an extensive interpretation on the term **adjacent to the coast** in the said Article and advance the view that the adjacency coprehended the whole continental margin.

(29) See, Belgium, A/AC. 135/SR.5,p.35; Somalia, A/AC/PV 1525, p.43; Canada, A/C.1/PV 1529, pp. 68-70 where Mr Gotlieb said that: The outer limits are at present subject to a definition based on the test of exploitability - a definition which would eventually permit coastal states to explore and exploit the resoruces of the abyssal depths, but expressed his disagreement with application of such a rule.

See also Mr. Beesley, A/AC. 138/SC. 1/SR.8, p. 89; USSR, A/AC. 138/SC. 1/SR. 8, where he said that: Many states were concerned about a possible de facto division of the ocean floor among coastal states, that's why it had been necessary to clarfy the definition of the continental shelf as set out in 1958 Convention on the subject.

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cc. The exploitability criterion applies on the geological shelf

According to one interpretation, which was, has remained as a minority view (30), under the Conventional regime, the outer edge of the geological shelf constitutes the farthest seaward limit of the continental shelf, for the following reasons:

First, the Convention employes the term "continental shelf' to define the areas subject to the national jurisdiction, which has a clear connotation, excluding submarine areas which do not qualify for such a definition. Secondly, the Convention itself was inspired by the Truman Proclamation in codifying or developing the law on the continental shelf. The Proclamation was based on the geological definition of the continental shelf. The 200m depth criterion as adopted by the Convention was accordingly intended to correspond approximately to the outer limit of the geological shelf. But there remained some parts of the geological shelf under the deeper waters beyond the 200m depth line. The exploitability criterion was designed to extend the coastal state's jurisdiction to the resources of those parts of the geological shelf as well, when they become exploitable. Consequently, both the 200m depth criterion and the exploitability criterion could only apply on the geological shelf.

This interpretation has been assailed by writers from all sides, including those favouring a restrictive interpretation of Article 1, on the ground that the drafting history of Article in question clearly shows that the exploitability criterion was added to the definition for the obvious purpose of enabling the coastal state which lacked a geological shelf to exploit the resources of the submarine areas beyond 200m depth when technology made it possible (31).

According to a second interpretation, (32) both the term 'continental shelf' and the co-existence of the 200m depth criterion with the exploitability criterion in Article 1 restricts the latter, but for different reasons:

First, national proclamations which had preceded the work of the ILC and the Geneva Convention claimed rights over the continental shelf, and not over any undefined submarine areas.

Secondly, the ILC and the Geneva Conference preferred the term "continental shelf" to the vague term "submarine areas" to describe the areas to be exploited by the coastal state.

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(30) See, Tubman, W., The Legal Status of Minerals Located on or Beneath the Ocean Floor Beyond the Continental Shelf, in EXPLOITING THE OCEANS, p.379, 380, 381.; Pirecy, G., DEPARTMENT OF STATE MEMORANDUM, p.5.

(31) Even Henkin, who was a champion of the restrictive interpretation of the Convention found it difficult to accept that interpretation. See, LAW FOR THE SEA'S MINERAL RESOURCES, 20 (1968).

(32) See, Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 226 (3rd ed. 1979) and Recommendations on the Limits of the Continental Shelf and Related Matters, in ALEXANDER (ed.), LAW OF THE SEA, NATIONAL POLICY RECOMMENDATIONS, 186 (1970); Denorme, id., at 268-69; Henkin, id., at 172 and 64 AJIL 66 (1970); Oxman, supra note 1 at 715.

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Thirdly, Article 6 of the Convention speaks of "the same continental shelf" adjacent to the territories of two or more states for the purpose of delimitation of overlapping claims.

Fourthly, the Commission stressed that the depth of 200 metres coincided with that at which the continental shelf in geological sense came to an end and the continental slope began. Thus, the 200m depth criterion was chosen as approximating the outer limit of the geological shelf. By including the exploitability criterion the ILC departed **to certain extent** from the geological shelf; but it mainly maintained it. In fact, there is no logic of mentioning of 200m depth criterion if states were to have sovereign rights over submarine areas of any depth where such exploitation was possible. Such position would be meaningless unless one concluded that the exploitability criterion was intended to be of the major criterion, which was not the case. Then, it follows that the exploitability criterion is linked with the 200m depth criterion and the term "continental shelf".

Last but not least, the drafting history shows that the national jurisdiction was intended to extend beyond the 200m depth of water but not far beyond it, probably, to the immediate environs of the geological shelf. That was why some members thought that the term "continental shelf" should be retained on the basis of the principle of **maxima pars pro toto** (the name of major part stands for the whole). (33)

This interpretation has been assailed by some other commentators (34) on a few grounds:

First, the term "continental shelf" as used in Article 1 is a term of art, the precise meaning of which is governed by the ensuing citeria. It incorporates, alongside with the continental shelf proper, shallow waters which technically speaking are not shelf, the continental slope, and potenially the areas beyond. This is exemplified very well in the ILC's debates of 1956, during which Fitzmaurice and Garcia-Amador made that point clear. Although the proposal to drop the term "continental shelf" was rejected by the Commission that is not of any significance, because the Commission departed from the strict geological meaning of the shelf in accepting that term in 1953. The term "continental shelf" was retained in spite of the departure in question since it was already in current use and "it served to indicate that the rights of the coastal state lay over a restricted area of the seabed off its coast and could not cover remote, isolated areas, nor the seabed in the middle of oceans." (35) However, the argument continues that, "to argue from this term to the proposition on limit is thus

(33) This view was expressed by the Soviet representative (Krylov) in the Eighth Session of the Commission [See, I YILC, 140 (1956)] and Brownlie and Denorme shared that view. See, **supra** note 1, at 150 and 269 respectively.

(34) See, Hutchinson, **supra** note 1.

(35) **Id.**, at 138.

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to be under the same misapprehension as were Pal and Zaurek when they joined the international law commission in 1953-a notion of which they were quickly disabused by their collegues." (36) Secondly, the 200m depth criterion has little relevance to the proper interpretation of the exploitability criterion. The combination of these two criteria could be explained without recourse to the idea that the 200m depth criterion has a gravitational effect on the exploitability criterion. (37)

dd. The phrase "adjacent to the coast" qualifies the exploitability

Many commentators who have disagreed with the "international lake" concept interpretation put much emphasis on the phrase "adjacent to the coast" (hereinafter to be cited as adjacency) as contained in the definition in Article 1, as restricting the exploitability criterion, although their understanding of the concept has varied considerably. The common thread running through the views expressed in that respect has been to argue that the submarine areas beyond 200m depth line should remain adjacent to the coast so that they could be classified as continental shelf when they become exploitable. In other words, even if the submarine areas beyond 200m depth line became exploitable as a result of the technological development, the areas in question would not qualify for the continental shelf unless they still remained adjacent to the coast.

However, the commentators falling in this group have differed on what exact effect the concept of adjacency should have on the definition of the continental shelf.

ee. Adjacency generally restricts the exploitability criterion but it provides no precise limit

Henkin, who forcefully fought against the expansionistic and nationalistic tendencies to extend offshore national jurisdiction, considered the "international lake" concept as being wholly without foundation and suggested that "no government, I believe, would dare to propose this as the interpretation of the Convention; if one did the other nations would reject it". (38) In his opinion, the definitin in Article 1 em-

(36) This statement probably does not do justice to Pal's reasoning and efforts to limit the continental shelf in accordance with its rationale. He said, not in 1953 but in 1956, that the term continental shelf had the merit of suggesting, at least, some juridical basis for the new claims to the seabed. He could not see any legal justification for extension of the coastal territory to an area which was not the natural prolongation of the territory. Otherwise, those areas would be regarded as **res communis**. The term continental shelf had the merit of bringing out the geophysical relationship between the land territory and the submerged areas. See, I YILC 133-34 (1956).

(37) Hutchinson, supra note 1, at 138-39.

(38) LAW FOR THE SEA'S MINERAL RESOURCES, 18 (1968)

ploys the term "continental shelf" which was intended to place some limit on the under-sea extension of the continent subject to the jurisdiction of the coastal state. That was why the "continental shelf" was limited to the seabed and subsoil of the submarine areas adjacent to the coast. Neither the International Law Commission nor the Geneva Conference nor their spiritual ancestor the Truman Proclamation ever intended that the oceans should be divided by the coastal nations. On the contrary, both the Commission and the Conference tried to find a proper definition which would put some outer limit to the areas to be exploited. (39)

Altough, he admited that under the exploitability criterion the national jurisdiction could be extended beyond 200m depth line, stating that the exploitability criterion was added to the definition in order to entitle the states with no geological shelf to exercise resource-oriented jurisdiction beyond 200m depth, (40) he considered the the phrase "adjacent to the coast " as restricting it. However, he did not say that the adjacency put any definite limit to the continental shelf. On the conrary, he said that the rapid development of marine technology had removed all limits which the Geneva Convention put on the outer limit of the shelf and that consequently the definition in Article I ceased to be a definition. He believed that the Convention should be revised, (41) and went on to say that:

> "The areas adjacent to the coast, in which the coastal states have exclusive mineral rights are areas that do not take 'too-big' a 'bite' out of the deep seabed; that do not reach 'too-far' from the shore; where the coastal state has a legitimate interest in excluding others; where -economically and technologically- exploitation depends heavily on the coastal state. There is some support too for an argument that the geological shelf has not become wholly irrelevent, that a state can claim all of its geological shelf, but overall and in general 'adjacent' areas do not extend 'too far' beyond the geological shelves of the world." (42)

This interpretation of adjacency later on found some other supporters who were equally against the expansionistic tendencies (43) and a passage the International Court of Justice employed in the North Sea Continental Shelf Cases, in 1969, allegedly, provided an additional support for this view. (44) The Court said, in that

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(39) **Id.**
(40) **Id.**, at 20.
(41) **Id.**, at 21
(42) **Id.**, at 24.
(43) **See, Friedmann, W, Selden Redivivus-Towards a Partition of the Seas.** 65 AJIL 759 (1971); **Andrassy, supra note 8, at 80-81,171,172 ; Weissberg, G., International Law Meets the Short-term National Interest: The Maltese Proposal on the Sea-Bed and Ocean Floor-Its Fait in Two Cities.** 13 ICLQ 81 (1969); Denorme, **supra note 1, at 269, 273.**
(44) **North Sea Continental Shelf. Judgment** ICJ REPORTS, 1969.

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case, while dealing with the argument by the Netherlands and Denmark that the basis of the continental shelf rights being proximity, in delimitation of the overlapping continental shelf areas between them and F.R.Germany, the equidistance method should be used, as a method inherent in the fundamental principle of proximity underlying the continental shelf rights, to give each state those submarine areas which were closer to its territory than to that of the other states, (45) that:

> It is evident that by no stretch of imagination can a point on the continental shelf situated say a hundred miles or even much less from a given coast, be regarded as "adjacent to it, or to any coast at all, in the normal sense of the adjacency, even if that point concerned is nearer to some coast than to any other. (46)

Drawing on this passage, the writers favouring a restrictive interpretation of the exploitability criterion (47) and representatives of some governments at the UN Seabed Committee and at the Third United Nations Conference argued (48) that the phrase "adjacent to the coast" as contained in Article 1 meant proximity and that the jurisdiction of the coastal state over submarine areas ended where the areas in question could not be considered as being near to it.

In spite of the good intention behind that interpretation, it hardly sounds good as a proper meaning of the judgment. It is true that, when taken out of its context, the passage in question lends itself to such an interpretation, but that is not what the Court meant by term 'adjacency'. Even one can argue safely that the converse was the case when the passage is read within the context of the whole judgment. (49) The Court clearly said that there was no complete identity between the notion of adjacency and proximity and that the former implied proximity only in a general sense.

In fact, the interpretation of adjacency as meaning proximity does not command a general approval of commentators. For example, O'connell writes that:

> The expression 'adjacent to the coast' qualifies the submarine areas and refers to contact rather than propinquity. It is the continental shelf next to the coastal state that is subject to the state's rights, not some other part of the continental shelf, and distance has nothing to do with location. (50)

Referring to the the above-mentioned court's decision, he says that the distance itself is of minor relevance. As to the position of the exploitability criterion in the definition in Article 1 he says that:

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(45) **Id.**, at 19, para. 13.

(46) **Id.**, at 30, para 41.

(47) **See supra** note 43.

(48) For example, Sweden, A/C. 1/P.V., 1527, pp. 48-50; Malta, A/C. I/P.V 1527, p.42; A/AC. 138/SC. I/SR. 7,pp. 61,62 and 65-66; Singapore, UNCLOS III, Official records, Vol. II, p. 151; Switzerland, **Id**, at 167-68

(49) See, BROWN, THE LEGAL REGIME OF HYDROSPACE, 34 - 35 (1971); Hutchinson, supra note 1, at 141 - 142.

(50) I INTERNATIONAL LAW OF THE SEA, 494 (1982)

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> what the debates [in 1960s] tended to obscure was that the exploitability criterion occurs in connection with the definition of the continental shelf; and could therefore have no significance for areas lying beyond the continental shelf. What it achieved was the practical extinction of the 200m isobath as a conventional limit to to continental shelf. (51)

Brown has apparently offered a different views of the term adjacency; he rejects the notion of nearness or proximity as a dominant element. His adjacency concept is in the sense that the area itself (not merely a random point within the area) must satisfy the depth criterion or the exploitability criterion continuously and without a break from the outer limit of the territorial sea to the extremity of the area claimed. However, he admits exceptions on the equitable grounds for relatiely narrow deeps or troughs in the shelf being considered as adjacent. (52) Like Henkin, he puts a sort of imprecise limit to the outer limit of the shelf, although not a kind of guideline. Arguing on the basis of the drafting history of the Convention, he says that the shelf should not be 'more than a reasonable, but yet to be defined, distance from the coast.' In determining what is reasonable, he emphasises that the regard should behad, inter alia, to the questions of whether the economic exploitation of the resources of the area is dependent upon the cooperation of the coastal state and whether the exploitation of the area by foreign states would constitute a potential threat to the coastal state unless it is subject to its jurisdiction and control. He adds that Article 1 cannot be properly interpreted so as to restrict the extension of the seabed by reference to the geological characteristics of the seabed. And thus he suggests that the continental shelf may extend beyond the 'natural prolongation' of the land territory. (53) As he uses the expression 'natural prolongation' to mean the geological shelf, and not in the sense of the continental margin, he should not be understood as suggesting that the continental shelf should include the deep oceans.

Goldie indicates that "a large amount of the discussion of the exploitability test's capacity to justify extensive continental shelf claims seaward and out into the abyss ignores tha fact that. Article 1 requires the continental shelf to be 'adjacent to the coast..." (54) He continues to say that this argument must be inconclusive if it is taken in isolation, since a shelf region can remain 'adjacent to' a coast on its land ward side and yet extend seaward out into the mid-ocean areas. To avoid such an interpretation, he adds that the intention of the framers of the Convention was to limit

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(51) **Id.**

(52) **See, Report on the Legal Regime of Deep Sea Mining,** 142 ILA, British Branch, 1968); ROME SYMPOSIUM, AT 244; LEGAL REGIME OF HYDROSPACE, 36 (1971).

(53) **Id.,** at 33.

(54) **The Exploitability Test-Interpretations and Potentialities,** 8NAT. RES.JOUR. 447 (1968).

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the continental shelf to little more, at least, than the zone enclosed by the two-hundred metre depth line. (55) He, consequently, rejects both the literal interpretation of the exploitability criterion and the interpretations based on the adjacency concept but has its aim to extend the national jurisdiction to the base of slope. (56)

Likewise, the Commission on Marine Science, Engineering and Resources (USA, working in close cooperation with Henkin) arrived the conclusion in 1969 that the interpretation stressing the exploitability criterion as paramount and thus dividing the oceans among the coastal nations read the definition in Article 1 as if the adjacency was not there. It put emphasis on the fact that the Convention sought to define 'the continental shelf' (57) and that extension of jurisdiction over the areas which has nothing to do with the continental shelf could not be justified under that term. Concentrating itself on what the definition could not cover, suggesting that under the existing law there remained no limit, it offered some **de lege ferenda** solutions, such as a new definition based on 50 miles distance and 200m isobath.

Brownlie has generally agreed with Henkin and with the Commission's views mentioned above, (58) but added that the definition in Article 1 is not more open-ended than the Commission Report suggested. In fact, he has resorted to the drafting history of Article 1 and concluded that the inclusion of the exploitability criterion in the Article was intended to include only certain further types of areas beyond the 200m depth. In his opinion, the exploitability criterion was not recognized as being the all-pervading test in the Article; but the states tolerated a compromise, of which the inclusion of the exploitability criterion was a part. The discussions in the ILC in 1956 made it clear that the adjacency and contiguity were overall requirements. The ILC included the exploitability criterion just in the same sense as it did in 1951 draft; in 1956 the 200m depth criterion was added to the definition in a context in which its co-existence with the exploitability criterion could be meaningful, requiring that the claims beyond 200m depth be exceptional and conditioned in some way by adjacency. Finally, he has said, the majority decision of the ICJ in 1969 and individual opinions of the judges was such that the exploitability criterion could not be considered as being divorced from contiguity or adjacency. In short, Brownlie is of the view that the 200m depth criterion is subject to exploitability criterion but the latter is conditioned by adjacency or contiguity. (59) Thus, his view of adjacency seems to tilt towards the concept of natural prolongation rather than the adjacency in the sense of proximity.

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(55) **Id.**, at 448.

(56) **See, International and Domestic Regimes for Coastal, Continental and Deep Oceans Mining Activities,** in ALEXANDER, LAW OF THE SEA, NATIONAL POLICY RECOMMENDATIONS, 233,234,235 (1970).

(57) **The Marine Resources and Legal, Political Arrangements for Their Development** VIII-17 (Washington, US Government Printing Office, 1

(58) **See, supra note 1, at 138-40.**

(59) PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 226 (3rd.ed 1979).

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Andrassy, one of the exponents of the restrictive interpretation of Article 1, apparently approves the judgment of the ICJ in 1969, emphasising a geophysical relationship between the land territory and the continental shelf as restricting the expansionistic national claims, (60) but interpreting the concept of natural prolongation as including only the geological shelf, not the whole continental margin. (61) However, he admited that the outer limit of the shelf is not precise under the Convention. (62)

Denorme, although approvingly referring to the interpretations favouring a restricted shelf, (63) said that the definition of the continental shelf as contained in Article 1 not only lacked a precision, but also it was clearly open-ended and needed revising. (64)

Hutchinson considers the term adjacency as meaning that which lies next, referring to location rather than dimension. (65) And he concluded that, although a limit near the environs of the outer limit of the geological shelf was contemplated, a definite limit was not intended by the framers of the Convention. (66) In fact, he argues," it was the very purpose of the rule in Article 1 to leave the question of limits for subsequent resolution'. (67)

In conclusion, the common point on which all those writers have agreed is that a limit on the seaward of the continental shelf was intended. Therefore, the international lake concept is without foundation. But they all have admitted that there is no precise limit to the continental shelf, as the 200m depth criterion has lost i's practicality. Almost all of them have suggested that the Convention should be revised.

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(60) See, supra, note 8, at 89.
(61) id., at 171.
(62) id., at 90.
(63) See, supra, note 1, at 269 - 74.
(64) id., at 274.
(65) See, supra, note 1, at 141.
(66) id.
(67) id, at 163.

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ff. Adjacency comprehends the continental margin

Towards late 1960's when there was a great disagreement among the scholars with respect to the outer limits of the continental shelf, several influential organizations in the USA (68), supported by some scholars (69), advanced and developed a theory,which apparently relied on the adjacency concept in Article 1, but interpreted it very extensively, which many other organiztions and scholars considered as unacceptable. The theory argued that the literal interpretation as advanced by Oda and the views aiming at restricting the outer limit of the continental shelf to that of the geological shelf or to its environs were not correct. The correct view, it continued, was that the coastal state's right up to the 200m depth line was unconditional and independent of exploitablility of resources of the area in question. But it did not need to stop there; it could extend farther. However, the exploitability criterion was not the sole criterion in determination of the seaward limits; it should be limited by adjacency (70). Otherwise, there would remain no limit, which was not the intention of framers of the Convention, who clearly intended to put a limit to areas to be exploited by the coastal state. The limit in question was intended to go beyond 200m depth to embrace the submerged land mass of the adjacent continent down to its junction with the deep sea ocean floor (71). The framers did not say that clearly but the element of adjacency as contained in Article 1 and as understood in geological sense comprehended the continental margin and consequently it coincided with the foot of the submerged portion of the continental land mass. Thus, under that theory, not only geological shelf but also continental slope and, even for some, a part of the continental rise which overlappes the slope would be subject to the jurisdiction of the coastal state (72). Moreover, although the theory reached that result by interpreting the Geneva Convention, it obviously did not make the exploitability of the resources of the area in question as condition of acquisition of jurisdiction over it. Instead, it argued that Article 2(2) of the Convention preserved the exclusive rights of the coastal state through whatever period of time was needed before the exploitation became a reality (73)

(68) See, **Joint Report by American Bar Association, Sections of Natural Resources Law, International and Contemporary Law and the Standing Committee on Peace and Law Through the United Nations to the 1968 Session of the House Delegates of the Same Association,** reprined in III NAT. RES. LAW. No 2, 186, 190 (1970); **The Committee on Deep Sea Mineral Resources of the American Branch of International Law Association,** INTERIM REPORT, July 19, IC - XI (1968); **The National Petroleum Council's Committee on Petroleum Resources under the Ocean Floor** (hereafter to be cited as NPC 's Report), 61 (1968); **Report of Special Committee on Outer Continental Shelf to the Senate Committee on Interior and Insular Affairs,** 91st. Cong., 2 nd. sess. (hereafter cited as Metcalf Report) 1970.

(69) See, Finlay, **The Outer Limit of the Continental Shelf-A Rejoinder to Professor Louis Henkin,** 64 AJIL 42 (1970); Hedberg, H.D., **Limits of the National Jurisdiction over Natural Resources of the Ocean Bottom,** in Alexander, THE LAW OF THE SEA, NATIONAL RECOMMENDATIONS, 159 (1970).

(70) NPC'S REPORT, p. 57.

(71) INTERIM REPORT, pp. IX - XI ; NPC'S REPORT, p. 57; American Bar Association Joint Report, P. 190.

(72) See, Hedberg, **supra** note 68, at 161

(73) NPC'S REPORT, p. 56 - 57.

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The theory was explained on a few legal grounds, supported by geological data. For example, the National Petroleum Council's report arrived at the above-mentioned conclusion on the bases of geology, the drafting history of the Convention, practice of states, scholarly opinions, the Ciudad Trijillo Conference's resolution (74), and partly of the natural prolongation concept as enunciated by the ICJ in 1969 in the North Sea Continental Shelf Cases (75)

The thrust of the thesis was that it identified the **adjacency** with the continental margin, thus rejecting the view that adjacency should be understood in terms of closeness or proximity as advanced by the Commission on Marine Science, Engineering and Resources, and by Henkin. Therefore, the latter and those attaching a more restricted meaning to the term adjacency severely criticised that theory on the following grounds:

First, the term adjacency in Article 1 could not be understood as meaning the continental margin (76); if that were the intention of the framers of the Convention they would say that clearly (77). On the contrary, there were many statments in the drafting history of Article to refute such an extensive interpretation (78). The Convention regulated the institution of the continental shelf, from the geological

(74) According to the NPC Report, representatives of 20 member states of the Organization of American States met at the Inter - American Specialized Conference on 'Conservation of Natural Resources: Continental Shelf and Marine Waters', held at Ciudad Trujillo (Dominican Republic) in March 1956, adopted a resolution which provided that the seabed and subsoil of the continental shelf, continental and insular terrace, or other submarine areas adjacent to the coastal state, outside the area of the territorial sea and to a depth of 200 metres or beyond that limit, to where the depth of the superjacent waters admitted of exploitation of the national resources of the seabed and subsoil appertained to the coastal state and were subject to its jurisdiction and control. From this resolution, in particular from the reference to the continental terrace which encompasses the slope from the edge of the shelf to the greatest depths, only one conclusion could be drawn: the Conferees at the Ciudad Trujillo intended, inter alia, to assert national jurisdiction of American states over the entire submerged portion of the continental landmass of the American Continent. From this point the Report proceeded to the Eighth session of the Commission in 1956 when G.Amador proposed a new definition of the continental shelf on the basis of the Ciudad Trujillo Resolution. The Report argued that although the Commission adopted only one part of the G.Amador's proposal (exploitability), and thus rejected that part of the proposal regarding the concept of continental terrace, that was on the understanding that under the adopted exploitability criterion the area of the continental terrace would automatically come under the concept of exploitability. Thus, the Ciudad Trujillo resolution was considered as having been incorporated into the Article 1. See, NPC'S REPORT p. 58.

(75) As to the Court's decision, the Report is more cautious: The "prolongation" concept is referred to by the Court as applying to the "continental shelf" without particularizing the sense in which the Court uses that term. Nonetheless, the rationale of prolongation concept, which the Court adopts clearly supports the NPC view that the coastal state has exclusive sovereign right over the natural resources of all the submerged areas which form part of the under water prolongation of such nation's land territory. Id, at 62."

(76) Denorme, **supra** note 1, at 270

(77) Henkin, 64 AJIL 64 (1970).

(78) **Id.**

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definition of which the framers departed only to certain extent, and therefore it was not acceptable that it could be interpreted in such a way as to include the whole continental margin (79).

Secondly, the theory has been criticised for putting the whole continental margin under the jurisdiction of the coastal state regardless of whether or not the depth of waters admitted exploitation of the resources. In fact, the theory thus sought to create two kinds of rights: existing rights exercised over the continental shelf and potential rights which the coastal state allegedly had over the area extending from the outer limit of the continental shelf down to the outer edge of the continental margin, without need of the resources of the area being exploitable, a requirement which could not be explained away under any circumstances.

Thirdly, it was argued that the Geneva Conference refused to adopt the Panamian proposal which would have included the whole continental margin in the area to be exploited by the coastal state. Therefore, it could not have been the intention of the conferees to include the area in question in the difinition.

Conclusions:

It seems to be fair to draw from the study of the views of the writers on the seaward limits the following conclusions:

1. All writers, almost without exception, have considered the general concept of the continental shelf as part of the general international law; no one ever raised any question as to the validity of the right of the coastal state to exercise jurisdiction over the adjacent continental shelf areas though they differed with each other on the limits.

2. Again, no writer has ever raised any question about the right of the coastal state to extend its resource jurisdiction out to the 200 m. depth line. In other words, the 200m depth line has been considered as the minimum limit. Almost all the writers, with exception of a minority, interpreted Article 1 as giving right to the coastal state to extend its jurisdiction beyond the 200 m depth. That is, the legal continental shelf was considered as going beyond the geological shelf.

3. The exploitability criterion has generated an unprecedented disagreement among the writers. It has created many difficulties of interpretation.

4. Writers favouring a literal interpretation have always been nothing but a minority. The theoretical explanations and justification they offered has not been considered as satisfactory but the effects of the theory on the course of events was tremendous, as it catered for the expansionisic tendencies of the coastal states.

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(79) Id. In his view, the drafting history shows that by the exploitability criterion some areas beyond 200 m depth line were contemplated but intention hardly was to triple its size, giving one - quarter of all the seabed areas. See. Paper cited in supra note 1, at 172.

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5. Writers favouring a restrictive interpretation have constituted a clear majority. They all agreed that the element of adjacency as contained in Article 1 restricted the exploitability criterion and consequently the jurisdiction of the coastal state could not extend to the middle of the ocean. However, they differed with each other on the exact limit of the national jurisdiction. Those who interpreted the adjacency as comprehending the whole continental margin suggested a definite limit and insisted that there was no need for revision of the Convention, while others who attached a less restricted meaning to the same concept could not offer any definite limit and favoured a revision.

6. Consequently, when read together, what the writers have offered is a great disarray of views on the outer limits. On the basis of their writings it is not possible to point to any definite limit whatsoever.

E - State Practice

a. Practice as reveals from the exploratory and exploitatory activities of the states

In spite of all rhetorics by many that the technology has reached a point that any submarine area at almost any depth could be worked, the practice of states is not rich enough to corroborate such a claim. As a matter of fact, a report prepared by the Ad Hoc Committee showed that exploitation of minerals through drilling could be done only at a 110 metre depth of water in 1969 (80). The actual practice of states available to us belonged to the years 1960s and early 1970s which was then provided to the public to justify claims to the areas extending down to the abyssal depths (81).

In the U.S., the Outer Continental shelf Lands Act of 1953 did not provide any specific outer limit. It was the decisions taken at the executive level that provided some guidance.

Only three years after the conclusion of the Convention , in 1961, in response to an application of a company which applied to the Department of Interior for permission to lease a seabed area known as the Forty Mile bank, 40 miles from the California coast and in waters 43 - 670 fathoms deep, and separated from the mainland by a deep trench of 4000 - 5000 feet in order to dredge for phosphate nodules on the seabed, the Associate Solicitor of the Department of Interior rendered an opinion to the effect that leasing of the said area was permissible, "since the United States has now asserted the seabed and subsoil as far seaward as exploitation is

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(80) GO: A / 7230 , **Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea - Bed and the Ocean Floor Beyond the Limits of National Jurisdiction.** New York, 1968.

(81) *See, supra* V,2, D, c, ee.

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possible". Departments of State and of Justice to which the opinion was submitted for consideration did not make any objections. And the company in question was granted the lease (82). The same Department asserted, consistent with that policy, jurisdiction over and leased to Shell Oil Company three oil and gas blocs in the Tillamook Area of Oregon which lie in 1200 to 1800 feet of water and are approximately 26 miles offshore (83). In 1967, the same Department asserted jurisdiction over the Cortes Bank which lies approximately 120 miles off San Diego and at points, is under less than 50 feet water. However, between the Bank and the coast most of the lands are much deeper than 200 metres, reaching in some places 6000 feet (84). Again in the same year, Humble Oil and Refining Company was granted a permission to drill 21 core holes beneath the floor of the Atlantic Ocean in waters ranging in depth from 650 to 5000 feet on the continental slope of the US off Florida (85). The areas in which the core holes were authorized lie as far 300 miles as from the coast. In 1968, the Department issued gas and oil leases in Santa Barbara Channel which included an area in waters of 1800 feet (550m) deep. It, additionally, issued leasing maps for areas off California coast as far as 100 miles from the mainland at depths as great as 6000 feet (1828m) (86).

Australia, in the meantime, granted exploration permits for areas 200 miles offshore. Its official intepretation of the continental shelf boundary was apparently based on the natural prolongation concept (87).

Soviet Union was reported, in 1969, to have carried out drillings in the Caspian Sea at depths of from 300 to 600 metres (88).

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(82) See, **The Memorandum of May 5, 1961 concerning the Application of the Outer Continental Shelf Lands Act to Lease Areas**, reprinted in INTERIM REPORT ON THE UNITED NATIONS AND THE ISSUE OF DEEP OCEAN RESOURCES by the the Sub - Committee on International Organizations and Movements of the House Committee on Foreign Affairs, H.R.Rep. No 99, 90th. Cong, 1st. Sess. 1967, pp. 165 - 68. For further details see, Krueger, N.R.L., **supra** note at 6; Barry, F.J., **The Administration of the Outer Continental Shelf Lands Act, NATURAL RESOURCES LAWYER, vol. no 3. p. 38, 46; Luce, C.H.F. The Development of the Ocean Minerals and the Law of the Sea, id.**, at 31; Brown, ROME SYMPOSIUM, at 250; Auburn, F.M., **The 1973 Conference on the Law of the Sea in the Light of Current Trends in State Seabed Practice**, I THE CANADIAN BAR REVIEW, 86/1972); Anand, THE LEGAL REGIME OF THE SEABED AND THE DEVELOPING COUNTRIES, 60- 61 (1975); NPC's REPORT, at 64.

(83) See, Krueger, **supra** note 82, at 6; Auburn, supra note 82, at 96

(84) See, Krueger, **supra** note 81, at 6; Barry, **supra** note 82, at 47; Luce, **supra** note 82, at 31; Brown, supra note 82, at 253; Auburn, **supra** note 82. at 97.

(85) See, Krueger, **supra** note 82, at 7; Auburn, **supra** note 82, at 96. Accoding to the Ad Hoc Committee Report, the techniques required could be used in water of any depth for exploration of mineral fuels and soluble minerals, but discovery of deposits of hydrocarbons were limited to 200m depth in 1968. See, **supra** note 80, at 25.

(86) See, Luce, **supra** note 82, at 65; Auburn, **supra** note 82, at 97.

(87) Auburn, **supra** note 81, at 100.

(88) NPC's Report, at 64 - 65.

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According to the NPC Report, by 1969, the following states had granted concessions in water deeper than 200 metres : British Honduras, Cuba, Denmark, Eqtorial Guinea, Ethiopia, Gabon, Ghana, Guyana, Honduras, Indonesia, Italy, Jamaica, Japan, Malaysia, Mauritania, Norway, Oman, Panama, Peru, Philippines, Senegal, Spanish Sahara, Sudan, Surinam, Turkey (89).

Canada defined its continental shelf as extending at least to the abyssal depth, on the basis of the principle of natural prolongation (90). It granted permits for exploration in water depths ranging from 900 (Arctic Island) to 3700 metres (Scotian Shelf). Those areas extend out up to 300 miles offshore (91).

New Zealand granted petroleum prospecting licences for areas in water depth of from 200 to 1000 metres (92).

As it has been pointed out above, according to the Geneva Convention the mere issuance of leasses or the activities short of exploitation, such as exploration, would not necessarily extend shelf jurisdiction. The above - mentioned practice of states could probably not be considered as capable of extending their jurisdiction, since it is likely that most of the lincences or permits were for exploratory purposes. In fact, the **Report of the Economic and technical Working Group of the Ad Hoc Committee** shows that it was hardly possible to exploit minerals by drilling at depth of water deeper than 110 metres in 1968, while exploitation through dredging was limited to 30 to 60 metres (93).

As Brown has indicated, assertion of jurisdiction over submarine areas which are not exploitable by the current technology could not be justified in accordance with Article 1, although some would argue that the areas over which the US asserted jurisdiction was part of the continental margin of its land territory which was as such subject to its jurisdiction in accordance with an extensive interpretation of the concept of **adjacency** as comprehending the whole continental margin (94).

On the other hand, it could safely be said that during late 1960s and early 1970s the positon of the U.S. towards the outer limit of the continental shelf was not fully clear, as it appears from the Nixon Announcement and other US proposals to the UN Sea - Bed Committee (95).

In coclusion, although the practice of states outlined above indicates that the states in question tended to extend their jurisdictions beyond 200m depth line, it is not conclusive of any specific limit. Moreover, there are indications that considerations other than the exploitability criterion, such as the principle of natural prolongation, influenced the actions of states.

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(89) **Id. at 64.**
(90) Auburn, **supra** note 82, at 99.
(91) **Id.**
(92) **Id.**
(93) **See, The Report of Ad Hoc Committee, supra** note 80, at 26.
(94) **see, supra** V, 2, D, c, ee.
(95) **See, supra** VI.

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b. Practice as reveals from official statements of states in the United Nations Forums and from the resolutions of the General Assembly

Many governments had the opportunity of expressing their opinions on the subject at various bodies of the United Nations, while the law of the sea in general had been studied and formulated between the years 1967 and 1982. After the Pardo's address in the First Committee of the General Assembly (96), a consensus appeared among the states on the revision of the law of the sea in general and the rule on the seaward limits of the continental shelf in particular. The area beyond the outer limit of the national jurisdiction being considered as common heritage of mankind, the imprecise nature of Article 1 was concern of many developing, land - locked and shelf - locked states. Pardo himself expressed his concern over the ambiguity of Article 1 and urged quick action to stem the expansionistic tendencies resulting from the imprecise language of the Article in question (97). His concern was shared by many other representatives. Somalian representative observed that arrangement in Article 1 being based on the technological capability of the coastal state, was not satisfactory, as catering for the technologically developed states (98). The French representative said that the definition had given rise to controversies and he reminded the participants of the French endeavours in the Geneva Conference to have the exploitability criterion deleted with no success (99). The representative of Ghana, expressing his displeasure with the 1958 Convention, said that thanks to the Maltese inititative, they had a unique opportunity to get out of the rut, to look ahead and to take decisive action to present future difficulties (100). Similar views were expressed by th representatives of Austria (101), and Sweden (102). The representative of UAR said that "it is now generally felt that there is no clear delineation or definition of the seabed or ocean floor. (103)" The Belgian representative suggested that a general agreement had not been achieved on the outer limit of the continental shelf (104). The Japanese representative said that "at the present stage in the devlopment of international law, outer limit of the continental shelf is quite unclear. (105)" The Honduran representative considered that any study of the matter should not safeguard the existing foundation because there was no principle of international law on that point, which could be applicable to all states (106).

(96) See, UNITED NATIONS GENERAL ASSEMBLY, 22nd Sess. First Committee, A/C. I/P.V. 1515,1 November 1967.
(97) Id., at 41 - 47.
(98) A/C. I/PV 1525, p. 43.
(99) A/C. I/PV 1526, p. 16.
(100) A/C. I/PV 1526, p. 36.
(101) A/C. I/PV, 1527, p. 41.
(102) Id., at 48 - 50 .
(103) A/C. I/PV, 1528, p. 48 - 50.
(104) A/C. I/PV, 1529, p. 13.
(105) A/C. I/PV, 1527, p.61. On another occasion Tsuroka observed that as the 1958 Convention had been ratified by only 37 states, the committee should not proceed on the assumption that the provisions of that Convention had been established on international customary law A/AC. 135/SR. 5, p. 34.
(106) A/C. I/PV, 1527, p.32.

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In responding to the Secretary General's note verbal requesting the views of member states on the question of whether the subject of the law of the sea should be undertaken by **an Ad Hoc Committee** as referred to in the General Assembly's resolution 2340 (XXII) of 18 December 1967, many states made it clear that the definition in Article 1, in particular the exploitability criterion, was not sufficiently precise (107), that the existing international law was extremely vague (108) that the outer limits of the national continental shelves were not absolutely defined either in international law or in the practice of states (109), that the Geneva Convention should not be taken as international customary law (110), that the rules adopted by the Convention were too vague to be generally applicable (111), and that the continental shelf should not extend beyond 200 metre depth, the areas beyond which being **res nullius** (112).

Similar views were expressed by other states on other occasions (113).

A working paper prepared by the Secretariat upon the request of the chairman of the Ad Hoc Committee (114), concluded, on the limits established by the Geneva Convention, that "those limits were, it was widely stated, insufficiently precise since that Convention had defined the limits of the continental shelf over which the coastal states exercised jurisdiction as the 200 metre isobath or limits regardless of depth which a coastal state was technically able to exploit." The paper continued to state, inter alia, that: A number of members considered the criterion of exploitability unacceptable and fear that it might give rise to a too extensive interpretation which could lead to an appropriation of the seabed.

The Report of the Legal Working Group on its first session (an Annex to the Ad Hoc Committee Report) stated that "it was generally felt that many problems related to the seabed and ocean floor were not adequately dealt with in the existing international law (115)."

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(107) Denmark, A/AC. 135/I Add. 2, p. 4.

(108) Belgium, A/AC. 135/I p.26; Finland, A/AC. 135/ IAdd. 6., p.3; Turkey, A/AC. 135/I, p.5, where it said that it would be desirable for the Committee to seek more stable and permanent definition than the exploitability in the determination of the continental shelf beyond 2000 metres depth.

(109) Norway, A/AC. 135/I p.40.

(110) Japan, A/AC. 135/I Add. 8, p.2.

(111) Iceland, A/AC. 135/I Add. 3, pp.2 - 3.

(112) Madagascar, A/AC. 135/I p.2.

(113) See, Brazil, A/AC. 138/SR.19, p.17; Bulgaria, A/AC. 135/WG - I/SR. 10, p.88, where Mr. Yankov said that the existing rules of customary and conventional law were not sufficient to provide states with valid tenets (Ad Hoc Committee Legal Working Group). See, also, A/AC. 138/SC. I/SR. 37, p.17; Kuwait, A/AC. 138/SR. 23, p.61.; Libya, A/AC. 135/SR. 17, where the statement was made that the 1958 Convention should be clarified; USSR, A/AC. 138/ SC. I/ SR 8, p. 80.

(114) See, A/AC. 135/12, 7 June 1968.

(115) See, G.A.O.R. Twenty - Third Session, **Report of the Ad Hoc Committee to study the Peaceful Uses of the Sea -Bed and Ocean Floor Beyond the National Jurisdiction**, New York, 1968, p. 44.

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In the Third United Nations Conference, a considerable number of other states joined the above - mentioned ones in opposing the rule in Article 1. The delegates observed that the criterion of possible exploitaton or the definition in Article 1 was "outdated" (116), that it contradicted the Declaration of Principles (the General Assembly's resolution to be dealt with below) (117), that it was inadequate and inequitable (118), that it was not precise or it needed clarification (119), that it caused confusion (120), that it was obsolete (121), that it should be abandoned (122), that it was to the disadvantage of certain member states (123), that it was unjust, favoring a few privileged states (124) that it was a striking example of furtherence of the interests of a few states (125), that it was not an objective and uniform limit (126), that the overwhelming majority of states had rejected it, (127) and that it did not do full justice to the intrests of the developing countries (128).

In contrast, there are some statements by representatives of Argentina (129), Australia (130), Canada (131), Indonesia (132), Mexico (133), and Norway suggesting that they considered that Article 1 was based on the customary international law. But when further analysed, it will be seen that most of those states which are wide margin states, have agreed that the outer limit was imprecise and that they based their claims, in the main, on the principle of natural prolongation (134).

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(116) Israel, UNCLOS III, **Official records**, vol. II, P. 144.
(117) Austria, id., at 143.
(118) Libya, id., at 145.
(119) Japan, id., at 147; Lebanon, 148; El Salvador, 149; Uruguay, 153; Pakistan, 154; Australia, 147; Italy, 167.
(120) Ecuador, id., at 158.
(121) Irak, id., at 159.
(122) Trinidad and Tobago, id., at 154.
(123) Switzerland, id., at 157.
(124) Singapore, id., at 151; Uganda, 151.
(125) Nepal, id., at 151.
(126) Panama, id., at 168.
(127) Kenya, id., at 168.
(128) Ghana, id., at 165.
(129) A/AC. 138/ SC. I/SR. 11 p. 127.
(130) A/AC. 138/WG. I/SR/8, p. 64
(131) A/C. I/PV, 1529, pp.68 - 70; A/AC. 138/SC. I/SR. 8p. 90; A/AC. 138/SR. 24p. 82.
(132) A/AC. 138/ SR. 55,p. 126.
(133) A/AC. 138/SR. 58, p. 186.
(134) For example, see, the the statement of Argentine representative in the Third United Nations Conference, UNCLOS III, **Official Records**, vol. 2, at 150 where she said that the natural prolongation or a well defined exploitability should be the outer limit. The Australian representative said that the definition in the 1958 Convention should be clarified and that there must be a precise outer limit, since no state was proposing that the coastal state should have rights to the center of the abyssal plain. He proposed that the continental shelf be defined in terms of the outer edge of the continental margin. UNCLOS III, **Official Records**, vol, 2, at 144, 147. The Mexican representative said that the exploitability criterion had certain disadvantages and that the literal interpretation of that criteron was the least satisfactory interpretation, the end of which, in fact, had been split by the emergence of the concept **of the common heritage of mankind. id.**, at 166.

On the other hand the General Assembly, apart from accepting the Maltese proposal for revision of the law of the sea and forming special committees for that purpose, expressed very clearly, through resolutions it passed in 1969 and 1970, that the definition of the continental shelf as contained in the Geneva Convention was imprecise and the international law on the subject was inconclusive. It further prohibited states from exploiting the resources of the area beyond the national jurisdiction, thus rejecting the literal interpretation of the exploitability, and dashing any hope that the criterion might be considered as part of customary international law. It furthermore passed resolution of General Principles which stated that there existed an area beyond the national jurisdiction, the precise limits of which were yet to be defined and declared the area in question as the common heritage of mankind (135).

c. State practice as reveals from the international and national legislation

The practice of states on the seaward limits up to 1958, as we pointed out below, was not uniform enough to form a rule of customary international law (136). According to a study made by the UNESCO's Secretariat for the Second United Nations Conference on the Law of the Sea in 1960 (137), during the two years after the conclusion of the Convention the practice of states had remained as before.

As Article 12 of the Convention prohibits states from making reservations to articles 1 to 3, states could not express their views of the criteria in the definition when they became parties to it. Therefore, acceptance of the Article had to be in the nothing or all the way fashion. It is not unlikely that had it been possible many states would have ruled out the exploitability criterion through reservations upon their ratifications. Indeed, France, in spite of prohibition, did not fail to make its revervation to Article 1 when it ratified the Convention:

> The expression "adjacent" areas implies a notion of a geophysical, geological and geographical dependence which ipso facto rules out an unlimited extension of the continental shelf (138).

This revervation to which the other governments did not make any objections was consistent with the French policy of opposing the exploitability criterion, the origin of which dates back to the Geneva Conference (139).

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(135) For the resolutions and information on them see, infra, VII, 1.

(136) See, supra, V, 2, C, cc.

(137) See, Synoptical table concerning the breadth and juridical status of the territorial sea and the adjacent areas (A/CONF.' 19/8).

(138) UNTS vol. 538, p. 336.

(139) See, supra V, 2, C, bb.

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According to a survey of national legislations of states made by the United Nations Secretariat in 1968 (140), out of 32 states whose legislations were surveyed, 15 states maintained claims on the basis of the Geneva formula (141); 2 states on that of the exploitability criterion alone (142); 4 states on that of the 200 metre depth criterion alone; (143) 1 state on that of 200 miles distance (144); 1 state on that of 100 mile distance (145), and 8 did not specify any limit at all (146). However, as the survey did not cover legislations of all states, any conclusion to be drawn from those data would remain incomplete.

According to another survey published in 1973 (147), 29 states made claims to the submarine areas in accordance with the Geneva formula (200 m. depth and exploitability) (148), five states in accordance with the exploitability criterion alone (149), four states in accordance with the 200 m depth criterion alone (150), eleven states preferred a 200 mile maritime zone (151), one state a 100 mile zone (152), one state 50 metre depth criterion (153), one state a 12 - mile maritime zone, (154) and 65 states did not specify the outer limits of their continental shelves (155).

In view of the present author, these data are conclusive against a view that Article 1 constituted, during 1960s, part of customary law on the basis of the legislation of the states. In fact, this result was expressed by Brown as early as 1971 when he said, in conslusion, that:

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(140) See, UNITED NATIONS SECRETARIAT, **Survey of National Legislation Concerning the Seabed and Ocean Floor Thereof, Underlying the High Seas Beyond the Limits of National Jurisdiction**, A/AC. 135/11, 4 June 1968 and Add. 1.

(141) Argentina, Australia, Denmark, Finland, Italy, Malaysia, Netherlands, New Zealand, South Africa, Sweden, USSR, Venezuela, Yugoslavia, Dominican Republic. India.

(142) Philippines and Norway.

(143) Ecuador. Ghana (100 fathoms), Senegal, and Ivory Coast.

(144) Chile.

(145) Dahomey.

(146) Irak, Iran, Kuwait, Brazil, Guatemala, Nigeria, UK, Mexico.

(147) See, Lay - Churchill - Nordquist (eds.), NEW DIRECTIONS IN THE LAW OF THE SEA, DOCUMENTS, vol. II, 871 (1973).

(148) Australia, Belgium, Denmark, Dominican Republic, Finland, France, D.R. Germany, F.R. Germany, Ghana, Honduras, India, Italy, Liberia, Malaysia, Mauritania, Mauritius, Netherlands, New Zealand, Nigeria, Portugal, South Africa, Sudan, Syria, Trinidad and Tobago, USSR, Venezuela, Republic of Vietnam, Yugoslavia.

(149) Iceland, Indonesia, Israel, Philippines, Norway.

(150) Ivory Coast, Pakistan, Senegal, Yemen.

(151) Argentina- Brazil, Chile, Costa Rica, Ecuador, El Salvador, Nicaragua, Panama, Peru, Sierra Leone, Uruguay.

(152) Dahomey.

(153) Cambodia.

(154) Colombia.

(155) Albania, Algeria, Bahrain, Bangladesh, Barbados, Bulgaria, Burma, Cameroon, Canada, People's Republic of China, Republic of China, Congo, Cuba, Cyprus, Equatorial Guiena, Ethiopia, Fiji, Gabon, Gambia, Greece, Guatemala, Guinea, Guyana, Haiti, Iran, Irak, Ireland, Jamaica, Japan, Jordan, Kenya, North Korea, Republic of Korea, Kuwait, Lebanon, Libya, Malagasy Rebublic, Maldives Islands, Ras al - Kaimah, Romania, S.Arabia, Singapore, Somalia, Spain, Sri Lanka, Tanzania, Thailand, Togo, Tonga, Tunisia, Turkey, UAE, UAR Netherlands, Western Samoa, Zaire.

Although, therefore, it is possible to discern a trend towards acceptance of the Geneva formula by both Parties and non - Parties to the Geneva Convention, there is still far too much variety in state practice to be possible to perceive, either in the legislation it self or in its application, any real pointers to the proper interpretation of Article 1 of the Geneva Convention (156).

However, at least, there is another view which argues to the contrary (157). According to that view, a survey of claims made in the period up to 1971 showed that 50 states, 20 of which were Parties to the Geneva Convention, maintained claims to the continental shelf rights which employed the exploitability criterion (with or without the 200 m depth criterion), by making reference to the Geneva Convention. Twenty - four states did not specify any seaward limits. But the latter claims, the argument continues, should be counted alongside the former ones because the main purpose underlying both of them were the same (158). Thus, adding the numbers of the former to those of the latter, according to the argument, one would have a fair body support which was representative of international community for formation of a rule of customary international law.

This author is, unfortunately, unable to accept that view. First, it is assumed that, among others, the Arab states bordering the Persian Gulf, having not specified any seaward limits to their continental shelves, could be counted alongside the states which maintained claims in accordance with the exploitability criterion. The assumption is wrong. The Gulf is a semi - closed sea, the depth of which does not exceed 70 fathoms. Its submarine area is fully exploitable. The claims of the bordering states therefore are covered by the 200 m. depth criterion. Whereas the exploitabalitiy criterion appiles to the submarine areas beyond the 200 m isobath if and when the superjacent waters admit of the exploitation of the resources of the seabed and subsoil. The Gulf States did not specify the seaward limits because physically there are no seaward as such; whole area is surrounded by a number of states. Consequently, the outer limits of the shelves of those states have been or will be determined by application of the rules on delimitation between neigbouring states. Therefore, it is not understandable what was the common purpose which underlay the declarations of the Gulf States and those of Chile, Peru and Honduras, which made claims to the ocean floors.

(156) THE LEGAL REGIME OF HYDROSPACE, 29 (1971).
(157) See, Hutchinson, supra note 1 at 119, and the sources cited therein.
(158) Id., at 116, 119.

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Secondly, many states which failed to specify any seaward limits and which are counted by the above - mentioned argument alongside those claims favouring the exploitability criterion clearly condemned the criterion in question, in the Ad Hoc Committee, the UN Seabed Committtee, and the Third United Nations Conference (159). For example, Irak said that the exploitabilitiy criterion was obsolete (160). Panama said that it was not objective and uniform (161). Trinidad and Tobago said that it should be abandoned (162). Australia, Canada, Argentina, which are considered as having applied at the material time the criterion in question made it clear at the UN forums that they relied more on the natural prolongation than on Article 1 (163).

Thirdly, Brazil and Costra Rica are counted alongside the states which favoured theexploitability criterion, but that was hardly the case. Costra Rica from very beginning, Brazil as of 25 March 1970 have defendede the 200 mile territorial sea, not the exploitability criterion.

This brings us to the conclusion that the exploitability criterion did not become a rule of general law, either in 1958 or in late 1960s. How could it have been? A criterion, the content and scope of which is not clear can hardly become a rule of general law.

(159) See, supra V, 2, E, c.
(160) id.
(161) id.
(162) id.
(163) id.

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VI- SEAWARD LIMITS AND CUSTOMARY INTERNATIONAL LAW PRIOR TO 1982

1. The North Sea Continental Shelf Cases: Article 1 and the Concept of Natural Prolongation

Introduction

The ICJ has had occasions to deal, in detail, with Article 2 of the Geneva Convention, while its concern with Article 1 has always been indirect and remained limited in scope and purpose (1). The first and most important case in which the Court gave its opinion on the status of the articles in question is the North Sea Continental Shelf cases of 1969, which undisputably laid the foundation of the law on the continental shelf (2). The subsequent international cases of the kind have, generally speaking, built on it, interpreting and sometimes improving on it.

As it is well known, F.R. of Germany, on one hand and the Netherlands and Denmark, on the other, had requested, by a Special Agreement, the Court to decide on the principles and rules of international law applicable to the delimitation as between them of the areas of the continental shelf in the North Sea, a dispute which they had not been able to solve through negotiations. The North Sea being a shallow sea, which nowhere exceeds 200m in depth, and its seabed being a geological continuity without any break in the gradient, the question of the seaward limits of the continental shelf was not raised. Besides,the case was decided on the basis of customary international law. Therefore, the applicability of the Convention as treaty law was not in question. However, the Court felt obliged to consider certain provisions of the Convention within the context of the customary law, in view of the legal ar-

(1) See, North Sea Continental Shelf Cases, Judgment, I. C. J. Reports. 1969; Continental Shelf (Tunisia / Libyan Arab Jamahiriya), Judgment, I. C. J. Reports, 1982.

(2) See, generally Friedmann, W., **The North Sea Continental Shelf Case - A Critique,** 64 AJIL 229 (1970); Grisel, **The Lateral Boundaries of the Continental Shelf and the Judgment of the Internatonal Court of Justice in the North Sea Continental Shelf Cases,** 64 AJIL 562 (1970); Johnson, **The North Sea Continental Shelf Cases,** 3 INTERNATIONAL RELATIONS, 522 (1969); Brown, **The North Sea Continental Shelf Cases,** 23 CURRENT LEGAL PROBLEMS, 187 (1970) ; D' Amato, **Manifest Intent and the Generation Treaty of Customary International Law,** 64 AJIL 892 (1970); Goldie, **The North Sea Continental Shelf Cases: A Postscript,** 18 NEW YORK LAW FORUM, 411 (1972); Goldie, **The North Sea Continental Shelf Cases: A Ray of Hope for the International Court,** 16 NEWYORK LAW FORUM, 325 (1970); Goldie, **The International Court of Justice's "Natural Prolongation" and the Continental Shelf Problem of Islands,** 4 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW, 237 (1973); Chaturvedi, **the North Sea Continental Shelf Cases Analysed,** 13 INDIAN JOURNAL OF INTERNATIONAL LAW, 481 (1973); Murray, **The North Sea Continental Shelf Cases: a Critique,** 24 JAG. JOURNAL, 887 (1969-70); Nelson, **The North Sea Continental Shelf Cases and Law Making Conventions,** 35 MODERN LAW REVIEW, 52 (1972).

guments the parties made during the proceedings. More importantly, it laid down general principles regarding the legal basis of the continental shelf which have been considered as related to the seaward limits as well.

A - Legal Arguments of the Parties

Denmark and the Netherlands contended, both on conventional basis and on a customary law basis, that the delimitation was governed by the mandatory principle of equidistance. In the first place, they argued that the equidistance principle as reflected in article 6 of the Convention was binding on F. R. of Germany, since the latter, although not a party to the Convention, had, by its conduct and statements, unilaterally, assumed the obligations arising from the Convention, or had recognized it generally as applicable to the delimitation of the continental shelf. In the second place, they advanced the view that even if article 6 was not opposible to Germany as treaty law, it was opposible to it as part of customary international law, because the principle in question had gained the status of the customary law, binding all states, including Germany. (3) That contention they based on both the positive law, which was, in turn, based on the practice of states and on what they called as the natural law of the continental shelf. According to the latter, the rights of the coastal state derive from the sovereignty over the land territory, of which the shelf was a natural prolongation into and under the sea. However, they claimed that the test of prolongation (appurtenance) must be proximity or rahter closer proximity. That is, all the parts of the shelf which were closer to a particular coastal state than to another or.e should be considered as appurtenant to the coast of the former rather than that of the latter. Thus, they identified the concept of natural prolongation with the notion of proximity. From that premise they proceeded to the view that the delimitation must be effected in such a way as to give to each of the states concerned all the areas which were nearest to their coasts. (4)

On the other hand, F. R. of Germany denied the obligatory character of the equidistance principle for the states not parties to the Geneva Convention. It contended, in the main, that the correct rule to be appled for the delimitation of the continental shelf in the North Sea, with its peculiar conditions, was the rule according to which each of the states concerned had a "just and an equitable" share of the available continental shelf in proportion to the length of its coastline or the sea frontage. (5) It also argued, in the alternative, that if the equidistance principle was held as applicable to the delimitation in question, the configurations of the German coast constituted a special circumstance, such as to justify a departure from the application of the equidistance principle. (6)

It was in response to those questions that the Court referred to some provisions of the Convention and made some important but controversial findings.

(3) See, North Sea Continental Shelf, Judgment, I. C. J. Reports, 19 - 20 (1969).
(4) id. at 28, para. 37.
(5) id. at 20, para. 15.
(6) id. at 21, para. 14.

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B- The Concept of Natural prolongation and Article 2

In dealing with the thesis advanced by F. R. of Germany that each of the states concerned should have a "just and equitable", share of the shelf in proportion to the length of its coastlines the Court made the following observations:

> "More important is the fact that the doctrine of just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of 1958 Geneva Convention though quite independent of it - namely that rights of the coastal state in respect of the area of the continental shelf that constitutes a natural prolongation of its land territory into and under the sea **ipso facto and ab initio,** by virtue of its sovereignty over the land and as an extension of it in exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (as many states have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is "exclusive" in the sense that if the coastal state does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair but no one else may do so without its express consent." (7)

Consistent with this principle, the Court then rejected the German view of just and equitable share of shelf:

> "It follows that even such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or another of these states affected. The delimitation itself must indeed be equitably effected but cannot have as its object the awarding of an equitable share as such at all - for the fundamental concept involved does not admit of there being anything undecided to share out. (8)"

C- The Concept of "adjacency" or proximity

The Court's observations on the Netherlands - Denmark argument shed some light on the meaning of the concept of adjacency and further clarify what it understood of the concept of natural prolongation in relation to proximity.

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(7) **id.** at 22, para. 19.
(8) **id.** at. 22, para. 20.

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According to the Court, such vague terms as "near", "close to its shore", "off its coast", "in front of the coast", "in the vicinity of", "opposite", "neighbouring the coast", "adjacent to", "contiguous", do not imply absolute proximity. Even the most frequently used term adjacency does not convey such a meaning:

> "It is evident that by no stretch of imagination can a point on the coast situated, say a hundred miles, or even much less from a given coast be regarded as adjacent to it or to any coast at all, in the normal sense of adjacency, even if the point concerned is nearer to some one coast than any other. This would be even truer of localities where physically the continental shelf begins to merge with the ocean depths." (9)

After this observation the Court made its crucial statement that:

> "(t)here seems, in consequence, to be no necessary, and certainly no complete, identity between the notions of adjacency and proximity; therefore, the question of which part of the continental shelf "adjacent to" a coastline bordering more than one state fall within the appurtenance of which of them, remains to this extent an open one; not be determined on the basis exclusively of proximity." (10)

For these reasons the Court concluded that:

> "Hence it would seem that the notion of adjacency, so constantly employed in a general sense and does not imply any fundamental or in" herent rule, the ultimate effect of which would be to prohibit any state otherwise then agreement from extending continental shelf rights in respect of areas closer to the coast of another state". (11)

Comparing the notion of the proximity with the principle of natural prolongation, the Court laid down the basic pillar of the law of the sea on the continental shelf, which was to intrigue the minds of many in the subsequent years:

> More important than the notion of proximity appears to be the principle - constantly relied upon by all the Parties of the natural prolongation or continuation of the land territory or domain or land sovereignty of the coastal state, into and under the seas, via the bed of its territorial sea which is under the full sovereignty of that state. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal state because - or not only because - they are near it. They are near it of course; but this would not suffice to confer title... What confers the ipso jure title which international law attributes to the coastal state in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal state already has dominion - in the sense that, although covered with the water, they are a polongation or continuation of that territory, an extension of it under the sea. (12)

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(9) Id. at 30, para. 41.
(10) Id. at. 30, para. 42.
(11) Id. at 30-31,, para. 42.
(12) Id. at. 31, par. 43.

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D- The Court's Statement concerining Articles 1-3

As we have already indicated, no question was raised as to the seaward limits of the shelf in the North Sea and the Court was exclusively concerned with the delimitation of the continental shelf areas in the said sea. However, as a part of its study of the legislative history of the equidistant principle as contained in Article 6 of the Convention, which Denmark and the Netherlands claimed formed part of customary international law, the Court had to deal with the first three articles in the context of Article 12 concerning reservations. The article in question prohibited states from making reservations in respect of the said articles. (13) According to the Court, the fact that Article 12 provided the Parties with the faculty of making reservations in respect, inter alia, of Article 6 was a clear indication that the article in question and consequently, the equidistance principle contained in it were not considered in 1958 as part of customary law because, the Court said, "it is a characteristic of purely conventional rules and obligations that in regard to them, some faculty of making unilateral reservations may be... admitted". (14) On the contrary, the Court continued, "in the case of general or customary law rules and obligations which by their very nature, must have equal force for all members of international community and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any of them in its own power", such a faculty of making reservations in respect of those rules and obligations was not conferred on the Parties. (15) Consequently, it said, when such rules of customary law nature were embodied in certain provisions of a convention, the expectation was that those rules would be excluded form the scope of the right of the parties to make reservations. That expectation, the Court explained, was fulfilled by Article 12 of the Convention which prohibited states form making reservations in respect of the first three articles. Because, the Court added, those articles were considered in 1958 as reflecting or crystallizing, received or at least emergent rules of custormary internationl law relating to the continental shelf. Among them it cited the rules concerning seaward extent of the continental shelf; the juridical character of the coastal state's entitlement; the nature of the rights exercisable; the kind of the natural resources to which those rights related; and the preservation intact of the legal status of the superjacent waters and of the air space above it. (16)

As Article 6 was not among those rules, the Court concluded, it was fair to assume that it was not considered as part of customary international law.

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(13) Article 12 reads as follows:

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

(14) North Sea Continental Shelf, Judgment, I.C.J. Reports, 38 (1969).

(15) Id. at 39.

(16) Id.

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E- The concept of natural prolongation and the question of limits

a- Natural Prolongation in geological sense

According to one school of thought, (17) the Court enunciated the principle of natural prolongation in a geological sense. The continental shelf being the submarine areas geologically identical with, even a part of, the land territory over which the coastal state exercises its sovereignty, the exclusive rights of the latter derives from that relationship. Therefore, what is the basis of the rights is conclusive of the extent of the rights as well.

The approach of this theory to the Geneva Convention and to its rules on the outer limits is interesting. It suggests that the submarine areas up to a depth of 200m contour should be considered as being adjacent to the coastal state and as such subject to its jurisdiction, but the area beyond it would become so when it becomes exploitable, provided that it is still adjacent. (18) However, it considers the adjacency as meaning, not closeness, but the geological identity between the emergent and submerged land. (19) Therefore, the continental shelf proper and continental slope which are the same as the land territory in geological composition but which are different only with regard to the contours of the seabed, (20) are considered to be the natural prolongation of the continent (21). Consequently, for the purpose of the general law, the outer limit of the continental shelf is said to coincide with the base of the slope (22). As the proponent of this theory is Jennigs, it would be proper to study his views in some detail.

After having dismissed the argument that under the exploitability criterion the oceans of the world might eventually become national lakes (23), Jennings carefully studies the Truman Proclamation and the Court's Judgment and concludes that the reasons which underpinned the Proclamation were not different from those which led the Court to enunciate the concept of natural prolongation (24). He refers to the Court's statement that the principle of natural prolongation is "the most fundamental

(17) See, Jennings, **The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment**, 18 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 819 (1969); Anand, LEGAL REGIME OF THE SEABED AND THE DEVELOPING COUNTRIES, 75 (1975); Anand, **Legal Continental Shelf**, in Anand (ed). LAW OF THE SEA: CARACAS AND BEYOND, 160-63 (1980). And many states at the Caracas Session of the Third United Nations Conference on the Law of the Sea, UNCLOS III, Official Records, vol. 2.pp. 144 et seq.

(18) Jennings, supra note 17, at 823, 829.

(19) **Id.** at 824.

(20) **Id.** at 829.

(21) **Id.**

(22) **Id.**

(23) **Id.** at 821.

(24) **Id.** at 822.

of all rules of law relating to the continental shelf" and that the principle is enshrined in article 2, which makes it clear that the rights of the coastal state do not depend on occupation or proclamation and he concludes that the appurtenance and lack of need for any act of acquisition go together and depend on each other. So, he says, it is Article 2, rather than Article 1, to which one must look for the basic principle of customary international law (25). From this proposition he argues that the quality of the prolongation could only be identified by reference to physical facts, making geomorphological, or perhaps geological considerations paramount. In his view, the Court confirmed this point very clearly when it said that the continental shelf constituted the natural prolongation of the land territory of the coastal state and when it indicated that the institution of the continental shelf had arisen out of the recognition of a pyhsical fact, that the link between that fact and the law was responsible for the existence of the institution. Referring to the Court's rejection of the proximity theory of Denmark and the Netherlands, he concludes that the Court attached importance to the physical identity between the land and the continental shelf in terms "at least partly of geology" (26).

His consideration of Article 1 is accordingly based on the general meaning he attaches to the concept of natural prolongation. He considers the phrase 'adjacent to the coast' in Article 1 as qualifying the whole submarine areas with which Article deals and as comprehending the idea of natural prolongation (27). Having settled that, he turns to the question of how the concept of natural prolongation could be expressed in geological or geomorphological terms. He suggests that the continental shelf proper and the borderland are clearly subject to the national jurisdiction, and the abyssal plain is just as certainly beyond it (28). Being aware of the fact that under Article 1 it would not be easy to arrive at such a conclusion, he address es the question of the status of the 200m depth and exploitability criteria in that article. He suggests that the 200 m criterion was chosen as a solution **ad interim** because it was clear that on any view the coastal state's rights extended that far. That view, he says, accords with the adoption of the pragmatic criterion of exploitability. Furthermore, he continues, both the Convention and the practice do not confine the national jurisdiction to the geological continental shelf. (29)

In this interpretation of the coexistence of the 200m depth criterion and the exploitability criterion in Article 1, he points out that the 200m depth criterion should be so interpreted that it would be meaningful with the addition of the exploitability criterion. Accordingly, he suggests that for the purpose of the Convention,

(25) **id.** at 823.
(26) **id.** at 824.
(27) **id.** at 825. See, also Anand, THE LEGAL REGIME OF THE SEABED AND THE DEVELOPING COUNTRIES, 75 (1975).
(28) Jennings, supra note 17, at 826.
(29) **id**, at 828.

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the submerged areas up to 200m contour are **per se** 'adjacent' to the coast and as such certainly appertain to the coastal state, while the adjacent area beyond would become so when it is exploitable.

In order to see how far seaward the adjacent (natural prolongation) area extends, he turns to the geography and geology for guidance. In his opinion, the continental shelf and the continental slope are identical in their structure. The only difference, he says, is geomorphological, that is a difference in gradient (30). Referring to some statements of the Judgment, he argues that when the Court spoke of the natural prolongation, what it had in mind was not only the geological shelf (31). In conclusion, he says that, under general law, not under the Convention, the continental shelf and the continental slope are the natural prolongation of the land territory over which the coastal state has sovereign rights (32) but about the continental rise he expresses some doubts (33).

As to the place of the exploitability criterion in this context, he says that there have always been difficulties in reconciling the pragmatic exploitability test with the provision of Article 2 that vests the coastal state with inherent rights. But he adds that while Article 2 enshrines the basic principle of the general international law, Article 1 is an artifact designed for the purpose of the treaty only. Thus, Article 1 contains **an ad interim** solution for areas where the practical questions arise in practice. (34) Thus, he suggests that the exploitability criterion should be related to the basic principle but it should be applied as treaty law. The exploitability criterion, he continues, only serves to extend the particular treaty regime beyond the 200m depth, although it provides no clear cut outer boundary within the limit laid down by general law and embodied in the Convention itself in the term 'adjacent'. Finally, he concludes that the exploitability clause could now for the practical purposes be regarded as **functus officio**, and the extent of the continental shelf jurisdiction governed by the Convention be regarded as approximating to that sanctioned by the general law. (35) To summarise, as a matter of general law, he considers the continental shelf as comprising the continental shelf proper and the continental slope which, he says, are natural prolongation of the territory of the coastal state. The outer limit of the national jurisdiction is the base of the slope. The whole area landward of that limit is considered to be 'adjacent' to the coast, as the latter is considered as comprehending the natural prolongation.

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(30) **id.** at 829.

(31) For example, he refers to the statement of the Court reading "localitities where, physically the continental shelf begins to merge with the ocean depths" and the reference to the Norwegian Trough. id.at 830.

(32) At this point he also says that "this **a priori** conclusion is in process of confirmation by the state practice. For state's assumption of exclusive jurisdiction in granting of licenses has already extended in a number of instances to the continental slope." id. See, also Anand, supra note 27 at 65.

(33) He says that one cannot speculate about the continental rise because the geology itself is not certain about it.. id.

(34) **Id.** at 831.

(35) **Id.** at 832.

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The 200m depth criterion and exploitability criterion are said to be for the purpose of the Convention and therefore they were accepted as **ad interim** solutions. However, the areas up to 200m depth are considered as adjacent to coast without reservation. The area beyond would be so considered if and when it becomes exploitable, provided it is still adjacent. But within the definite limit arrived the exploitability criterion does not have any clear limit. In fact, it is considered as to be **functus officio.**

b- Other Views of the Concept

The Jennings' theory has been criticised mainly on the following grounds:

In the first place, it is argued that the Court dealt with a delimitatoin in an area where there is no continental slope or rise. Besides, it referred in its judgment to the continental shelf and not to the slope or to the rise. Had it intended the latter components of the seabed, it would have mentioned of them. Obviously, that it did not do. Therefore it is reasonable to read the concept of natural prolongation as referring to the geological shelf and not to the continental margin. Additionally, it is said that in view of the Court's reference to the Geneva Convention, it would not be reasonable to conclude that the Court decided that the coastal state had **ipso facto** and **ab initio** exclusive rights over the whole margin, regardless of whether or not they are exploitable (36).

Secondly, it is argued that there is no evidence that the Court employed the term natural prolongation to refer to the crustal geology. It may well be using it in geomorphological sense, to refer to the prolongation of the lands under the sea in the form of a horizontal plateau, because, it is argued, the Court said that "the continental shelf is, by definition, an area physically extending the territory of most coastal states into a species of platform." In fact, on the basis of the subsequent judgments, it is continued, one might say that the Court now considers the concept of natural prolongation as being a term of legal short hand (37).

The original source of that interpretation seems to be the above-mentioned dicta of the Court that the first three articles of the Convention were considered in 1958 as reflecting the customary law (38). It has been used, inter alia, to minimize the significance of the more articulate concept of natural prolongation in geological sense. Drawing on the drafting history of Article 1, and on the 1969 Judgment, **Ad Hoc** Judge Arechaga writes, in his separate opinion in the Tunisia/Libya Case, (39), that the concept of natural prolongation does not derive from any geological or

(36) See, BROWN, THE LEGAL REGIME OF HYDROSPACE, 33 (1971).

(37) See, Hutchinson, The Seaward Limit to the Continental Shelf Jurisdiction in Customary International Law, 56 BYIL 111, 148-50 (1985).

(38) See, supra note 14,15,16 and accompanying texts.

(39) See, Continental Shelf (Tunisia/Libyan Arab Jamahiriya,) Judgment, I.C.J. Reports, 100,110-117 (1982).

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geomorphological qualities of the submarine areas and that it merely means the continuation or extension of the coastal front of the coastal state (40). The natural prolongation, he continues, exists in any case where there is a coastal state, whatever might be the characteristics of the seabed or the depth of the water. The starting point of the Ad Hoc Judge is that the ILC had decided in early 1950s that the right to exploitation of natural resources of the submarine areas did not depend on existence of a geological continental shelf and that in response to opposition of shelf-locked states the Commission included the exploitability criterion in Article 1 which was accepted by the Geneva Conference (41). Referring to the above mentioned dicta of the Court he argues, without reservation, that the Court considered Article 1 with its exploitability criterion as part of customary law. From that proposition he proceeds to the view that as the accepted definition departed from the definition of geological shelf, the Court employed the term natural prolongation as meaning the extension of the coastal front of the coastal state and as not something requiring particular geological or geomorphological characteristics. Otherwise, he says, that would challenge the rights possessed ab initio and ipso facto by virtue of Articles 1 and 2 by the coastal states which lack geological or geomorphological natural prolongation. He further says that to argue that the 1969 Judgment interpreted the natural prolongation in a geological or geomorphological sense would imply that the Court denied the continental shelf rights to such states as Peru, Chile, and Norway which do have continental shelves under the Geneva Convention but do not have geological or geomorphological natural prolongations (42). That, he says, would be to attribute to the Court the intention of amending the definition contained in Article 1, which could not be the case because the court considered it as part of the customary law (43).

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(40) This view was partly taken up by U.S. in the Gulf of Main Case in 1984. According to the US reply the concept of natural prolongation which the Court enunciated in 1969 certainly had nothing to do with the geological processes and events occuring millions of years ago. See, I.C.J. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Main Area (Canada/ United States of America), Reply submitted by United States ofAmerica, 12 December (1983), p. 63. However, The U.S. view of the concept of natural prolongation differed from that of Arechaga in that while the former recognized that in the cases where there were two separate continental shelves the geomorphology might play a role (id. at 67), the latter did not recognize such a possibility.

(41) See, supra note 39, at 111. For the discussion in the Commission with respect to this topic See, supra V,2,B,c. Although the Commission and the Conference partly departed from the definition of the geological shelf there is no indication that they intended the areas beyond the continental margin to be put under the national jurisdiction. Geological shelf does not mean the whole margin, it is only a part of it.

(42) It is interesting to see that Norway acted together with the wide margin states in the Third United Nations Conference, and it is among the states that now possess the biggest areas of the maritime spaces, and that Chile has just extended its continental shelf around some of its islands in the Pacific Ocean to 350 miles from the coast, See infra, VIII, 5. Needless to say that it is also among the states that benefited the most from the acceptance of EEZ.

(43) See, supra note 39, at 113.

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The Court itself made similar statements in the same case (Tunisia/Libya Case), although for different purposes (44). Both Tunisia and Libya having based their arguments on the geological or geomorphological concept of natural prolongation of their land territories, the Court felt obliged to discuss the question of whether the concept of natural prolongation should be defined and identified by application of the science of geology or geomorphology, as distinguished from the legal principles (45). Contrary to views advanced by the parties, the Court expressed the view that, although the continental self had arisen out of recognition of a physical fact, it acquired at an early stage of its development a more extensive connotation and became a concept of law. Thus, the Court said, the continental shelf as a concept of law was differentiated from the physical continental shelf as it was understood by the geographers. The Court explained that widening of the concept for legal purposes took place by the exploitability criterion being included in article 1 (46). In its view, while the first part of the definition by reference to 200m isobath approximately corresponded to the outer limit of the continental shelf in physical sense, the second part of the definition by reference to the possibility of exploitation of the natural resources was clearly open-ended, and emphasised the lack of identity between the legal and geological or geomorphological continental shelf. Although that definition was for the purpose of the Convention text, the Court continued, it was considered by the 1969 Judgment as having been one of those [articles] as regarded in 1958 as "reflecting or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf".

Thus, the Court laid down the foundation for the view that the concept of natural prolongation should not be understood solely in geological or geomorphological terms but in the context of international law of which it had become a part (47).

However, although it rejected the Libyan contention that the natural prolongation should be understood in a geological sense and the delimitation should be effected as a result of identification, by aid of geology, of respective natural prologations, it did not dismiss the possibility that where there were two separate natural prolongations, marked by a major discontinuity, the maritime boundary should be drawn alongside with it (48).

Thirdly, it has been argued that the debates of 1950s of the ILC do not support the 1969 Judgment that the coastal state's title is based on submarine geology or geomorphology. Several states addressed the point at the Geneva Conference but the idea was rejected unequivocally. Additionally, the argument goes, there exists a considerable evidence that the ILC and the Conference justified the continental shelf regime by reference to considerations of policy quite different in nature from those of

(44) See, id. at 45-47
(45) We will deal with this topic under a separate heading further below. see, infra VIII, 2,B.
(47) id.
(48) id. at 57.

geology referred to by Jennings (49). The Panamian proposal which was based on the natural prolongation argument and which would have put the whole continental terrace under the national jurisdiction of the coastal state was rejected (50).

Fourthly, it has been contended that the term adjacency was accepted in 1958 as restricting the outer limits; it cannot be understood to achieve the very contrary of the intention of the framers of the Convention. Still less, when it is remembered that the concept of contiguity as a means of territorial acquisition has been rejected in the international law (51). Additionally, the critics continue, the Jennings' theory does not mention of the qualification made by the Court that a point on the continental shelf, say 100 miles from the shore cannot be regarded as adjacent to it, which was intended to restrict the extension of the limits (52).

Fifthly, it has been contended that if we accept the proposition that the right to the continental shelf derives from the factor of its being a natural prolongation of the land, then all the countries of that continent should have the right to share, not only those situated on the coast (53).

Last but not least, it has been argued that the concept of the continental slope cannot be sustained on the basis of the state practice. Absence of protests against granting licenses alone should not be determinative of the case; because in many cases states have not much interest in such activities. Besides, resolutions of the General Assembly in late 1960s and early 1970s should be considered as collective protests against excessive extensions of national jurisdictions (54).

c. Evaluation

Although the Court undisputably decided that "the most fundamental of all the rules of law relating to the continental shelf "was the principle of natural prolongation, a question as important as, if not more important than, that finding has yet to be answered: the sense in which the Court used the principle. Immediately below we will make an attempt to study the most possible meaning the Court might have attached to the principle in question.

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(49) See, Hutchinson, **supra** note 37 at 152; Andrassy, INTERNATIONAL LAW AND RESOURCES OF THE SEA, 171 (1970).

(50) Hutchinson, **supra** note 37, at 151-52.

(51) Andrassy, **supra** note 49, at 172.

(52) See, Friedmann, **Selden Redivivus-Towards a Partition of the High Seas**, 65 AJIL 757, 762 (1971). He also argues that Jennings substituted "adjacency" for "exploitability". **id.**

(53) Andrassy, **supra** note 49, at 172.

(54) **id.** at 173-74. Andrassy also refers to the origin of the sediments as being land from which material is carried by rivers into the sea and concludes that according to the natural prolongation concept as advanced by Jennings the non-coastal states of the continent of which the continental shelf is a continuation and from land of which the sediments have come should have a share in the resources. **id.** at 172-73. At the Third United Nations conference this theme was taken up by some landlocked states. See, **infra** VII, 2.

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aa. The Concept of natural prolongation as understood by the Interational Law Commission

When the ILC began considering in 1950 the subject of the continental shelf, it was well aware of and probably affected by the theories advanced by the scholars as to the legal status of the seabed of the high seas (55), and legal bases on which the unilateral declarations of states were sought to be justified (56).

At the second session, the Commission's member Yepes made a very long statement as to the legal status of the continental shelf (57). He said that there were various theories relating to the formation of the continental shelf but among them he preferred the theory of accession, according to which the continental self was formed as a result of a process of sedimentation through which the coastal state recovered on the seabed the land it had lost by erosion. However, he admitted that accession by sedimentation was a hypothesis and perhaps a legal fiction which he believed would serve to establish the continental shelf right of the coastal state (58).

The first and most important conclusion which he drew from that legal fiction was the rule of contiguity, according to which the continental shelf was nothing but the submarine continuation of the territory (59). From that premise he proceeded to the view that a state should exercise over its continental shelf the same right of sovereignty as it exercised over its land territory. Consequently, he proposed that theories of **res nullius** and **res communis** should be rejected (60).

However, the Commission did not address that question immediately. It first decided on the principle that the coastal state could exercise control and jurisdiction over the seabed and subsoil of the submarine areas contiguous to the coast, but outside the territorial sea for the purpose of exploration and exploitation of its natural resources (61). It further decided that such control and jurisdiction did not depend on the presence of a continental shelf in geological sense (62).

But at the 67th meeting, it took up the question of the legal status of the continental shelf when Yepes proposed that the Commission take a decision on whether the continental shelf was **res nullius** or **res communis** or the submarine extension of the coastal state's territory (63). The proposal met with a favorable reaction and Brierly clarified the point:

(55) For the scholarly opinions on the status of the seabed see, supra IV.
(56) See, supra III.
(57) See, I YILC 216-18 (1950).
(58) **Id.** at 217. para 1. a.
(59) **Id.**, para. 1.b.
(60) **Id.** para 1.c.
(61) See, **id**, at. 218 - 21.
(62) This aspect of the problem has been addressed before, see, supra V,2, B, c.
(63) See, **supra** note 57, at 226, para 1.

[t]here are three possibilities for that area of control: it might be argued that it was res nullius. That must be counted out as being incompatible with the principle adopted previous day. If the shelf were res nullius, it could be acquired by any state, whether littoral or not; and that was inadmissable. It could be argued again that it was res communis; that too was incompatible with the previous day's decision. Res communis was common property and the continetal shelf in that case could not be subject to the conrol and jurisdiction of any particular state.

He accordingly suggested that:

"It would be better to say that the continental shelf belonged **ipso jure** to the littoral state... If this right belonged ipso jure to the littoral state there was no necessity for the latter to make any claim or annexation. Such a proclamation or annexation might of course serve to indicate that a state had begun to work its zone of control, but legally it was not necessary" (64).

Hudson, taking into account the discussions, made the following proposal:

Is submarine area (seabed and subsoil) of the continental shelf off the coast of a littoral state and outside the area of its territorial waters (1) **res nullius**, (2) **res communis**, (3) subject **ipso jure** to the control and the jurisdiction by the littoral state or (4) subject to the exercise of control and jurisdiction by the littoral state for the limited purpose of exploration and exploitation of the natural resources? (65)

The discussions preceding and subsequent to the proposal were generally favorable to the **ipso facto** theory. The early policy decisions of the Commission, as Brierly pointed out, were indicative of what kind of decison the Commission would take on the status question. No one defended the res nullius theory. But the res communis theory found a defender, apart from all the time champion of the high seas freedom, Scell, (66) in person of Hsu who advanced the view that the exploration and exploitation of the natural resources of the seabed and subsoil of the high seas shou'd be entrusted to an international agency for the benefit of international community (67).

The Commission, expectedly, rejected the res nullius theory unanimously; the res communis theory by 8 votes to none, with one abstention, and the ipso jure

(64) id.at 227. Brierly's statement was welcomed by Cordova, Yepes and Amado, id, at 228.

(65) id. at 228, para. 16.

(66) Scelle was against the doctrine of the continental shelf. He saw it as destroying the freedom of high seas. That was why he mostly did not participate in the votings, and when he participated his aim was to show his disapproval of the doctrine or to side with those who defended proposals of lesser evil. For example in 1953 while the seaward limits of the continental shelf were being discussed he said that: "as the Commission was seeking to define something which did not exist, its efforts would never meet with success..." I YILC 82 (1953). The efforts of the Commission met with success but his prophecy that the high sea freedom would be damaged has come true, perhaps far beyond what he predicted.

(67) See, I YILC 215-16 (1950).

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theory was adopted by 6 votes to 4 (68).

The Commission stated, in its report of the same year to the General Assembly, that:

> [t] he seabed and subsoil of the submarine areas above referred to were not be considered as either res nullius or res communis. The seabed and subsoil were subject to the exercise by the littoral state of control and jurisdiction for the purpose of the exploration and exploitation. The exercise of such control and jurisdiction were independent of the concept of occupation (69).

The special rapporteur, acting on the basis of the policy decisions by the Commission, produced his first draft articles for the consideration of the Commission in 1951 (70). Article 2 which was partly amended by the Commission explicitly embodied the basic idea underlying the ipso jure theory:

> "The continental shelf is subject to exercise by the coastal state of control and jurisdiction for the purpose of exploration and exploitation of its natural resources"(71).

The commentary accompanying that article gave the following reason why the res nullius theory was rejected:

> "It would seem to serve no purpose to refer to the seabed and subsoil of the submarine areas as res nullius, capable of being acquired by the first occupier. That occupation might lead to chaos, and it would disregard the fact that in most cases the effective exploitation of natural resources will depend on the existence of installations on theterritory of the coastal state to which the submarine areas are contiguous" (72).

The commentary continued to state that:

> The exercise of the right of control and jurisdition is independent of the concept of occupation. Effective occupation of the submarine areas in question would be practically impossible; nor recourse be had to a fictional occupation. The right of the coastal state under Article 2 is also independent of any formal assertion of that right by the state (73).

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(68) id. at 229
(69) See, II YILC 384 (1950).
(70) DOC. A/CN. 4/42, Deuxieme rapport de M.J.P.A. Francois, rapporteur special, I YILC 1951, at 75, 99, 102.
(71) id. at 141.
(72) id. at 142.
(73) id.

As to the res communis theory the commentary explained:

> In some circles it is thought that the exploitation of the natural resources of the submarine area should be entrusted not to the coastal state but to the agencies of international community generally. In present circumstances, however, such internationalization would meet insurmountable practical difficulties (74).

The study of the drafting history of Article 2 up to this point tells us why the res nullius and res communis theories were rejected, but it says little as to why the ipso jure theory was adopted. For a better understanding of it we propose to refer to the statements by the members.

The possibility that the theory might depend on the customary law is irrelevant. Most of the members, including the rapporteur, said that the question of the continental shelf was new and a matter which concerned with the development of the law (75). Only Yepes and Amado expressed the view that the existing practice constituted an established custom or at least an evidence of an embrionic customary law (76). This last view apparently depended on the geological facts.

The Comission's comment on article 2 in 1951 made it clear that the continental shelf rights did not depend on the customary law (77).

However, later on in 1953, Lauterpacht explicitly argued that the Commission would be codifying existing practice if it adopted the sovereignty of coastal state over its continental shelf (78). On the other hand, for such members of the Commission as Yepes, Cordova, el-Khory, Alfaro,Amado, Lauterpacht, Pal, the fact that the continental shelf constituted a natural prolongation of the territory of the coastal state came close to constitute a rule regarding the legal basis of the shelf (79).

(74) Id. at 142, para. 2.

(75) For example, Francois said, at the 66th meeting, in reply to Amado who considered that the duty of the Commission was the formulation of the existing regulations on the continental shelf, that a large number of proclamations by states already existed which constituted a starting point for the formulation of the positive law. I YILC 215 (1950). Spiropoulos stated that there was no rule of international law on the subject and they faced with a vacuum. Id. at 220. Briefly said with regard to the notion of ipso jure rights, that the question of the continental shelf was a matter of development of law. id, at 230.

(76) See, id at 218 and 220 respectively.

(77) See, II YILC 142 (1951).

(78) See, I YILC 86 (1953). That view was disputed by Hsu (id. at 87) and Liang (id. at 86) that the practice constituted a tendency at the most.

(79) See, Yepes' view I YILC 215, 226 (1950); I YILC 271 (1951); Cordova's view, I YILC 220, 229, 230, (1950); El-Khory's view, I YILC 221 (1950); Lauterpacht's view, I YILC 86 (1953); Pal's view, I YILC 133, 139 (1956); Amador's view, I YILC 271 (1951) and Alfaro's view, I YILC 81 (1953).

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The commentary on Article 2 as amended, in the light of observations by the Governments, (80) in 1953, to substitute the expression "sovereign rights" for "control and jurisdiction" echoed the general feeling of the Commission as to the legal basis of the rights in question (81). After saying that considerations relevant to that matter could not be reduced to a single factor, it repeated that the principle of sovereign rights could not exclusively be based on the recent practice. However it added that the practice itself was considered by the Commission to be supported by the considerations of legal principle and convenience. "In particular", it said "once the seabed and subsoil have become the object of active interest to states, with the view to exploration and exploitation of their resources, it is not practicable to treat them as res nullius, i.e. capable of being acquired by the first occupier. It is natural that coastal state should resist any such solution. Moreover, in most of the cases the effective exploitation of natural resources must depend on the existence of installations on the territory of the coastal state. Neither is it possible to disregard the phenomenon of geography, whether that phenomenon is described as propinquity, contiguity, geographical continuity, appurtenance, or identity of submarine areas in question with the non-submerged contiguous land. All these considerations of general utility provide a sufficient basis for the principle of sovereign rights of the coastal states.. " (82).

At the Eighth Session in 1956, the Commission did not change Article 2; neither did it change the commentary on it (83). However, during deliberations some members emphasised the close relationship between the legal basis of the continental shelf and its seaward extension. While the appropriateness of keeping the term continental shelf was being discussed, Pal pointed out that:

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(80) The Chilean Government found the continental shelf rights as recognized by the Commission to be too restricted and demanded that the coastal state should have sovereingty over the continental shelf on the following grounds:
In the first place, it said that the shelf was actually an extension of and part of the national territory.
Secondly, it resorted to the necessity of conserving and protecting the fishery stocks against overexploitation by foreign states.
Thirdly, it resorted to the concept of security, and the right of self-preservation.
Fourthly, it resorted to the state practice as confirming its claims, See, II YILC 243 (1953).
The Government of the United Kingdom explicitly said that the continental shelf was not res nullius and was independent of the concept of occupation. id. at 267.
The Israeli Government observed that the continental shelf should be res nullius but capable of being acquired only by the coastal state to the coast of which it was contiguous. id, at 258.
The Swedish Government observed that it regarded "any proposal to grant rights over the continental shelf to the coastal state as being de lege ferenda", and considered that such a proposal could only be put into effect by an international convention. id at 263.

(81) The commentary repeated all the reasons which the 1951 commentary gave for legal basis of the continental shelf.

(82) II YILC 215 (1953).

(83) See, II YILC 297-98 (1956).

> The high seas being common property, submarine areas could not be partitioned off for the exclusive use of the coastal states to the exclusion not only of the coastal states not possessing a continental shelf but also of the land-locked states. The only way out to support the right was to treat the continental shelf as an extension of the mainland which was the only possible justification for admitting that the coastal state had a preferential claim to exploitation (84).

Although the Commision's commentary on Article 2 did not give pride of place to the concept of natural prolongation and cited it alongside the other considerations, that should not undermine the importance of the concept as the basic justification for the recognition of the continental shelf rights. The Commission's attitude is explainable and understandable only when one remembers that some members and some states sought to extend the jurisdiction of the coastal state not only to the submarine areas but also to the superjacent waters on the basis of the concept of natural prolongation. That concern was stated by Fitzmaurice at the Eighth Session with regard to a proposal by Garcia-Amador that the term continental shelf should be replaced by the term "submarine areas":

> "A further reason for dispensing with the term "continental shelf" was the tendency to use the concept for purposes for which it was never intended, as a foundation for claims to exclusive rights not only over the seabed and subsoil, but also over the superjacent waters... And since that tendency was encouraged by the notion that the continental shelf was a geographically definable horizontal projection, it was one of the merits of the Chairman's proposal that it dispensed with the concept as a carefully defined area and substituted the correct notion of adjacent areas lending themselves to the exploitation" (85).

In conclusion, there is nothing in the preparatory work of the Commission which would show that the concept of natural prolongation was not the basic reason on which the exclusive claims of the coastal state to submarine areas were justified. The reasons of customary law, safety, or effective cooperation from the shore were all complementary to the concept of natural prolongation. What conferred indisputably the inherent rights on the coastal state could not have been only safety or other similar considerations, as the continental shelf rights are merely resource-oriented. The safety problem should be dealt with within the context of the territorial waters. However, the fear that if the res nullius theory were accepted, the developed countries could occupy the seabed areas off the coasts of under-developed countries and thus could constitute a potential danger to their safety played a part in the theory in

(84) See, I YILC 133, 139 (1956).
(85) I YILC 137 (1956)

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question being rejected readily. But that consideration could hardly justify the exclusive rights of the coastal state over the submarine areas of the high seas which had hitherto belonged to the whole international community. It was the physical nexus between the territory ad the submerged areas that made it possible for the coastal state to claim sovereign rights over the areas in question.

bb. The Concept of Natural Prolongation as Understood by the Geneva Conference

At the Geneva Conference, the general (naked, as it were) concept of the continental shelf was recognized by an overwhelming majority of the states represented. Aside from Germany, Japan (86), (87) and Monaco (88) which defended, at the beginning, the freedom of high seas and establishment of an international mechanism for the exploitation of the seabed and subsoil of the high seas, all the other states did not question the validity of the concept. Some states explicitly said that they rejected the theory of occupation and favoured the attribution ipso jure of rights to the coastal state (89). Probably, the most remarkable observation on Article 68 came from the Philippine representative when he said: "Article 68 should be regarded as merely declaratory of the sovereign rigths of the coastal state to explore and exploit the natural resources of its continental shelf, the existence of such rights was not derived from any specific provision of international law but was inherent in the sovereignty which the coastal state exercised over the adjacent land territory" (90).

On the other hand, in reply to the German representative, many other representatives argued that the continental shelf being a natural prolongation of the territory of the coastal state, it should belong to the latter and not to the international

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(86) Federal Republic of Germany, as it has been indicated before, was of the view that under the international law in force the coastal state had no exclusive rights over the continental shelf beyond the territorial sea. Any one was free to explore and exploit the submarine areas in question, provided that other legitimate uses of the high seas were not hampered. Accordingly, it proposed that the exploitation of the seabed and subsoil of the high seas should be regulated in such a way that all the states could take part in such an exploitation. See, DOC. A/C CONF. 13/C. 4/L.1, UNCLOS I, Official Records, Vol. VI, at 125-26.

(87) The Japanese representative said at the Fourth Committee that although there was a need to exploit the resources of the continental shelf to the benefit of mankind, he did not find it necessary to vest the monopoly of the continental shelf rights in the coastal state. See, id. at 14.

(88) The representative of Monaco said that the continental shelf rights were not yet recognized by international law. The articles submitted by the Commission constituted only an adequate **interim solution**. The possibility of internationalization of the exploitation of the continental shelf was not excluded by the Commission, at least for sometime in the future. Id. at 18.

(89) Argentina, id. at 2-3; Chile, id. at 16; India, id. at 12.

(90) id. at 8.

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community as a whole (91). Some states resorted to the same concept either to justify the coastal state's sovereignty, as opposed to the "sovereign rights", or "exclusive rights", over the continental shelf, (92) or to justify exclusive claims to the super jacent waters (93). Still others relied on the concept as justifying the extension of the jurisdiction of the coastal state to the outer edge of the continental margin (94). On the other hand, few states referred to the safety of the coastal state to dismiss the proposal by Germany (95). But that was with regard to the acceptance or rejection of the theory of res communis; it had nothing to do with the limits. For example, Argentina, Lebanon, and Brazil referred to the safety together with specific proposals for limiting the shelf or with other specifications (96).

A few proposals submitted to the Conference by some states are instructive as to how states regarded the legal nature of the continental shelf. For example, Mexico made a proposal recognizing the full sovereignty of the coastal state over the continental shelf and giving full effect to the idea of inherent rights. But it was not accepted by the Fourth Committee mainly as it incorporated the term "sovereignty" (97). However, the inherent nature of the continental shelf rights was recognized and embodied in the paragraphs 2 and 3 of Article 2 (then 68) when the proposals of

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(91) See, Dominican Republic, id. at 9; Colombia, id. at 9, para. 9; Peru, id. at 10, para. 16, but no reference to the natural prolongation; Yugoslavia saw the Germany's proposal as an attempt to reverse a situation already accepted as an effort to restrict the advantages of the shelf to the highly industrialized countries. Id. at 11, paras. 11-4; the Cuban representative considered the continental shelf as an accepted practice and therefore did not agree with the Germany's proposal. Id. at 25, para. 24; The Indian representative also expressed his opposition to the proposal in question. Id. at 12, para. 8. Also see: Ceylon, id. at 13, para. 20; Israel, id. at 17, para. 26; Brazil, id. at 36; and the other states simply ignored the proposal in question and discussed the substance of the matter.

(92) For example, Argentina, id. at 53, para. 28-30; Mexico, id., at 58, para. 3.

(93) Chile, id. at 16, para. 12-18 and 57, para. 31.

(94) Dominican Republic, id. at 9; Portugal, id. at 15; Chile, id, at 16; Venezuela, id. at 21; United Arab Republic, id. at 27; Panama, id. at 32; El-Salvador, id. at 24; Philippines, id. at 42; Argentina, id. at 53.

(95) See, Argentina, id: at 43; Peru, id. at 11; Lebanon, id, at 14.

(96) Argentina made proposals which would have extended the jurisdiction of the coastal state to the continental terrace. DOC. 13/C. 4/L.6, reprinted in UNCLOS, I Official Records, VOL. VI, at 127. Lebanon and Brazil insisted on the 200m depth criterion and were against that part of the submarine areas being used by any country other than the coastal state. Id. at 14, and 36 respectively. Besides, Lebanon was categorically against the exploitability criterion. In spite of that, Ad Hoc Judge Arechage, in his seperate opinion in Tunisia/Libya Continental Shelf Case, refers only to that part of the statements by those governments which refer to the safety, without mentioning of other parts of them, in his attempt to show that the concept of natural prolongation was not understood in a geophysical sense. See, Jimenez Arechage, separate opinion, in Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports, 120.

(97) It read as follows:

The coastal state exercises sovereignty over the seabed and subsoil of the continental shelf and over the natural resources thereof, **to the exclusion of other states or virtual occupation not being a necessary condition** (emphasis added). A/CONF. 13/C. 4/L.2, id. at 126.

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Argentina, (98) and Cuba (99) were accepted by the Conference. The first proposal read as follows:

> The rights of the coastal state are exclusive in the sense that if that state does not explore or exploit the continental shelf no other may undertake these activities without its consent.

The second proposal complemented the first:

> The rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any other express proclamation.

The latter proposal was submitted after the Fourth Commitee substituted the terms "exclusive rights" for the terms "sovereign rights", which had been accepted by the Commission, in the first paragraph of Article 68 (100). Although some delegations found it superflous, (101) the others considered it as an application of the principle that the continental shelf formed part of the territory of the coastal state (102).

It is pertinent perhaps to note that on a few occassions the proposals justified by their sponsors on the basis of the concept of natural prolongation were rejected by the Conference. That fact might give the impression that the majority of states did not favour the concept. But that was hardly the case. The proposals in question had their aim to extend the soverignty of the coastal state to the continental shelf with potential dangers with regard to the legal status of the superjacent waters. The Conference did not accept it, however sound the logic of the proposals might be. To say that the continental shelf should belong **ipso jure** to the coastal state because it forms the under-sea extension of its territory is one thing, but to claim sovereignty over both the seabed and subsoil of the continental shelf as well as over the superjacent waters on the same basis (as Chile claimed) is quite another thing. The problem is with the extent of rights claimed, not with the justification provided for the very existence of the basic rights. Therefore, we submit that the rejection of excessive claims by the Conference should not derogate from the soundness of the main justification for recognition of the continental shelf rights, which was, in fact, embodied by the Conference in Article 2.

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(98) DOC. A/CONF. 13/C. 4/L. 6/Rev 2, id. at 128.

(99) DOC. A/CONF. 13/C. 4/L. 45, id. at 139.

(100) Id. at 72.

(101) Münch (Germany) said that the words "sovereign rights" were substituted for the words "exclusive rights" and thus it became clear that the rights in question did not depend on occupation or on proclamation. Id. at 74. See, also Mouton's remarks, Id. at 74.

(102) The Philippine representative said that he supported the Çuban proposal as:

The coastal state's possession of its continental shelf as an integral part of its territory in the geological sense was an unquestionable fact which the Commitee could not but recognize. Id. at 74. See, also, India, Id. at 74; Mexico, Id.; Guatemala, id.; and Indonesia, id. But see, Greece , Id.

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In conclusion, it would be fair to say that it is almost impossible to argue on the basis of the preparatory work of the Geneva Convention that the concept of natural prolongation was understood in a sense other than that of a geophysical one.

cc. The sense in which the Court used the concept of natural prolongation

A few paragraphs of the Judgment indicate that the Court, in fact, did use the concept in a geological sense generally and in a gomorphological sense particularly.

One needs not to search elswhere for the evidence: the paragraph referring to the Truman Proclamation is a good starting point. The Court, in its review of the genesis and development of the equidistance method of delimitation, started with the Proclamation, and said that it had a "special status" in the law on the continental shelf. In its opinion, although various theories as to the nature and the extent of the continental shelf rights had been advanced, the Truman Proclamation "soon came to be regarded as the starting point of positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal state as having an original, natural, and exclusive (in short vested) right to the continental shelf off its coast, came to prevail over all others, being now reflected in Article 2 of the 1958 Convention on the Continental Shelf" (103). It will be recalled that the most basic rationale on which the Truman Proclamation based the exclusive continental shelf rights was the fact that the continental shelf off the coasts of U.S. was the extension of the land territory of the former (104). Given that the same idea was considered by the Court as customary law, it is only reasonable to conclude that the concept of natural prolongation as the Court enunciated could not be other than that enunciated by the Truman Proclamation. The fact that the Proclamation also referred to the equitable principles for the purpose of delimitation between neighbouring states should not be considered as derogating from the soundness of this view. In fact, a considerable part of the Judgment is reflective of the fact that the delimitation question should be considered separately. First, after the Court had established that the legal basis of the continental shelf rights of the coastal state was the sovereignty the latter exercised over the land territory of which the continental shelf constituted an under-sea extension, it decided that the question of delimitation of the continental shelf areas between neighbouring states was not a question of apportioning an as yet undelimited area between the states concerned. On the contrary, it said, the basic concept of the continental shelf entitlement did not admit of there being anything undivided to share out. According to that basic concept, it continued, the delimitation process was essentially one of drawing a boundary line between areas which already appertained to one or other of the states concerned (105).

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(103) See, North Sea Continental Shelf, Judgment, I.C.J. Reports, 32-33 (1969).
(104) See, supra, III, 1,A.
(105) See, Judgment, id. at 22. para. 20.

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Secondly, the Court emphatically stated that "the continental shelf of any Parties must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of the other" (106).

Thirdly, the Court, in rejecting the argument of Denmark and the Netherlands as based on proximity, said that "(s)ubmarine areas do not really appertain to the coastal state because - or not only because - they are near it." In its view, what conferred the ipso jure title which the international law attributed to the coastal state in respect of the continental shelf was the fact that the submarine areas concerned might be deemed to be actually part of the territory over which the coastal state had already dominion. The Court went on to clarify the position that the submarine areas, although covered with the water, were an extension of the territory. From that principle it concluded that "whenever a given submarine area does not constitute a natural or the most natural - extension of the land territory of any of other state, it cannot be regarded as appertaining to that state (107)."

It is very clear from those statements that what the Court sought was an identity between the emerged land and the submerged land. It was the exercise by thecoastal state of sovereignty over the land territory of which the submerged land was an extension that the Court said conferred the ipso jure title on a given coastal state as opposed to other states with which the coastal state could share the same continent or which the submarine areas in question could be nearer but not appurtenant. It was that identity which led the Court to state that the delimitation process was drawing boundary lines between areas which already appertained to one or other of the states concerned.

The Court's references to the physical facts of the shelf were not limited to those mentioned above. It further said that:

> [t] he institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would have never existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal states into a species of platform, which has attracted the attention first of geographers and hydrographers and then of jurists" (108).

To strenghten its basic idea of the natural prolongation as based on physical facts the Court continued:

The appurtenance of the shelf to the countries in front of whose coastlines it lies, is, therefore, a fact..." (109)

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(106) Id. at 47. para. 85.
(107) Id, at 31, para. 43.
(108) Id, at 51, para. 95.
(109) Id,

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In those statements, too, the Court attached importance to maintaining a physical identity and continuity between the shelf and the land territory. The implication is that beyond the point where the identity ends, the continental shelf would end too. There should be no doubts that this conclusion is equally applicable where the natural prolongation of the land territory meets the deep ocean floor which is geologically quite different. In this sense, the Court used the natural prolongation in geological terms.

On the other hand, a Court's reference to the Norwegian Trough suggests that it used the concept of natural prolongation in a geomorphological sense too. After having rejected the arguments of both Parties on the nature of the concept of natural prolongation, the Court said that "(w)ithout attempting to pronounce on the status of that feature [the Norwegian Trough], the Court notes that the shelf areas in the North Sea separated from the Norwegian coast by the 80-100 kilometres of the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation..." (110) This paragraph would seem to suggest that the Court considered the Trough as a place where the natural prolongation of the parties ended. It was its quality of being a depression that the Court considered it not to be a prolongation of the coast of Norway (111). The fact that Court did not refer to the exploitability criterion in that context might only be construed as confirming the view that the natural prolongation in geomorphological sense was considered as the customary law, and not the exploitability criterion.

However, some other passages of the Judgment might suggest that the Court did not use the concept of natural prolongation in geophysical sense, at least so far as the delimitation is concerned. Particularly, the emphasis the Court put on the equitable principles deserves a detailed treatment.

Apart from the question of the legal basis of the continental shelf, the Court had to resolve the question of whether the equidistance method was an obligatory one in the delimitation of the continental shelf areas of the North Sea. After having concluded that the method in question was not mandatory either as an inescapable a priori accompaniment of the proximity doctrine or as a rule of customary international

(110) Id. at 32, para. 45.

(111) Accord: Feulner, G.R., **Delimitation of Continental Shelf Jurisdiction Between States: The Effect of Physical Irregularities in the Natural Continental Shelf**, 17 VA. J. INT'L L. 77,94-95 (1976); Christie, D.R., **From the Shoals of Raj Kaboudia to the Shores of Tripoli: Tunisia/Libya Continental Shelf Boundary Delimitation**, 13 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 23 (1983). But see, Bowett, D.W., **The arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches**, 49 BYIL 1, 16 (1979) where he calls the Court's observation as "delphic", and Hutchinson, **Seaward Limit to Continental Shelf Jurisdiction in Customary Law**, 56 BYIL 153 n. 282 (1985).

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law developed through the practice of states,-the Court turned to the equitable principles. In its view, if the equidistance method were to be compulsorily applied in all situations, that would not be consonant with the basic principle that the delimitation must be the object of agreement between states concerned and that such agreement must be arrived at in accordance with equitable principles. However, for the Court, the question was not" a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles in accordance with the ideas which have always underlain the developments of the legal regime of the continental shelf." (112) The ideas which the Court cited included 1) the obligation to enter into negotiations, 2) an obligation to act in such a way that, in particular case, the equitable principles are applied, and 3) making sure that the continental shelf of any state must be natural prolongation of its land territory and must not encroach upon the natural prolongation of another state (113).

Thus, the Court did not treat the equitable principles and the concept of the natural prolongation as mutually exclusive. Rather, it used the former to give effect to the idea of the natural prolongation.The fact that in the North Sea there is no outer limit to the shelf and that the application of the equidistance method would cause parts of the natural prolongation of one state to be allocated to another state, due to the convex and concave configuration of the coasts of the states concerned, were the basic reasons why the Court resorted to the equitable principles. The Court had been called on to delimit an area of the seabed which constituted the natural prolongation of all the Parties. The coastal states were in comparable positions so far as the length of their coastlines was concerned. They were in a theoretical situation of equality, as the Court put it. The Court had to examine the question of how the continental shelf could be delimited in such a situation where the equidistance method did not provide an equitable solution. It was in that spirit that the Court said that" [a]s operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable; rather is the problem above all one of defining means whereby the delimitation can be carried out in such a way as to be recognized as equitable" (114). The equitable result being the goal, it was not necessary to seek one method of delimitation. In the Court's view," there is no legal limit to the considerations which states may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others..." (115). Among those various aspects of which the Court said account must be taken were included a number of factors, some relating to geology, some to geography and still others to the

(112) See, 1969 Judgment, supra note 1, at 47, para. 85.
(113) Id.
(114) Id. at 50, para. 92.
(115) Id. para. 93.

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unity of deposits. The Court further said that" [t] he appurtenance of the shelf to countries in front of whose coastlines it lies, is, therefore, a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities they point up the whole notion of appurtenance of the continental shelf to the state whose territory it does in fact prolongs" (116).

Now, those statements of the Court might be taken to mean that the concept of natural prolongation was understood by the Court in a non-geophysical sense (or a judicial sense if you like), because the Court said that in balancing-up of the factors, the geology was one aspect to be taken account of and that "it can be useful to consider geology" in a delimitation process (117).

Apparently, those statements suggest the relative power of the geology in a setting where the submarine area constitute a geological continuity, and when read together with the equitable principles, they could be considered as meaning that the geology was subordinated to the former. However, the context in which the Court referred to the geology does indicate how the Court treated the geography rather than the geology as such." In order to find out whether the direction taken by certain configurational features should influence the delimitation", the Court found out it useful to consider thegeology of the shelf. That is, the geology was still a yardstick against which the geography was tested. The fact that the Court attributed a relative power to the geology in such a delimitation setting should not detract from the principle of natural prolongation as the basis of the continental shelf. On the contrary, it confirms the view that in areas where the geology of the continental shelves differ from each other, the geology would be decisive factor in drawing a boundary between shelves appertaining to different jurisdictions. Again, in areas where there exists a major geomorphological disruption (a trough, or a trench) naturally dividing the submarine areas it could be considered that the natural prolongations of the neighbouring countries end at that geomorhological feature. What should be kept in mind here is that the Court did not exclude the geography in a delimitation process but it did not consider that the geography was the basis of the continental shelf. In fact, the Court introduced, in that case, the concept of proportionality as a factor to be taken into account in a delimitation:

> [a] final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the states concerned and the lengths of their respective coastlines-these being measured according to their general direction in order to

(116) Id. at 51, para. 95.

(117) In fact, the Court itself, in the Libya/Malta case, alluded to this statement when it reviewed and probably reversed its previous jurisprudence. See, Continental Shelf (Libyan Arab Jamahiriya/ Malta), Judgment, I.C.J., Reports, 36 (1985).

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> establish the necessary balance between states with straight, and those with markedly concave or convex coasts or to reduce very irregular coastlines to their truer proportions (118).

Court used geography as an element of the equitable principles which it said should be applied in accordance with the ideas which underlay the development of the legal regime of the continental shelf. One of these ideas was that the continental shelf of a state must be the natural prolongation of its land territory and must not encroach upon the natural prolongation of another state. When considered in the light of this basic policy, the Court's use of equitable principles and of the geography as a component of the former only strenghtens the basic concept of natural prolongation in the geophysical sense. In fact, the Court ordered in the operative part of its Judgment that:

> the delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other (119).

As for the factors to be taken into account during the negotiation, it decided that they were to include: 1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features, 2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved and 3) an element of a reasonable degree of proportionality (120).

Here, again, some may pick up the phrase "delimitation is to be effected by agreement... in such a way as to leave as much as possible to each Party... the natural prolongation of its land territory" as meaning that the Court did not use the concept in the geophysical sense (121). But that could not be the case. The Court's main occupation there was exclusively with the delimitation of a geologically continuous submarine area on which the states concerned abuted, and not with the legal basis of the continental shelf rights in abstract. It is quite natural that the Court should have resorted to the equitable principles where there was no geologically definable and discernable natural boundaries. However, the Court yet did not fail to order that every care should be taken to make sure that the continental shelf of each state was the natural prolongation of its land territory. Moreover, as the equitable principles should be applied and understood in accordance with the same basic principle and

(118) See, 1969 Judgment, supra, note 1, at 52, para. 98.
(119) Id. at 53, para. 101.
(120) Id.
(121) Again, the Court itself made such a statement in the Tunisia / Libya Case, See, Continental Shelf (Tunisia / Libya Arab Jamahiriya), Judgment, I.C.J., Reports, (1982).

not in abstract, it is not right to conclude that the equitable principles were understood as excluding the principle of natural prolongation. However, it is a reality that in such situations, the geology alone cannot determine the individual boundaries. The equitable principles take - over and solve the question. The use of the geography then is not exclusive of the geology but complementray to it because it helps towards identification of the individual boundaries of the natural prolongations concerned.

This analysis brings us to the conclusion that the Court employed the concept of natural prolongation in geophysical sense. It emphasised a physical identity between the land territory and the submerged land. The Judgment could not be interpreted as meaning that the coastal state has sovereign rights over any submarine areas lying next to its territory, regardless of the geology and geomorphology of the seabed. Otherwise, one has to ask why the coastal states, as opposed to the land-locked states, should have those rights. The practice of states and the drafting history of the continental shelf clearly confirm the view that because of the identity of the land territory of the coastal state and the submerged land contiguous to its coast, the coastal state has been granted the shelf rights. Many states have understood the Judgment this way and expressed their opinions in the Third United Nations Conference on the Law of the Sea accordingly. Attempts to explain the whole Judgment on the basis of the now discredited exploitability criterion are not legally well grounded, since the exploitability criterion has never become a part of customary law.

2. The subsequent decisions and the concept of natural prolongation

In the Anglo-French Continental Shelf Arbitration, (122) which, like the 1969 Judgment, was not related to the outer limits of the continental shelf, the Court of Arbitration considered many of the pronouncements of the ICJ in the 1969

(122) See, France - United Kingdom: Arbitration on the Delimitation of the Continental Shelf, Court of Arbitration, Decision of 30 June, 1977, reprinted in 18 ILM 397 (1979). For the comments on this case see, among others, Brown, **The Anglo-French Continental Shelf Case**, 16 SAN DIEGO LAW REVIEW, 461 (1979); Bowett, **The Arbitration between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South Western Approaches**, 49 BYIL 1 (1978); Bowett, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW, Ch. 7(1978); Tolunay, MILLETLERARASI HUKUK DERSLERI, 189(1984); Colson, **The United Kingdom - France Continental Shelf**, 72 AJIL 95 (1978); Colson, **The United Kingdom-France Continental Shelf Arbitration: Interpretative Decision of March 1978**, 73 AJIL 112 (1979); Bearly, **Half-Effect Applied to Equidistance Line**, 56 INTERNATIONAL HYDROGRAPHIC REVIEW, No 1,153 (1979); Berry, **Delimitation and the Anglo-French Arbitration**, 6 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW, 139 (1978).

ment as being of general character and applicable to any delimitation (123). It specifically and approvingly referred to the principle that a coastal state had inherent rights in the continental shelf which constituted the natural prolongation of its land territory. Then, it referred to the conclusions which the ICJ had drawn from that principle: the conclusion that delimitation of the continental shelf was not a question of apportionment, but a process of drawing a boundary line between areas which already appertained to one or other of states concerned; (124) and the conclusion that the continental shelf of any state must be natural prolongation of its land territory and must not encroach upon what was the natural prolongation of the territory of other state (125).

The Court of Arbitration fully agreed with the first conclusion and said that "although the delimitation in the present case must be equitable, it cannot have its object simply the awarding of an equitable share in the continental shelf to each Party" (126).

However, it found the second conclusion to be not useful for the delimitation. "This conclusion", it said, "follows directly from the fundamental rule and, is, indeed, merely an application of that rule to the context of a single area of the continental shelf upon which the territories of two or more states abut. So far as delimitation is concerned, however, this conclusion states the problem rather than solves it. The problem of delimitation arises precisely because in situations where the territories of two or more states abut on a single continuous area of continental shelf, it may be said geographically to constitute a natural prolongation of the territory of each of the states concerned. Consequently, it is rather in the rules of customary law discussed in the North Sea Continental Shelf Cases and which are specifically directed to delimitation that guidance may be sought regarding the principles to be applied in delimiting the boundaries of the continental shelf in such situations" (127).

However, it implicitly recognized that the concept of natural prolongation in a geomorphological sense might play a role even in a delimitation setting, when it dealt with an alternative argument by the U.K. that Hurd Deep-Hurd Deep Fault Zone should constitute the natural boundary (128).

U.K. argued that should the Court decide the delimitation issue on the basis of general international law, as opposed to the Geneva Convention, rule was that the delimitaton boundary should be so drawn as to leave as much as possible to each Party all those parts of the continental shelf that constituted the natural prolongation

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(123) **See,** Award, supra note 122, at 422, para. 77.
(124) **Id.** para. 78.
(125) **Id.** at 423, para. 79.
(126) **Id.** at 422, para. 78.
(127) **Id.** at 423, para. 79.
(128) **Id.** at 427-28.

of its land territory. Thus, it apparently, referred to the operative part of the 1969 Judgment. But acting on the assumption that the entire continental shelf area subject to delimitation constituted a geological continuity and thus it could be claimed by both Parties as constituting the natural prolongation of their land territories, it argued that the continuous delimitation area should be delimited by application of the equidistance method. However, apparently encouraged by the ICJ's reference in the 1969 Judgment to the Norwegian Trough it made an alternative argument that if the Court decided that there existed a major and persistent structural discontinuity of the seabed and subsoil of the Channel of such a nature as to interrupt the essential geological continuity of the continental shelf and thereby indicated the limits of those parts of the continental shelf constituting the natural prolongations of the Parties, the boundary should be drawn along the axis of that structural discontinuity (129). The discontinuity it referred to was Hurd Deep-Hurd Deep Fault Zone. Hurd Deep is a series of geological fault, situated a few miles to the north and the north west of the Alderny and Guernsey island groups. It extends in a south-westerly direction for a distance of 80 miles and it is between one to three miles wide and its depth exceeds 100 miles (130). In short, the U.K. was of the view that : 1) under the customary law each Party should be given as much as possible all those parts of the continental shelf which constituted the natural prolongation of its land territory, 2) the seabed to be delimited constituted a geological continuity, therefore, the area as a whole appertained to the territories of both the Parties, 3) consequently, the seabed should be divided by application of the equidistance principle, and 4) in the case the Court decided that the Hurd Deep constituted a major geomorphological feature of such a nature disrupting the essential geological unity of the seabed, the boundary should be drawn alongside that feature.

On the other hand, France argued, on the basis of the customary international law as stated, in particilar, by the ICJ in the 1969 Judgment, and confirmed by the state practice and the work of the Third United Nations Conference, that the delimitation boundaries in the area in question should be drawn in conformity with the principle of natural prolongation, and with the equitable principles (131). It considered the faults in question as constituting, at most, minor and disconnected rifts in the structure of the shelf and could not see in them any coherent and continuous delimitatory feature.

The Court of Arbitration rejected the British argument that the Hurd Deep should have an influence on the delimitation of the boundary, either in the Atlantic Region or in the English Channel. It agreed with the parties that the continental shelf throughout the delimitation area was characterized by its geological continuity. But, in its view:

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(129) Id. at 428.
(130) Id. at 408. Hurd Deep Fault Zone is a prolongation of Hurd Deep into the Atlantic Ocean.
(131) Id. at 404.

> The geological faults which constitute the Hurd Deep and the so-called Hurd Deep Fault Zone, even if they be considered as distinct features in the geomorphology of the shelf, are still discontinuties in the seabed and subsoil which do not interrupt the essential unity of the continental shelf either in the Channel or the atlantic region. Indeed, in comparison with the deep Norwegian Trough in the North Sea, they can only be regarded as minor faults in the geological structure of the shelf; and yet the United Kingdom agreed that the Trough should not constitute an obstacle to the extension of Norway's continental shelf boundary beyond that major fault zone. Moreover, to attach critical significance to a physical feature like Hurd Deep-Hurd Deep Fault Zone in delimiting the continental saelf boundary in the present case would run counter to the whole of tendency of state practice on the continental shelf in recent years (132).

The Court of Arbitration further considered that the axis of the zone was placed where it was simply a fact of nature, and there was no intrinsic reason why a boundary along that exis should be preferred to any other boundary drawn in accordance with some other methods (133).

Although the comparison the Court of Arbitration made between the Norwegian Trough and the Hurd Deep -Hurd Deep Fault Zone and the result it drew from it is open to question, the main idea underlying the decision not to recognize any significance to the Hurd Deep could legitimately be considered as a recognition of the rule that major discontinuities in a delimitation area could constitute a natural boundary between the continental shelves appertaining to two different countries (134).

The Court of Arbitration's reference to the Norwegian Trough to justify its ignorance of the Hurd Deep-Hurd Deep Fault Zone was an unfortunate one, because the Great Britain's consent to the Norwegian demand that the Trough in question should be a part of the continental shelf of Norway could hardly be explained on the basis of law. It is true that both governments in their responses to the draft articles of the ILC had expressed different views with respect to the Trough, and that some

(132) Id. at 428, para. 107.

(133) Id. para. 108.

(134) Brown who had written in 1971 that the concept of natural prolongation belonged to the problem of the seaward limits, not to the delimitation between neighbouring states, revised his opinion in 1979 that "it is perhaps necessary to qualify this view by saying that it holds good only so long as it may be assumed that the neighbouring states abut upon one continuous continental shelf." See, Brown, 16 SAN DIEGO LAW REVIEW, 477 (1979). He further went on to say that if there was a major structural discontinuity of the seabed and subsoil of such a nature as to interrupt the essential geological continuity of the continental shelf, then in a sense the concept of natural prolongation would be relevant to the delimitation. Id.
Bowett observed that "it remains an open question whether, on the same shelf, geological or geomorphological features can constitute such a break in the continuity of the shelf as to form a 'natural boundary and, if so, what manner of features will bring about this result. see, 46 BYIL 17 (1979).

members in the Commission echoed the policy of their governments (135). But in the Geneva Conference the representative of the U.K. made a statement that:

> "In cases -as off the west coast of Norway- there was a deep channel immediately off the coast, the provision would apply in the same way as to a continental shelf in the geological sense of the term" (136).

Thus, the British representative clearly recognized the Norwegian view, and the representative of Norway later on thanked her for such a favorable statemen. (137). Subsequently, the two states entered into an agreement demarcating the boundary on the seabed between the continental shelves of the two countries (138).

As Goldie puts it, the quality of the agreement between the two states as a precedent to be used by an international court judging on the basis of established law is doubtful:

> In the actual circumstances of the North Sea State's situation, the Government of the United Kingdom, in terms of equity, comity, and respect for Norwegian claims, unilaterally promulgated a claim only out to a line some miles west of a true median line between the Norwegian and the British coasts... It might be argued that such a respect for equities might not obtain in other, and perhaps less developed, or friendly regions (139).

In view of those facts, it is difficult not to agree with Prof. Goldie that a statement expressing goodwill by the representative of a friendly nation and its confirmation by the party to benefit from it and their agreement to that effect do not vest an international customary law right in the beneficiary state (140). And we would like to add:a practice limited only to two states and likely to have been inspired by non-legal considerations should not have been taken as a precedent by an international court of arbitration whose task it was to decide by international law. It might be that it would have reached the same result had it decided the case without making reference to such a controversial precedent, because the effect of that statement has been unfairly tremendous in the subsequent adjudications.

On the other hand, while one could infer from the above mentioned holding that the Court used the concept of natural prolongation in a geophysical sense, the subsequent passages of the award indicate that the Court qualified the physical

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(135) See, **supra** V, 1.2.

(136) See, statement by Miss Gutteridge in UNCLOS I, Official Records, Vol. VI. p.41.

(137) **Id.** at 48.

(138) See, Norway and United Kingdom: Continental Shelf Boundary, 10 March 1965, in LIMITS IN THE SEA, No 10, (revised), 1974.

(139) See, Goldie, **A Symposium on the Geneva Conventions and the Need for Future Modifications,** in Alexander (ed), THE LAW OF THE SEA -OFFSHORE BOUNDARIES AND ZONES, 273, 277 (1967).

(140) Goldie, **The International Court of Justice's "Natural Prolongation" and the Continental Shelf Problem of Islands,** 4 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW, 237,256 (1973).

prolongation with the equitable principles, depriving the concept of absolute power, so far as the effect of the concept on the delimitation of a geologically continuous shelf is concerned. The Court said that:

> And the very fact that in international law the continental shelf is a juridical concept mean that its scope and the conditions for its applications are not determined exclusively by the physical facts but also by legal rules. Moreover, it is clear both from insertion of the "special circumstances" provision in Article 6, and from the emphasis on the "equitable principles" in customary law that the force of cardinal principle of natural prolongation is not absolute, but may be subject to qualification in particular situations (141).

Although the Court of Arbiuration decreased the excessive emphasis on the geological factors, it is clear that it limited its finding to the effect of natural prolongation on the delimitation of a geologically continuous shelf between opposite or adjacent states. Therefore, the finding was not intended to adversly affect the standing of natural prolongation as basis of entitlement. It is quite interesting that the Court did not attach any importance to the exploitability criterion in article 1 of the Geneva Convention, to which many turn to discredit the principle of natural prolongation or to read into it a meaning which was never intended for the concept to have.

In the Aegean Sea Continental Shelf Case, in 1978, (142) the Court, in elaborating the meaning of the term "territorial rights" which was one of the key issues in establishing whether the Court had the jurisdiction over the case, once again expressed itself on the legal basis of the continental shelf. The Court said that:

> a dispute regarding entitlement to and delimitation of areas continental shelf tends by its very nature to be one relating to territorial status.The reason is that legally a coastal state's rights over the continental shelf are both appurtenant to and directly derived from the state's sovereignty over the territory abutting on that continental shelf (143).

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(141) **See**, Award, supra note 122, at para. 107.

(142) **See**, Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, I.C.J. Reports, 3 (1978). For the comments on it see, TOLUNER, MİLLETLERARASI HUKUK DERSLERİ, 206-218 (1984); Gross, **The Dispute Between Greece and Turkey Concerning the Continental Shelf in the Aegean**, 71 AJIL 31 (1977); Bowett, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW, Chs 6,8 (1978); Gündüz, Ege Denizi Kıta Sahanlığı Davası ve Bazı Düşünceler, 2 MİLLETLERARASI HUKUK VE MİLLETLERARASI ÖZEL HUKUK BÜLTENİ, 11 (1983); Pazarcı, Ege'deki Deniz Sorunlarında Türk-Yunan Görüşleri-Hukuki Açıdan, EGE'DE DENİZ SORUNLARI SEMİNERİ, Ankara, 79 (1986).

(143) **Id.** at 36, para. 86.

That, in the Court's opinion, emerged from the emphasis it had placed in the North Sea Cases, on "natural prolongation" of the land as a criterion for determining the extent of a coastal state's entitlement to continental shelf as against another state abutting on the same continental shelf (144).

From these judgments, it seems fair to conclude that the case-law as developed by the ICJ and the Court of Arbitration up to 1978 regarded the physical identity between the territory of the coastal state and the submerged area contiguous to it as necessary for recognition of the sovereign rights of the coastal state over the areas concerned. The latter being an under-sea extension of the land territory over which the coastal state has already sovereignty, the continental shelf rights were considered as being inherent rights. Thus, the continental shelf rights could be considered as relating to the territorial status. This conclusion comes close to saying that the continental shelf areas are a kind of territory, over which the coastal state exercises such powers as the international law recognies.

3. Evaluation of the Court's statement with respect to Articles 1 to 3

The Court's statement in the 1969 Judgment that the first three articles of the Geneva Convention were regarded in 1958 as reflecting the customary law has been taken for granted by some scholars as well as by some states, especially when it served the interests for which they stand (145). It is a fact that the Court made that statement without making an indepth study and analysis of the matter and heavily relied on the fact that those articles were excluded from the faculty of making reservations, as they were supposedly considered part of customary international law. However, the Court did not make the proposition clearly. It rather said that the conferees had so regarded it in 1958. But it is clear that the Court was sympathetic to the proposition (146). Its reference to the same statement in the Tunisia / Libya

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(144) Id.

(145) See, among others, Rozakis, C.L., **The Greek-Turkish Dispute over theAgean Continental Shelf**, in OCCASIONAL PAPER SERIES, LAW OF THE SEA INSTITUTE, University of Rhode Island, Kingston, Rhode Island, 1975; Bowett, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW, 139 (1979); the British view in the Anglo-French Continental Shelf arbitration, 18 ILM 439 (1979); the Greek view in theAegean Sea Continental Shelf Case, supra note 142, at 8.

(146) This aspect of the statement has been emphasised by some scholars. See, O'connell, I THE INTERNATIONAL LAW OF THE SEA, 475 (1982); Hutchinson, **Seaward Limit to Continental Shelf Jurisdiction in Customary International Law**, 56 BYIL 117 (1985)
Judge Padilla Nervo wrote in his separate opinion in the 1969 Judgment that "the first three articles of the Convention were intended to be **broadly declaratory of the customary international law...** (emphasis added)", North Sea Continental Shelf, Judgment, I.C.J., Reports, 96 (1969).
Judge Ammoun wrote that although the concept of the continental shelf had been definitively recognized, the question of the outer limit was subject to controversy and that articles 1 and 2 were not result of a codification of the customary law. Id. at 101, 106, 123.
Judge Tanaka wrote in his dissenting opinion that articles 1-3 constituted customary interna-

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Case in 1982 , however, added to that sympathy, (147) although its interpretation of the exploitability criterion is still open to question.

Whatever might be the intention of the Court in making the statement, the scholars who have studied the subject in detail have come with the conclusion that the court's statement might not be right.

Judge Oda in his dissenting opinion in the Tunisia/Libya Case observed that:

> the fact that the continental shelf was given a firm place in the framework of customary international law did not necessarily mean that the actual povisions of the Convention on the continental shelf reflected customary international law (148).

Having quoted the Court's statement regarding the articles in question, he continued to say that:

> I submit that this statement went too far in saying that "received or at least emergent rules of customary international law" had appeared not only with regard to the juridical character of the coastal state's entitlement and the nature of the rights exercisable, but also with regard to some other aspects (149).

Andrassy, after having referred to the statement in question, wrote in 1970 that:

> [w] e must, however, take exception with one of the points in the quoted Judgment, namely,the inclusion of the provision concerning the seaward extent of the shelf among the "received" or "at least emergent rules of customary international law" (150).

Commenting on the statement O'connell wrote that:

> It is to be concluded, then, that the Court, although its language is not unequivocally in support of the view that the first three Articles of the Convention are declaratory of international law, as it was in 1958, went as far as could be expected in indicating the relationship between those texts and: "received and emergent "international law (151).

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tional law, but when his opinion is further studied it will be seen that his purpose was to show that the institution of the continental shelf had become a part of customary law, so that even states not parties to the Convention could benefit it; his emphasis was not on the details or limits of the shelf. See, id. at 179.

(147) See, Hutchinson, supra note 111, at 118.

(148) See, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports, 192 (1982)

(149) Id.

(150) INTERNATIONAL LAW AND RESOURCES OF THE SEA, 66,67 (1970).

(151) See, supra note 146, at 474.

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However, in his treatment of islands with respect to delimitation of maritime areas between neighbouring states, he put aside all reservations and refinements to say that Article 1 was considered by the Court as being part of customary international law (152).

Goldie would appear to qualify the statement, with respect to islands, by giving a lesser treatment to the small or geographically ill-placed islands (153).

Brown considered in 1971 that Article 1 was not part of customary law so far as the seaward limits were concerned, (154) but in his article on Rockall Island he has taken the statement for granted and proceeded to examine the case accordingly (155).

For these reasons, the scholarly opinions exclusively directed at the statement are not convincing.

In the Anglo-French Continental Shelf Arbitration, the Parties and the Court of Arbitration indirectly discussed the articles in question and the general implication of it is that they did not consider Article 1 as customary law. France argued, among others, that the Convention had been rendered obsolete by the recent evolution of the customary law stimulated by the work of the Third United Nations Conference (156). In its view, a consensus had been arrived at within the framework of the Conference regarding the right of the coastal state to claim jurisdiction over a 200 mile zone comprising both the continental shelf and the overlying waters. Consequently, France claimed that the Geneva Convention was not in force and was not applicable to the pending case (157).

The Court of Arbitration rejected the argument on the following grounds:

> the Court recognizes progress and the possibility that a development in customary law may, under certain conditions, evidence the assent of the states concerned to the modification, or even termination of previously existing treaty rights and obligations. But the Continental Shelf Convention of 1958 entered into force as between the parties little more than a decade ago. Moreover, the information before the Court contains references by the French Republic and the United Kingdom, as well as by other states, to the Convention as an existing treaty in force which are of quite recent date. Consequently, only the most

(152) See, II THE INTERNATIONAL LAW OF THE SEA, 714 (1984).
(153) See, **The International Court of Justice's "natural prolongation" and the continental shelf problem of islands**, 4 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW, 247 (1973).
(154) THE LEGAL REGIME OF HYDROSPACE, 29 (1971)
(155) Rockall and the limits of national jurisdiction of the UK, MARINE POLICY 204 (1978).
(156) See, supra note 122, at 416.
(157) Id.

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conclusive indications of the intention of the Parties to the 1958.Convention to regard it as terminated could warrant this Court in treating it as obsolete... In the opinion of the Court, however, neither the record of the Third United Nations Conference on the Law of the Sea, nor the practice of states outside the Conference provide any such conclusive indication that the Continental Shelf Convention of 1958 is today considered by its Parties to be already obsolete and no longer applicable as treaty in force (158).

The Court of Arbitration, when delivering its award, was aware of the fact that the French Republic had attached an interpretative statement to Article 1 with regard to the effect of the exploitability criterion and that the ICJ in 1969 made a reference to the legal status of the same article. Moreover, the French argument with regard to the obsoleteness of the Convention was sought to be justified by the widely adoption by states of the 200 mile zone which was directly related to Article 1.In spite of all those stimulating references, the Court insistently treated the rules of the Convention as the treaty law. Had it believed that the definition in Article 1 of the Convention was part of customary law, it would have said so.

As we have concluded before, the definition in Article 1 was intended to be a compromise and an **ad interim** solution and the drafting history of the Article does not indicate that it was considered as customary law. (159) In fact, when the Court's statement is closely studied, it will be seen that the Court drew on Article 12 of the Convention and not on the drafting history in order to make the statement in question.

Apart from those defects, its reasoning that Article 12 did not permit reservations to be made in respect of Articles 1-3 because they were considered as reflecting customary law might not be so sound as it would appear to be. First, there is not a rule of law prohibiting states from changing among themselves even the undisputedly sound rules of customary international law by treaty, unless the rules in question are **jus cogens**. No one in the real world could claim that the rule, if rule at all, in Article 1 was or is **jus cogens** (160). Therefore, the exclusion of those provisions from the faculty of making reservation need not exclusively be explained by their being considered as part of customary law (161). Secondly, there are other good

(158) **Id.** at 417, para 47.

(159) See, supra V,2,C. cc and E.

(160) This the Court itself acknowledged. See, supra note 1, at 42.

(161) Judge Morelli wrote in his dissenting opinion that power to make reservations affected only the contractual obligation following from the Convention and he did not share the Court's view that Article 6 being covered by article 12, it could not be considered as part of customary law. Id, at 198-99.

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reasons for excluding some articles of a convention of law making nature from the faculty of making reservations: for example, the concern to maintain the integrity of the convention. The drafting history of Article 12 shows that, contrary to what the Court said, it was that concern which was responsible for exclusion of articles 1-3 from faculty of making reservations.

At the Fortieth Meeting of the Fourth Committee the question of reservations was discussed on the basis of a Canadian proposal, (162) which would have prohibited reservations being made in respect of Draft Articles 67-73 of the Commission. The proposal was found not acceptable in general, but a distinction was made among the Articles in question. Some representatives argued that if the reservations were allowed to be made in respect of the then draft articles 67, 68, 69 (corresponding to the first three articles of the Convention), the Convention would be weakened, since they dealt with the matters of substance (163). Some others advanced the view that the states should be allowed to make reservations in respect of all the articles, if they so wished (164). At the end, the suggested draft article concerning reservations was rejected and the Committee could not make any reccomendations to the Conference in that respect (165). In the Ninth Plenary Meeting, the same views were again voiced by various governments (166). The main concern of some representatives was that if the first three articles were not excluded from faculty of making reservations, "the whole basis of the Convention would be destroyed", but that view was not shared by all the participants. Finally, the USSR representative made a proposal based on a formula produced by the Drafting Committee, (167) which was accepted by 43 votes to 5, with 19 abstentions. So, there is not even an indication in the records of the Conference that the first three articles were considered in the same way as the Court said they had been considered.

Today, we have a very striking example in this respect. The Montego Bay Convention prohibits reservations to be made in respect of almost any one of i's provision (168). But one can hardly say that all the provisions of the Convention were considered by the representatives of the states in 1982 as being part of the customary law, and that's why the Convention prohibits reservations.

On the other hand, in view of the conclusion that the court considered the concept of natural prolongation in geophysical sense, it would be extremely difficult to reconcile the Court's proposition that Article 1 was considered in 1958 as

(162) See, DOC. A/CONF. 13/L. 16,21 April, 1958, in UNCLOS I Official Records, vol. VI, at 94.
(163) For example, Union of South Africa (id.at 114); UK (id. at 115); Canada (id.); India (id.); Sweden (id. at 116); F.R. of Germany (id.).
(164) Mexico (id, at 115); Venezuela (id. at 116); Chile (id).
(165) Id.
(166) Against: Philippines, UNCLOS I Official Records, Vol. II, at 56; Venezuela, id. In favour: U.S. id.
(167) DOC. A/CONF. 13/L. 32, 25 April 1958, Sixth Report of the Drafting Committee of the Conference, id at (127).
(168) Article 309

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reflecting the customary law with what it called "the most fundamental of all the rules of law relating to continental shelf, enshrined in article 2...". If the concept of natural prolongation as the legal basis of the customary law is ensrined in article 2 and is a part of the customary law quite independent of it, which the Court said, it was so, then logic dictates that Article 1 which contains the exploitability criterion should not be part of customary law as long as it is interpreted as allowing states to extend their jurisdiction to the areas beyond the continental margin.

Conclusions

The following conclusions seem to stand out of the foregoing study of the case - law:

The concept of natural prolongation has throughout underlain the continental shelf rights. From the very beginning, the coastal state was granted the shelf rights over the submarine areas beyond its territorial waters but adjacent to its coast, because the submerged land was considered as an appurtenance of its land territory. The ICJ unequivocally stated that fact in the North Sea Continental Shelf Cases in 1969. That Judgment, the subsequent judgments, and the facts on which the Court relied in expressing itself on the concept do not support the recently - advanced view that the natural prolongation was understood by the Court as meaning the extension of sea-front, regardless of the geological or geomorphological characteristics of the submarine areas. There is not a single statement in judgments studied that would support such a view. Nowhere in the Judgments in question there is a hint that the coastal state could exercise jurisdiction over the ocean floor with the oceanic crust, simply because the coastal state borders onto an ocean.

We have concluded above that the exploitability criterion has never formed part of customary international law. Therefore, interpretations of the concept of natural prolongation on that basis cannot succeed. The fact that the Geneva Convention partly departed from the definition of the geological shelf does not mean that it also departed from the concept of the continental shelf geologically still being part of the land territory. That is, it did not exclude the concept of the continental margin. Otherwise, one has to accept the legality of the "international lakes" concept, which has been condemned. Besides, this writer does not know any rule of international law which requires that for a rule on the seaward limit to exist, it should make sure that Chile and Peru, or any other particular state would have the continental shelf.

However, as none of the above-mentioned cases was related to the outer limits, there are not clear statements in the quoted judgements that the continental shelf extended up to the edge of the continental margin. Rather, it is the general purport of the cases that gives such an inference. If the submarine extension of the land territory is the continental shelf, then it would extend as seaward as that extension goes. That is what the Court understood of the natural prolongation. The interpretation on the basis of the exploitability criterion reads all the history of the concept as if all those realities had not existed, as if the exploitability criterion was a cherished and dominant criterion, as if the international community did not condemn it, as if greater part

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of the 1969 Judgment concerning the concept of natural prolongation did not exist. Probably, the exploitability criterion is the only criterion ever to have been resoundedly rejected by the international community on one hand, and given pride of place by some exegetics in relation to the examination of the still existing law on the other.

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VII - THIRD UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

(Montego Bay Convention)

1.Developments Leading to the Conclusion of the Convention

A. Developments Outside the United Nations

a. Conflicting views on and different solutions offered to the problems of the outer limits in the United States

Toward the end of the 1960s when it became crystal clear that the Geneva Convention failed to provide an exact and non-controversial outer limit for the continental shelf, various governmental as well as non-governmental groups in the United States offered different solutions. The public opinion had been divided mainly into two groups. One group, represented by National Petroleum Council, American Branch of International Law Association, American Bar Association, and later on joined by the adherents of the famous METCALF Report and some scholars suggested that the solution lay in the interpretation of the adjacency element of the definition in Article 1 of the Geneva Convention in such a way as to include the whole continental margin (1)

However, they urged the Government to hold consultations with the like-minded foreign governments to issue unilateral declarations embodying the solution thus offered (2). This wiew, in part, represented mainly the interest of the mining industry.

The judgment of the International Court of Justice in the North Sea Continental Shelf cases in 1969 gave an additional strength to the followers of this policy, as it defined the continental shelf to be the natural prolongation of the land territory (3).

Another group, on the other hand, had declared the definition in the Convention as providing no guidance and urged for an early revision of it. However, they considered that a restricted continental shelf would serve the interests of the U.S. much better. In their view, an extensive continental shelf would benefit more other

(1) The views of this group have been discussed above. See, infra, V. 2. D.C. (ee).

(2) The National Petroleum Council Report stated that in the following words:
It is desirable that the Parties to the 1958 Convention, with such additional nations as care to join them, promulgate parallel uniform declarations, stating the extent of their claims (on the limitations on those claims) under the 1958 Convention on the Continental Shelf.
NPC's REPORT, p. 70.

(3) The judgement and its possible interpretations have been dealt with above. See, supra VI.

states than the U.S., especially when the navigational interests were considered in light of the Latin American practice of patrimonial sea or 200 mile territorial sea as equivalent of the continental shelf (4).

It is interesting that the proposals made during that period were mostly based on the distance criterion, which had been repeatedly rejected by the ILC and the Geneva Conference (5).

Among others, Henkin suggested that the seaward limit be set at the 200 mile depth or at x miles distance as measured form the baselines. He also suggested establishment of a "Buffer Zone" beyond the outer limit of the continental shelf where some benefits would accrue to the international community (6). The idea was taken up by the Commission on Marine Science, Engineering and Resources, which had been appointed by President Nixon to formulate long - term ocean policy of the U.S. (7). It proposed as the seaward boundary the 200 mile isobath or the 50 mile distance, whichever alternative gave greater area. Beyond the outer limit of the continental shelf it suggested establishment of an intermediate zone extending to the 2500 metre isobath or to the 100 mile distance from the baselines. In the zone the Coastal States would have the right to exploitation of the natural resources but an International Registry Authority, to be established, would have some regulatory power over the zone. Finally, beyond the Intermadiate Zone there would be an international Seabed Area over which the International Registry Authority would have exclusive jurisdiction (8).

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(4) See, Henkin, in Alexander (ed.), THE LAW OF THE SEA - NATIONAL POLICY RECOMMENDATIONS, 171, 178 (1970).

(5) The idea was first advanced in 1950 by the French Branch of the International Law Association which suggested a maximum distance of 20 miles for the states whose continental shelf did not extend to that limit according to the 200 mile depth criterion. See, ILA, REPORT OF THE FORTY - FOURTH CONFERENCE, Copenhangen, 94 (1950). The same formula was introduced in the ILC by some members and was hotly debated. But the Commission rejected it. See **supra**, V.2, B d (bb). In the Geneva Conference, Yugoslavia tried hard to have the conference accept it but it was of no avail. See, **supra** V., 2, C.

(6) LAW OF THE SEA'S MINERAL RESOURCES, 72-73 (1968).

(7) See, OUR NATION AND THE SEA, Report of the Commission on Marine Science, Engineering and Resources, (1969).

(8). **Id.**, at 147 - 157. According to the proposal an international fund would be established. The national claims beyond continental shelf would be registered with the Authority on the basis of "first come, first registered rule, " but every nation registering claims would pay a portion of value of the production to the Fund to be used, in **inter alia**, for developing countries **id.**, pp. 149-50. For various views on the Commission's Report see, Alexander (ed.), LAW OF THE SEA - NATIONAL POLICY RECOMMENDATIONS (1970).

The Commission further proposed that no one should make any claim to areas beyond the 200 mile isobath until the proposed regime entered into effect (9). The idea was supported by the United Nations Committee of World Peace Through Law Center and it heavily influenced the early policy of the U.S. Government (10). Senator Pell made similar proposals in the Senate providing for setting outer limit at 550 m. depth of water or at 50 mile limit as measured from the baselines (11).

In parallel to those mainstream movements, many writers both within and outside the United States made various proposals for the seaward limits, generally based on the depth and / or distance criterion (12). The British Branch of the International Law Association suggested in 1968 the 200 mile distance criterion (13), while the Dutch Branch of the same organization preferred the 500 metre isobath as the outer limit (14).

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(9) Compare with President Nixon's Announcement of the U.S. ocean policy (infra VII, 1, A.h.) and the U.S. proposals to the UN Sea Bed Committee (infra, VII, 2,A.) Senator Pell who made various proposals to the Congress basically endorsed the Commission's policy but he was against the establishment of an intermediate zone. See Statement, in Alexander, THE LAW OF THE SEA - - NATIONAL POLICY RECOMMENDATIONS, 65 (1970). Brownlie too sanctioned the limits proposed by the Commission id. 143. But the Commission's Report was severely criticized by the National Petroleum Council. See PETROLEUM RESOURCES UNDER THE OCEAN FLOOR, prepared by The National Petroleum Council's Committee on Petroleum Resources Under the Ocean Floor, 69-79 (1969).

(10) **The United Nations and the Bed of the Sea,** (Nineteenth Report of the Commission to Study the Organization of Peace), New York, 29 (1969) and the Commission's Twenty First Report, **The United Nations and the Bed of the Sea,** New York, 17 (1970).

(11) See, S. Res. 33, 91st Cong., Ist Sess. CONGRESSIONAL RECORD vol. 115, p. 1330, January 21, 1969.

(12) See, Andrassy, INTERNATIONAL LAW AND THE RESOURCES OF THE SEA 118 (1970), where he proposed a distance of 30 miles from the coast and beyond it so far as the 200 metre isobath. Brown, first, suggested a line drawn at 2500 m. isobath or at a distance of 200 miles from the applicable baselines, whichever gave greater area, See, **Our Nation and Sea: A Comment on the Proposed Legal - Political Framework for the Development of Submarine Mineral Resources,** in Alexander (ed.), THE LAW OF THE SEA - - NATIONAL POLICY RECOMMENDATIONS 63 - 66 (1970), but later on he changed his mind to recommend a single 200 mile limit, THE LEGAL REGIME OF HYDROSPACE, 39 (1970). Christy and Brooks proposed a limit of 100 miles or 200 isobath, whichever gave the greater area. See, **Shared Resources of the World Community,** in NEW DIMENSIONS FOR THE UNITED NATIONS (1966). Mero suggested the 2500 m. isobath contour. See, **Alternatives for Mineral Exploitation,** in Alexander, II. Sea Institute Proceedings 96 (1968). Goldie suggested deletion of the exploitability criterion from Article 1, See, **The Contents of Davy Jone's Locker - - A Proposed Regime for the Sea - Bed and Subsoil,** 22, RUTGERS LAW REVIEW (1967). Many other writers suggested the outer edge of the continental margin as the seaward limit, either on the basis of interpretation of the Geneva Convention or of the North Sea Judgement of ICJ. See, infra, V.2, D.C. (ee).

(13) See, Brown (Rapporteur), **Report of the Legal Regime of Deep - Sea Mining,** The British Branch, Committee on Deep - Sea Mining, INTERNATIONAL LAW ASSOCIATION, BUENOS AIRES CONFERENCE 59 (1968).

(14) **The Exploration and Exploitation of Minerals on the Ocean Bed and in its Subsoil,** ILA, REPORT OF THE FIFTY - SECOND CONFERENCE, Helsinki , 797 (1966). The advisability of a 500 m. limit was considered in the report of the International Committee on Deep - Sea Mining of ILA (Bauchez Rapporteur), REPORT OF THE FIFTY - THIRD CONFERENCE, Buenos Aires, 231 - 32 (1968).

b. President Nixon's Announcement of the U.S. Policy

At a time when the above - mentioned interest groups in the United States were trying hard to persuade the Government to act in such a way that would fit their needs and interests, and when there was more disagreement than agreement on how far seawards the outer limits of the U.S. extended or should extend, President Nixon made an announcement on 22 May, 1970, of the U.S. policy (15), in which he said that:

> **"The stark fact is that the Law of the Sea is inadequate to meet the needs of modern technology and the concerns of the international community.** If it is not modernized multilaterally, unilateral action and international conflict is inevitable." (emphasis added) (16).

The President accordingly proposed that:

> "All nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the Seabed beyond the point where the high seas reach a depth of 200 metres (218.8 yards) and would agree to regard those resources as the *common heritage of mankind*" (emphasis added) (17).

Thus, the President implicitly declared the Geneva Convention to be inadequate and, therefore, demanded a revision of it. This policy could be considered as a refusal of the view that, under the Geneva Convention there was no question of outer limits of national jurisdiction, since the outer edge of the continental margin was the limit (18). However, he did not dismiss the possibility of rights having been acquired beyond the 200 m. depth line because he asked the other nations to "renounce, by a treaty all national claims over the natural resources of the seabed beyond 200 m. depth line". Likewise, his agreement to regarding as common heritage of mankind the area beyond that line was also conditioned on acceptance of a treaty he proposed.

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(15) **See, Announcement by President Nixon on United States Ocean Policy,** Saturday, 23 May, 1970. IX INTERNATIONAL LEGAL MATERIALS 807 (1970).

(16) **Id.,** For the comments on the Announcement see, among others, Friedmann, W., **Selden Redivivus - - Towards a Partition of the Seas,** 65 AJIL 757 (1971); ANAND, R.P. LEGAL REGIME OF THE SEABED AND THE DEVELOPING COUNTRIES 130 (1975); ODA, Dissenting opinion in **Continental Shelf (Tunisia / Libyan Arab Jamahiriya), Judgement,** I. C.J. Reports, 213 (1982).

(17) **See, supra** note 15, at 807.

(18) **See, The Report of The Special Committee on Outer Continental Shelf** (26 Metcalf Report) of December 21, 1970, which indicated the areas of difference with the President in its comments on the U.S. Draft Convention, implementations the Nixon's Announcement submitted to the UN Sea Bed Committee in August 1970. See, Report by the Special Committee on Outer Continental Shelf to the Senate Committee on Interior and Insular Affairs, 91st Cong. 2nd Sess., 29-30 (Committee Print, 1970).

The President's announcement further proposed that the area beyond 200 m. line should be divided into two parts with two different legal regimes: 1) a zone between the 200 m. isobath and the outer edge of the continental margins (trusteeship zone), and 2) the zone beyond the continental margin (19).

In the Trusteeship Zone, the Coastal State would act as a trustee for the international community, in return for a share of revenues from that zone. In the second zone, an agreed international machinery would regulate and authorize the exploitation and use of the seabed (20).

Those parts of the President's announcement were in line with the developments then taking place in the United Nations (21). From the concept of "common heritage of mankind" through needs of developing countries to the designation of zones where the Coastal State's jurisdiction was relatively restricted, it bore some similarities to the resolutions of the General Assembly. Yet, it was more conservative in its approach to the seaward limit of the shelf issue, as compared to the demands of other states which began to be made known in the meantime. However, the announcement did not prohibit the issuance of permits and leases for depths greater than 200 m. On the contrary, it suggested that such permits and leases should be issued subject to the international regime to be established and that the regime should give due protection for the integrity of the investments made in the interim period. However, a substantial portion of revenues derived by a state from exploitation beyond 200 m. during the interim period would go to the community. The President's announcement, on the other hand, was heavily modelled on the views of the Commission on Marine Science, Engineering and Resources.

Last but not least, the President's announcement strongly emphasized the harmonious and unfettered multiple uses of the oceans. It urged that the proposed treaty should provide for a 12 mile territorial sea and free transit passage through international straits (22). From 1970 to 1982 this aspect of the policy continued to be a basis of all trade offs or compromises which the United States Government made with other nations. Especially, recognition by the United States of the exclusive economic zone was closely dependent on the acceptance by third states of the transit regime through straits (23).

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(19) See, **supra** note 15, at 808.

(20) **Id.**

(21) See, **infra** VII.

(22) The announcement stated that:

> It is equally important to assure unfettered and harmonious use of the oceans as an avenue of commerce and transportation, and as a source of food. . . This Treaty would establish a twelve mile limit for territorial seas and provide for free transit through international straits. It would also accommodate the problems of developing countries and other nations regarding the conservation and use of the living resources of the high seas.

id., at 809.

(23) See, Oda, **supra** note 16, at 223 - 24.

c. Unceasing demands by Latin American States for a patrimonial sea and emergence of the global concept of economic zone

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As a universally recognized institution of international law, the exclusive economic zone (EEZ) is relatively new, but the idea underlying it is as old as, if not older than, the institution of the continental shelf. As we have observed before, the earliest national claims to the submarine areas of the high seas were in the form of claims to the sedentary fisheries, and the national interest in the continental shelf first appeared and later grew mainly because of the fact that the continental shelf was considered as the main habitat of the edible fish (24). That was quite natural because until as recently as 1950s the marine technology was not developed enough to work the submarine areas at great depths. But the fishing has been a source of subsistence for the coastal communities since the time immemorial.

The distinguishing feature of EEZ is that it enables the coastal state to exercise jurisdiction over a maritime area of 200 miles in breadth for purpose of exploration and exploitation of living and non-living resources found on the seabed or under the subsoil of the submarine areas or in the water column overlying the former (25). Therefore, it covers the rights which the coastal state exercises under the continental shelf regime.

Disregarding the details, when looked at from this perspective, one may see a loose form of EEZ in the Truman Proclamations as issued in 1945, when the Proclamation concerning Fisheries is superimposed on that concerning the continental shelf (26). The declaration of some Latin American States following and imitating

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(24) See, supra, II. As to the evolution of the concept see, among others, Krueger, B.R. - - Nordquist, M.H., **The Evolution of the 200 - Mile Exclusive Economic Zone: State Practice in the Pacific Basin**, 19 VA. J. INT'L L. 321 (1979); Alexander - Hodgson, **The Impact of the 200 Mile Economic Zone on the Law of the Sea**, 12 SAN DIEGO LAW REVIEW 569 (1975); NAWAZ, M.K., **On the Advent of the Exclusive Economic Zone: Implications for the New Law of the Sea**, in Anand (ed.) LAW OF THE SEA: CARACAS AND BEYOND 180 (1978); Sharma, **Exclusive Economic Zone in Policy Perspective**, id. at 204; EXTAVOUR, W.C. THE EXCLUSIVE ECONOMIC ZONE, 2nd ed. (1981); ATTARD, D.J., THE EXCLUSIVE ECONOMIC ZONE, (1987); TOLUNER, S. MILLETLERARASI HUKUK DERSLERI 224 - 229 (1984); ILA, **First (preliminary) Report of International Committee on the Exclusive Economic Zone**, THE SIXTIETH CONFERENCE, Montreal, 303 (1982); ILA, **International Committee Report**, in REPORT OF THE SIXTY - FIRST CONFERENCE, 183 (1984); Oda, Dissenting Opinion in **Continental shelf (Tunisia / Libyan Arab Jamahiriya)**, Judgments, I.C.J. reports 223 (1982); SYMONIEDES, J., **The Exclusive Economic Zone**, XIV POLISH YEARBOOK OF INTERNATIONAL LAW, 43 (1985); Brenann, K.G., **The Evolution of the Sui Generis Concept of "the Exclusive Economic Zone**, PROCEEDINGS OF THE 7TH INTERNATIONAL OCEAN SYMPOSIUM (October 21 - 22, 8 (1982); YOKOTA, Y. **How the Concept of the Exclusive Economic Zone" Has Been Formed?**, id., at 14; OXMAN, **An Analysis of the Exclusive Economic Zone as Formulated in the Informal Composite Negotiating Text, in** LAW OF THE SEA: STATE PRACTICE IN ONES OF SPECIAL JURISDICTION (Olingan, ed.), The Law of the Sea Institue. (1982).

(25) Article 56 of the Montego Bay Convention.

(26) See, supra III, 1, A and B.

the Truman Proclamation, on the other hand, could hardly be told from today's EEZ (27).

In the chronological order, next came the Santiago Declaration of 1951 which was signed and ratified by Chile, Peru and Ecuador and to which Costa Rica acceded in 1954 (28), it was, in fact, nothing but a repetition and consolidation of the principles contained in the previous unilateral declarations into an international treaty, whereby they proclaimed that

> "each of them possesses sole sovereignty and jurisdiction over the area of the sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast. Their sole jurisdiction and sovereignty over the zone thus described includes sole sovereignty and jurisdiction over the sea floor and subsoil thereof." (29).

Then came the Lima Agreement of 1954 (30) and the Ciudad Trujillo Conference of 1956 and other similar acts which were further attempts (31) by certain Latin American States towards legalization or legitimization of the above - mentioned initial claims.

Dissatisfied with the Geneva Convention, the Latin American States persistently maintained their claims through 1960s, in spite of the refusal by the world community to recognize them (32). However, time ran in their favor and the ambiguity surrounding Article I of the Geneva Convention helped them a lot. In 1970s,

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(27) We have commented on those declarations before. See **infra** pp. 32 et seg.

(28) See, Declaration on the Maritime zone, done in Santiago, 18 August 1957, **reprinted in** I NEW DIRECTIONS IN THE LAW OF THE SEA - Document, 231 (Lay - Churchill - Nordquist, eds. 1973).

(29) Article 3 (ii).

(30) **Agreement Supplementary to the Declaration of Sovereignty Over the Maritime Zone of Two Hundred Miles**, Lima, 4 December 1959, **reprinted in** I NEW DIRECTIONS IN THE LAW OF THE SEA, 233 (Lay - Churchill - Nordquist, eds, 1973).

(31) For other similar acts of Latin American States, see, Garcia - Amador, F.V., THE EXPLOITATION AND CONSERVATION OF THE SEA RESOURCES 101 - 108 (1963).

(32) We Have already referred to the pre- Geneva practice of the Latin American states. See **supra** III, 2.A. In 1965 Nicaragua claimed a 200 mile national fishing zone, see, Lay - Churchill - Nordquist (eds), II NEW DIRECTIONS IN THE LAW OF THE SEA 844 (1973). Ecuador extended to 200 miles the breadth of its territorial sea (adjacent sea) in 1966 (See, Lay - Churchill - Nordquist (eds.), II NEW DIRECTIONS IN THE LAW OF THE SEA 843 (1973); and in 1970 See Civil Code as amended by Decree No. 256 - CLP of 27 May, February 1970, **reprinted in** UNITED NATIONS LEGISLATIVE SERIES (ST / LEG / SER. B/18) 15 (1976). Argentina passed laws whereby it claimed sovereignty over a 200 mile adjacent sea, apart from a continental shelf area claimed on the basis of the Geneva formula. See, Law No. 17, 094 - M - 24 of 29 December 1966, **reprinted in** UNITED NATIONS LEGISLATIVE SERIES (ST / LEG / SER. B / 15) 45 (1970). Brazil which had previously pursued a cautious and moderate policy joined the club, in 1970, declaring a 200 mile territorial sea. See Morris, M.A., **Brazilian Ocean Policy in Historical Perspective** , 10 JOURNAL OF MARITIME LAW AND COMMERCE 349, (1978). Uruguay declared a 200 mile of fishing zone, See, Lay - Churchill - Norquist, (eds), II NEW DIRECTIONS IN THE LAW OF THE SEA 844 (1973).

the like-minded nine states issued in May 1970 the Montevideo Declaration (33) and others adhered to it at the Lima Conference held a few months later (34). The Montevideo Declaration in fact did not add any further substance to the previous declarations but it purported to give a more sophisticated legal colour to them. It stated that:

> [T] here exists a geographic, economic and social link between the sea, the land, and its inhabitants, man, which confers on the coastal peoples legitimate priority in the utilization of the natural resources provided by their marine environment.

Secondly, the Declaration referred to the danger of the living resources of the sea being plundered by foreign vessels through "injudicious or abusive" harvesting.

The Declaration not only recognized the previous declarations, treaties or resolutions of Latin American States, but also unequivocally extended the sovereignty or exclusive jurisdiction of the declarants over a maritime area extending to 200 miles from the coast.

The above - mentioned Lima Declaration likewise confirmed the previous declarations and acts of the Latin American states but did not specify any limit clearly, leaving it to the coastal state to determine "in accordance with reasonable criteria," (35) but the 200 mile limit was implicitly recognized.

Perhaps encouraged by the similar developments in the United Nations Sea Bed Committee, the Caribbean states adopted in 1972 the Santa Domingo Declaration, (36) which was much more elaborate. It set the breadth of the territorial sea at 12 nautical miles. It adopted a regime for the patrimonial sea, the breadth of which would not exceed 200 nautical miles. The coastal state would exercise sovereign rights over the *renewable and non-renewable natural resources*, found in the waters, on the seabed and under the subsoil of the area in question.

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(33) **See, Montevideo Declaration on the Law of the Sea**, adopted on May 8, 1970, **reprinted in** Lay - Churhill - Nordquist, (eds) 1 NEW DIRECTIONS IN THE LAW OF THE SEA, 235 - 36 (1978), and in UN LEGISLATIVE SERIES, (ST / LEG / SER. B / 16), 586 - 87 (1979). The Declaration was signed by Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru, and Uruguay.

(34) **See, Declaration of the Latin American States on the Law of the Sea**, Lima, 8 August, 1970 **reprinted in id.** pp. 237 - 239, and in UN General Assembly Doc. A/AC. 138 / 28, August 19, 1970. Argentina, Brazil, Chile, Colombia, Dominican Republic, Equador, El - Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Uruguay, voted for the Declaration; Bolivia, Paraguay, and Venezuela voted against it, while Trinidad and Tobago abstained.

(35) Operative Part, paragraph 8.

(36) **See, Specialized Conference of the Caribbean Countries on Problems of the Sea**, (Santa Domingo, June 5 - 9, 1972), Declaration of Santa Domingo, adopted on June 9, 1972. Fifteen states participated in the conference: Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad - Tobago, and Venezuela. But Barbados, El - Salvador, Guyana, and Panama refused to sign it. See, UN General Assembly Doc. A / AC 138 / 80, and SZEKELY, A. (ed.), LATIN AMERICA AND THE DEVELOPMENT OF THE LAW OF THE SEA, Part II, 53 (1986).

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Alongside with the patrimonial sea, a regime for the continental shelf was provided, which was borrowed from Article 1 of the Geneva Convention, while it was also stated as a desire of some participants that the Latin American Delegations in the UN Sea - Bed Committee should promote a study concerning the advisability and timing for the establishment of precise outer limits of the continental shelf, taking into account the outer limits of the continental rise (37). It was further stated that in that part of the continental shelf which was covered by the patrimonial sea the legal regime as provided for that area would apply, while the area beyond would continue to be governed by the regime established for the continental shelf by international law. In other words, the regime for the patrimonial sea would apply to the area landward of the 200 mile limit, while the area seaward of that limit would be subject to the regime of the continental shelf proper. The area beyond the continental shelf was named as International Sea - Bed, by referring to UN Resolution 2749 (XXV), December 17, 1970, declaring the area in question as the common heritage of mankind (38).

Although the idea of patrimonial sea originated in, and was kept alive by, Latin American States, from the 1940s through 1960s, the Afro - Asian Legal Consultative Committee is given credit for having, for the first time, formulated the term "economic zone" in its 12th session in 1971, (39) which was attended by the Latin American States working in close contact with the African States as a result of the diplomatic initiatives started by the Montevideo group (40). Whatever may have been the effect of the said committee on the emergence of the concept, it is an undeniable fact that the African States contributed enormously to its being accepted and recognized as a universal concept. And,a seminar held in 1972 by sixteen African States in Yaounde (41) doubtlessly constituted one of the most important hallmarks in the string of developments leading to the acceptance of the institution of EEZ. The document embodying the conclusions of the seminar stated, among others, that the African States had the right to establish beyond their territorial sea an Economic Zone over which they would have exclusive jurisdiction for purpose of control, regulation and national exploitation of the *living resources* of the sea. The Economic zone would be open to all African states, including land - locked ones. However, no definite limit was fixed for the zone in question, it was only stated that" the limit of the Economic Zone shall be fixed in nautical miles in accordance with the regional considerations taking duly into account the resources of the region and the rights and interests of the land - locked and near land - locked states.."

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(37) Id., at 58.

(38) Id., at 59

(39) See, O'Connell, I INTERNATIONAL LAW OF THE SEA 561 (1982); ATTARD, D.J., THE EXCLUSIVE ECONOMIC ZONE, 20 - 76 (1987); EXTAVOUR, W.C., THE EXCLUSIVE ECONOMIC ZONE, 2 nd ed. 155 (1981)

(40) For a detailed account of the developments, see, EXTAVOUR, supra note 39, at 155, 158.

(41) See, Conclusions of the Regional Seminar on the Law of the Sea, June 20, 1972, reprinted in THE REPORT OF THE COMMITTEE ON THE PEACEFUL USES OF THE SEABED AND OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION, UN GAOR. 27 th sess. supp. No. 21 (A / 8721) 1972, and in 12 ILM, 210 (1973).

The seminar further recommended that the Economic Zone, which would include at least the continental shelf, should embody all economic resources, both living and non - living, and that the natural resources outside the Economic Zone should be managed by the International Authority. Thus it incorporated the continental shelf into EEZ, although it reserved the exclusive use of the non - living resources of the EEZ for the coastal state.

In 1973, the Organization of African Unity, acting pursuant to the conclusions of the Seminar, adopted a similar but much clearer declaration which established a 200 mile EEZ comprising both living and non - living resources, (42) over which the Coastal State would exercise permanent sovereignty, without undue interference with the other legitimate uses of the sea. It also repeated that the land - locked and geographically disadvantaged states were entitled to participate in the exploitation of the living resources of the EEZ, thus making it clear that the non - living resources were exclusive to the coastal state.

When one compares the approaches of the two groups, one sees that they had some points in common, while differing on some other points. Apparently, they agreed on the following points:

1. The coastal state should have an economic zone (or a patrimonial sea) over which it would have exclusive jurisdiction for purpose of control, regulation and exploitation of both living and non - living resources.

2. The seaward limit of the area was to be a 200 mile line from the shore.

However, they disagreed on the following points:

1) The African States limited the national resource jurisdiction to the 200 mile limit, while, at least, some Latin American States recognized that the area in question would be beyond that limit.

2) The African States recognized the right of the land-locked and geographically disadvantaged states to participate in the exploitation of the living resources of the area, while the Latin American States generally would not.

3) Consequently, the African States recognized that the international sea bed area would start from seaward of the 200 mile limit, while Latin American states recognized that the area in question would be beyond the outer limit of the continental shelf.

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(42) See, Declaration on the Issues of the Law of the Sea, reprinted in REPORT OF THE COMMITTEE ON THE PEACEFUL USES OF THE SEABED AND OCEAN FLOOR BEYOND THE LIMITS OF THE NATIONAL JURISDICTION, vol. II, GAOR, 28th sess. Supp. N. 21 (A / 9021), p. 4.

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B. Developments in the United Nations

a. Pardo's Proposal: A formal call to halt the ever - expanding offshore limits of the national jurisdiction

The uncertainty about the seaward limit of the continental shelf under the Geneva Convention, and the greediness with which some states had gone about in extending their offshore resource national jurisdiction became a source of anxiety, in late 1960s, among the majority of nations which either had narrow shelves or were simply land - locked or shelf - locked. It seemed that if a definite limit were not put on the seaward extensions of the maritime jurisdiction of the states, all the ocean spaces which had traditionally belonged to all nations would be portioned off among a few coastal states in a very near future. Therefore, it was high time someone had acted to stem the expansionistic tendencies. That initiative was taken by Malta which requested, through a *note verbale*, the United Nations Secretary General that the following item should be included in the agenda of the 22nd session (1967) of the General Assembly: Declaration and Treaty concerning the reservation exclusively for peaceful purposes of the sea - bed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind (43). In a memorandum accompanying the *note verbal*, Malta pointed out that the danger of the sea bed beyond national jurisdiction being appropriated by the technologically developed states with the development of new techniques. Accordingly, the General Assembly was urged to act and declare the ocean beyond the national jurisdiction as the *common heritage of mankind* (44).

Speaking on his proposal in the First Committee of the General Assembly on 1 November 1967, Ambassador Pardo stressed the ambiguity of and different interpretation put on Article 1 of the Geneva Convention and said that the interpretations encouraged the appropriation of the vast areas of the ocean floors by those states which had the technical capacity to exploit them. He referred, particularly, to the literal interpretation by some scholars of its exploitability criterion in Article 1 and to the then current practice of the U.S. in leasing tracts of land situated under the water of several hundred fathoms deep and extending for a considerable distance beyond the territorial waters (45). He emphasized potential dangers which might result from such an unrestricted extension of national jurisdiction and suggested that a definite limit should be placed on it. He accordingly proposed that an effective international regime for the seabed and ocean floor beyond a clearly defined national juris-

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(43) See UN Doc. A / 6695. For the comments on the proposal, among others, see, Anand, LEGAL REGIME OF THE SEA - BED AND DEVELOPING COUNTRIES 181 - 82 (1975); ANDRASSY, INTERNATIONAL LAW AND THE RESOURCES OF THE SEA, 137 - 40 (1970); Oda, Dissenting Opinion, in **Continental Shelf (Tunisia, Libyan Arab Jamahiriya)**, Judgment, **I.C.J. Reports 212 - 13 (1982).**

(44) **It was also suggested that an international agency be established to control, and regulate the activities in the area.**

(45) GAOR, 22nd Sess. 1st Committee, 1515th meeting. (Document A/C. 1 PV 1515; November 1, 1967) p. 9.

diction should be established and the area beyond it should be recognized as the common heritage of mankind, to be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole (46).

b. Establishment of the Ad Hoc Committee

The above mentioned Maltese proposal and Pardo's speech in the General Assembly apparently expressed the common feelings of a great majority of states represented in the General Assembly and therefore found a favorable reaction with them (47). Indeed, shortly after the Maltese initiative, the General Assembly took action and unanimously adopted the resolution 2340 (XXII), on 18 December, 1967, whereby it created an *Ad Hoc Committee* composed of 35 members, to study the peaceful uses of the sea - bed and ocean floor beyond the limits of national jurisdiction, (48) General Assembly then recognized by that resolution, tacitly, that an area of the sea - bed and ocean floor existed beyond the national jurisdiction (49), although it did not take any action or express any opinion on the substance of the problem. Thus, the literal interpretations adopted by some scholars of Article 1 of the Geneva Convention that, as the technical capability of the coastal state developed, it could extend its jurisdiction across the deep sea floor up to the midway point between it and the coastal state opposite, was implicitly rejected by the General Assembly. The resolution in question also recognized the common interests of mankind in the sea - bed and ocean floor and that the exploration and use of the seabed and ocean floor should be so conducted as to be in the interests of maintaining the peace and security and to benefit of mankind as a whole.

The *Ad Hoc Committe* which was also instructed by the said Resolution to prepare for the 23rd session of the General Assembly a study which would cover a few aspects of the subject, could not reach any agreement on the principles relating to the seabed questions. And it reported to the General Assembly, acordingly. The report was discussed in the First Committee of the General Assembly in which the same conflicting views repeated themselves. However, the First Committee decided that the matter should be discussed and studied more thoroughly and recommended to the General Assembly that the *Ad Hoc Committee* should be given a permanent status (50).

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(46) Id. at 6.

(47) See, Anand, **supra** note 43 at 183.

(48) The Resolution's full title read: Examination of the question of the reservation exclusively for peaceful purposes of the sea - bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national, and the use of their resources in the interests of mankind, GAOR 22nd sess. Supplement A016 (A / 67 - 16).

(49) See Dissenting opinion of Judge Oda in **Continental Shelf (Tunisia / Libyan Arab Jamahiriya) , Judgment, I.C.J. Reports 219** (1982)

(50) For further details see Id., at 184 - 85.

(51) GAOR: 23rd Session, supplement No. 18 (A/7218).

c. Establishment of the Committee on the Peaceful Uses of the Sea - Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (U.N. Seabed Committee)

Pursuant to the recommendation of the First Committee, the General Assembly adopted, on 21 December 1968, the resolution 2467 (XXIII) (51) whereby it gave a permanent status to the *Ad Hoc Committee* and renamed it as Committee on the Peaceful Uses of the Sea - Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (hereinafter to be cited as the U.N. Seabed Committee).

The U.N. Seabed Committee composed of 42 members, continued with the work which it took over from the *Ad Hoc Committee*, and endeavored to formulate a set of principles to serve as a basis for a regime for exploiting the resources of the sea-bed, but its efforts, like those of its predecessor, proved to be unsuccessful due to the difficulty of reconciliation of different interests represented by different members. In its report to the General Assembly it stated its failure but suggested that it should be allowed to work in that direction (52). The report was discussed in its entirety in the First Committee and the latter, inspired by the report, recommended the General Assembly to pass four resolutions (53), which the General Assembly did and with which we will deal below.

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(52) See UN Doc. A / 7230), THE REPORT OF THE AD HOC COMMITTEE TO STUDY THE PEACEFUL USES OF THE SEA - BED AND THE OCEAN FLOOR BEYOND THE NATIONAL JURISDICTION, para. 22.

(53) All the resolutions bear the following title but are distinguished by different letters: Question of the Reservation for Peaceful Purposes of the Seabed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interests of Mankind, **reprinted in Nordquist** (ed. - in - chief) I UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, 169 - 76 (1985). By the resolution 2574 A (XXIV) the General Assembly instructed the Secretary General to ascertain the views of states about convening a conference on the Law of the Sea. The text of the resolution is **reproduced in, id.**, at 167.By the resolution 2579 B (XXIV) the General Assembly requested the Permanent Seabed Committee to prepare a comprehensive and balanced statement of principles for promoting international cooperation in the exploration and the use of the seabed and the ocean floor beyond the limits of national jurisdiction and for ensuring the exploration of these resources for the benefit of mankind and to submit a draft declaration to the General Assembly at its twenty-fifth session. (See **id.**, at 170 - 71). According to this resolution the Permanent Seabed Committee prepared the resolution, 2479 (XXV) concerning declaration of principles governing the seabed and ocean floor beyond the national jurisdiction, See **infra**. p. 147. By the Resolution 2574 C (XXIV) the General Assembly requested the Secretary - General to prepare a further detailed study on various types of international machinery, covering the status, functions, and powers of an international machinery having jurisdiction over the peaceful uses of the seabed and ocean floor beyond the national jurisdiction and submit his report thereon to the Permanent Seabed Committee. The text is **reproduced in** Nordquist's UN CONVENTION 1982, at 171 - 72. By the Resolution 2574 D (XXIV) (Moratorium Resolution) the General Assembly called on the states not to extend their offshore jurisdictions any further. For its text see **id.**, at 172 - 73. It is further elaborated below.

(54) See **supra** note 53.

d) The Secretary - General requested to ascertain possibility of convening a conference

The General Assembly, acting on the recommendation of the First Committee, passed the resolution 2574 A (XXIV) (54) on 15 December, 1969 whereby it expressed its view of the existing legal status of Article 1 of the Geneva Convention and it took the first step towards its revision. Thus the General Assembly,

> Considering that the definition of the continental shelf contained in the Convention on the Continental Shelf of 29 April 1958 does not define with sufficient precision the limits of the area over which a coastal state exercises sovereign rights for the purpose of exploring and exploiting of the natural resources, and that contemporary international law on the subject is inconclusive
>
> Noting that developing technology is making the entire seabed and ocean floor progressively accessible and exploitable for scientific, economic, military and other purposes
>
> Affirming that *there exists an area of seabed and ocean floor and subsoil thereof which lies beyond the limits of national jurisdiction* (emphasis added) (55).

instructed the Secretary General "to ascertain views of member states on the desirability of convening at an early date a conference on the Law of the Sea to review the regimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the sea, particularly in order to arrive at a clear, precise, and internationally accepted definition of the area of the seabed and ocean floor which lies beyond the limits of national jurisdiction in the light of the international regime to be established for that area. Although most of the industrialized countries opposed to the resolution (56) as recommending an" omnibus conference", which would take many years to prepare, they did not dispute the idea of establishment of an international regime for an area of the seabed and ocean floor beyond the national jurisdiction.

In contrast with the position of the developed countries, a group of developing countries suggested that a comprehensive conference, as opposed to a limited one proposed by Malta to deal with the matter of national jurisdiction, should be convened. They argued that the existing law helped the developed countries which had the capacity to exploit the resources of the seabed and that, therefore, not only delimitation of national jurisdiction with respect to the seabed and ocean floor but also all the other aspects of the Law of the Sea should be revised. Thus, they observed, the newly independent States, too, would have the opportunity to review the existing law and to participate in its codification (57).

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(55) **Id.**, at 170.
(56) **Id.**
(57) **See, Anand, supra** note 43, at 187 - 88.

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Despite the opposition on the part of the developed States, the resolution was adopted in the First Committee by 58 votes to 13 with 40 abstentions (58). The Secretary General, acting on that resolution made an inquiry of the views of the Governments about the desirability of convening such a conference, and he received favorable reactions.

e) The General Assembly Called for Convocation of the Third United Nations Conference on the Law of the Sea and the UN Seabed Committee Enlarged

Informed by the Secretary General of the favorable replies of the Governments for convocation of a conference on the law of the sea, the General Assembly passed a resolution 2750 (XXVI) (59) on 17 December 1970 by 108 votes to 7, with 6 absentions by which it decided

> to convene in 1973 ... a conference on the Law of the Sea which would deal with the establishment of an equitable international regime - - including an international machinery- - for the areas and the resources of the seabed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the regime of the high seas, the continental shelf, the territorial sea (including the question of the breadth and the question of international straits) and the contigous zone, fishing and the conservation of living resources of the high seas (including the question of preferential rights of coastal states) the preservation of marine environment (including, inter alia, the prevention of pollution and scientific research. (60)

The General Assembly enlarged, by the same resolution, the Permanent Seabed Committee by 44 members and instructed it to prepare for the proposed conference a draft treaty embodying all the regimes and issues as indicated in the resolution 2750 C (XXVI) (61) The enlarged Committee accordingly reorganized itself into three sub - committees to cope with the task entrusted to it. (62)

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(58) See, UN Doc. A / C. 1 / PV. 1709, 2 December, 1969, p. 46.

(59) The text of the resolution is **reprinted in** Nordquist's UN CONVENTION 1982, at 178 - 81.

(60) **Id.**, at 179.

(61) **Id.**, at 180.

(62) The Sub-committee I was entrusted with the task of preparing draft treaty articles embodying the international regime for the area beyond the national jurisdiction and its resources. The Subcommittee II was to deal with a comprehensive list of subjects and issues relating to the Law of the Sea, including the regimes of the high sea, the continental shelf, the territorial sea (including the question of its breadth and the question of the international straits) and contiguous zone, fishing and conservation of the living resources of the high seas. The Subcommittee III was to deal with the question of marine environment and scientific research and to prepare draft articles on them. However the Committee reserved the right for itself to determine the questions, inter alia, of the precise definition of the area of the seabed beyond the limits of national jurisdiction and of all peaceful use of that area.

However, the General Assembly reserved its right to review, at its 26th and 27th sessions, the Report of the Committee on the progress of is preparatory work with a view to determine the precise agenda of the Conference on the Law of the Sea, its definite date, location and duration and to postpone the conference if it found the preparatory work unsatisfactory (63). On the other hand, the General Assembly decided in 1971 to add to the membership of the UN Seabed Committee five more members and thus brought its membership to 91.

At the end of 1973, the UN Seabed Committee once again had failed in its task of producing a simple preparatory document in the form of a set of treaty articles. What it had done was a compilation in 6 volumes of hundreds of individual proposals or draft articles by States or groups of States as well as other documents and reports of the three subcommittees, which it submitted to the twenty - eighth session of the General Assembly (1973) (64). Nevertheless, the General Assembly confirmed in resolution 3067 (XXVIII) of 16 December 1973 its previous decision in its Resolution 3029 A (XXVII) and decided to convene the first session of the Third United Nations conference on the law of the sea in New York from 3 to 16 December 1973 for the purpose of dealing with matters relating to the organization of the conference. It further decided to convene the second session of the conference for a period of ten weeks from 20 June to 29 August 1974 at Caracas and, if necessary, to convene not later than 1975 any subsequent session or sessions as may be decided upon by the conference and approved by the General Assembly. The General Assembly also referred to the Conference reports of the U.N. Seabed Committee on its work and all other relevant documents of the General Assembly and the Committee. Besides, it invited the participating states to submit their proposals, including draft articles, on the substantive subject matters of the conference to the Secretary - General by 1 February 1974 and thereafter at any stage of the conference in accordance with the procedure adopted by the conference.

f) Resolutions of the General Assembly relating to the substance of rights of the coastal states

aa. Moratorium Resolution (66)

Fearing that by the time an agreement was reached on the legal regime of the seabed, a large part of it would have been exploited and consequently appropriated by those who had the technological capability, (67) the developing, land locked and

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(63) Id., at 180.

(64) See Koh, T.T.B., Jayakumar, S., **The Negotiating Process of the Third United Nations Conference on the Law of the Sea**, in Nordquist's UN CONVENTION 1982, at 29, 50.

(65) The text is reprinted in id., at 188 - 90. For the reasons why the GA decided to convene the conference see, Koh - Jayakumar, **supra** note 64 at 53 - 54.

(66) The text is reprinted in Nordquist's UN CONVENTION 1982, at 172 - 73.

(67) For example, the Swedish representative said

> "Mankind has become warned that while negotiations are going on, technological developments are only accelerating and the opportunities to exploit them are grasped with such alacrity by those who have the power to do so, that when we finally come to the negotiating table, there may not be a great deal left open to negotiate about.

See, UN Doc. A/C. I / P. V. 1527, 16 Nov. 1967, p. 56. For further details see, Anand, **supra** note 43, at 191 - 200.

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shelf - locked states attempted a somewhat drastic action to call a halt to the expanding national jurisdiction of the coastal states. They succeeded in having the General Assembly pass a resolution [2574 D (XXIV)] on 15 December 1969, whereby the General Assembly declared that the exploitation of the seabed resources beyond national jurisdiction should be carried out under an international regime including an appropriate international machinery, and it emphasized the importance of preserving the soil, seabed and ocean floor from actions and uses which might be detrimental to the common interests of mankind. It then categorically declared the most important and controversial part of its resolution:

> Pending establishment of the aforementioned regime: a) - states and persons, physical and juridical, are bound to refrain from all activities of exploitation of the resources of the area of the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction. b) - No claim to any part of that area or its resources shall be recognized. (68)

The resolution was adopted by 62 votes to 28, with 28 abstentions. Almost all the developed states voted against it. Moreover, the resolutions of the General Assembly as such not being binding on the member states, the legal effect of the said resolution was certain to be marginal (69) and, in fact, the developed states did not heed it in their practices. However, some commentators argued that the resolution constituted a substitute for individual or collective protests against extended claims to the areas envisaged by the resolution. (70)

Although the resolution did not define or specify the limits of national jurisdiction beyond which it prohibited the national judisdiction from being extended and, therefore, beg the very question all the activities were about, it absolutely emphasized the idea of limited national jurisdiction and demanded a halt to the expanding existing seaward limits.

bb. ***The Declaration of Principles Resolution***

The UN Seabed Committee acting on the General Assembly's resolution 2574 B (XXIV) dated 15 December 1969 (71) had prepared a draft resolution containing principles for promotion of cooperation in the exploration and use of the seabed

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(68) See, **supra** note 66, at 173.

(69) Commenting on the GA's resolution 2749 (XXV) of the 18 December 1970 Friedmann said that "But the positive achievements of the General Assembly resolution should not be exaggerated. - A declaration of principles is fine as far as it goes, but it does not commit anybody to any specific action..." **Selden Redivivus, Towards a Partition of the Seas** 65 AJIL 757 (1971). For the reaction of US Senate, Special Subcommittee on the Outer Continental Shelf as expressed by its chairman Metcalf, see, 9 ILM 831 - 82 (1970).

(70) Andrassy, **supra** note 12, at 127

(71) See, **supra** note 53, at 170 - 71.

and ocean floor beyond the national jurisdiction and for ensuring the exploitation of their resources for the benefit of mankind and submitted it to the First Committee of the General Assembly which, in turn, adopted and referred it back to latter. The General Assembly, upon the recommendation of the First Committee adopted unanimously, on 17 December 1970 the draft in question as its resolution [2749 (XXV)] entitled Declaration of Principles Governing the Sea - Bed and the Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction. (72)

The General Assembly declared by that resolution, inter alia, that there existed an area of the seabed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction, the precise boundaries of which were yet to be determined; that the existing legal regime of the high seas did not provide substantive rules for regulating the exploitation of the said areas; that an international regime applying to the area and its resources, with its appropriate international machinery should be established as soon as possible; that the seabed and ocean floor and the subsoil thereof, beyond the national jurisdiction (area) and its resources were *the common heritage of mankind*; that the area would not be subject to appropriation by any means by states or persons, natural or juridical and no state would claim or exercise sovereignty or sovereign rights over any part of it; that no state or person, natural or juridical, would claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of the Declaration; that the exploration of the area and the exploitation of its resources would be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of the developing countries, and finally that on the basis of the principles of the Declaration, an international regime applying to the area and its resources and including an international machinery to give effect to its provisions would be established by an international treaty of a universal character.

Thus, the resolution clearly recognized that there existed an area of the seabed and ocean floor beyond the national jurisdiction which was the *common heritage of mankind*, but it did not indicate any precise limit to the offshore national jurisdiction. In fact, it suggested that there was not any agreement on how far out to the sea the national jurisdiction extended (73). It did not mention, either, of the moratorium resolution which purported to put a brake on the extension seaward of the national jurisdiction. Neither did it mention of the high seas freedom to exploit the ocean floor. Perhaps the concept of "the common heritage of mankind" could be considered as a tacit refusal by the international community to recognize national claims to the areas beyond the national jurisdiction. But that would not help much, as the seaward limit of national jurisdiction itself was not clear and the moratorium resolution was not effective. The resolution being a compromise reached among not only the developed and developing countries, but also among the countries with various and, often, conflicting interests in the offshore areas, it was bound to be ambiguous and non-

(72) The text is reprinted in Nordquist's UN CONVENTION 1982, at 173 - 76.
(73) For an analysis and evaluation of the resolution see, Anand, supra note 43, at 200 - 05.

controversial. It is always a virtue of such resolutions that all the parties could find something in them to their interests and that they constitute a reasonable basis for future actions. Be that as it may, it is amazing to see today, in retrospect, how successfully the guidelines laid down by the resolution have been implemented by the Montego Bay Convention.

2. Proposals in the United Nations Seabed Committee

A. A Restricted Continental Shelf and An International Trusteeship Area Beyond

A few months after the Nixon Announcement, the United States submitted, on 3 August 1970, a draft convention to the UN Seabed Committee as a working paper (74).

The draft convention in fact was nothing but an implementation of the proposals contained in the Nixon Announcement (75). It designated the submarine areas up to 200 m isobath as the continental shelf indisputably subject to the jurisdiction of the coastal state and the area beyond it as the International Seabed Area which was, in turn, divided into two parts: the International Trusteeship Area, lying between 200 m isobath and the outer edge of the continental margin, and the Deep Ocean Area, lying seaward of the outer edge of the continental margin. The International Seabed Area was designated as the common heritage of mankind and the exclusive jurisdiction of the coastal state over that area was excluded. Each coastal state would act as a trustee for the international community in the Trusteeship Area off its coast, and its rights in the area were to be equal to those of other states except as specifically provided. The trustee state would have the right and the responsibility, subject to the general provisions of the draft convention, of issuing, suspending and revoking mineral exploration and exploitation licenses in return for such portion of royalties and profits as set forth in the draft convention. Beyond the Trusteeship Area, the International Seabed Resources Authority was to be the administering authority and all the revenues from the Trusteeship area were to be paid to it. The generated revenues were to be used for the benefit of all mankind, taking the developing countries into particular consideration. Like the Nixon Announcement, the Draft Convention provided due protection for the investments made in the International Seabed Areas prior to 1 July 1970, allowing them to be continued without change. The Draft Convention furthermore provided for an elaborate machinery to handle various issues relating to the exploration and exploitation of the International Seabed Area (76).

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(74) See, United States Draft of U.N. Convention on International Sea - Bed Area, August 3, 1970, reproduced in 9 ILM 1046 (1970)

(75) The draft convention was criticized by the "wide shelfers." See, The Metcalf Report, supra note 18, at 29, 30. On the other hand, such internationalists as Friedmann praised it. See, supra note 16, 756.

(76) For an objective analysis of the proposal see Oda, Dissenting Opinion in **Continental Shelf (Tunisia / Libyan Arab Jamahiriya)**, Judgment, I.C.J. Reports, 215 (1982).

Netherlands also proposed a restricted outer limit for the continental shelf, with an intermediate zone beyond it (77). According to the proposal, the outer limit of the continental shelf was either to be the 200 m. isobath or a line drawn at a distance of 40 miles as measured from the baselines. The Intermediate Zone was to comprise, as far as the living resources were concerned, the superjacent waters up to a distance yet- to - be determined and, so far as the non - living resources were concerned, the seabed and the subsoil of the submarine areas up to 40 miles seaward of the outer limit of the continental shelf (78). The coastal state was to license all exploration and exploitation of both living and non - living resources of the intermediate zone, subject to rules and regulations to be established by the competent international authorities. The proposal also contained an article suggesting that any states deriving revenues from the exploitation of the proposed Intermediate Zone should make available a yet - to - be specified percentage of revenues to the competent international authority to be used for benefit of international community (79).

On the other hand, Byelorussia suggested, in July 1971, 200 metres / 40 miles; Iraq suggested 40 miles, and Australia suggested 100 miles as the seaward boundary of the continental shelf. Many states suggested or supported 200 miles alone or in combination with some depth criterion (80). The 200 mile limit was generally accepted mainly because of the "take off" of the EEZ concept in the early 1970s. Therefore, the limits falling short of 200 miles did not find any favor either with the developing states supporting a 200 mile EEZ or with the wide margin states determined not to renounce their rights allegedly acquired under the existing regime.

United States changed its position in 1973 and made another proposal which was different from the 1970 proposal, substituting the *coastal seabed economic area* for the previously suggested ones (81). The new area was to cover the sea expanse from the outer limit of the territorial waters to the lower edge of the continental slope. The coastal state was to have the exclusive right to grant licenses, leases and other contractual arrangements to persons who might or might not be its nationals, in accordance with the terms of the proposal. The coastal state was not to take the property of the foreign instrumentalities or persons in the economic area except for a public purpose, and even then upon payment of a prompt and just compensation (82). It further provided that the coastal state would make available a portion of the

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(77) UN Doc. A/AC. 138 / 3C.II/L. 59 and Corr. 1, reprinted in REPORT OF THE COMMITTEE ON THE PEACEFUL USES OF THE SEA - BED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION. Vol. III, General Assembly Official Record, Twenty - eighth Session supplement No. 21 (A/9021) p. 111.

(78) Id., Article 1.

(79) Id., Article 8.

(80) See, Anand, supra note 43, at 143.

(81) See, United States of America: Draft articles for a chapter on the rights and duties of states in the coastal seabed economic area in UN Doc. A/AC. 138/S. II/L. 35. Corr. 1 reprinted in III UN Seabed Committee's Report, supra note 76 p. 75.

(82) Article 2 (d).

revenues gained from the exploitation of the resources of the area to be dedicated to the international community (83).

Admittedly, the real intention of the United States was for the continental margin to be placed under the control of the coastal state, while giving it at the same time, the status of an international seabed which would provide international protection to the US investments made in the area against any arbitrary nationalization or confisication by the coastal state (84).

The United States proposals were not accepted, partly because of the bad effect of the term trusteeship on the newly independent states (85) and partly because of the greed with which many states went by in appropriating the vast portions of high seas under the name of economic zone, epicontinental sea, etc. In spite of so much rhetoric for the common heritage of mankind, coastal developing countries did not agree to less than a 200 n.m economic zone. However, a group of states, mostly composed of land-locked or shelf-locked states insisted that the outer limit of the 200 mile zone should constitute the maximum limit of the national jurisdiction, as well, while others, specially wide margin states did not agree to such a proposal and insisted that where the continental margin extended beyond the 200 mile limit, the coastal state should maintain its rights which they had allegedly acquired under the existing law.

B. A single 200 mile exclusive economic zone and no continental shelf beyond

Just as in the Asian - African Legal Consultative Committee, so in the United Nations Seabed Committee it was Kenya that introduced, for the first time, the concept of the exclusive economic zone in its original form (86). The proposal provided for a 12 mile territorial sea and a 200 nautical mile economic zone as measured from the applicable baselines, in which the coastal state would exercise exclusive jurisdiction for the purpose of control, regulation and exploitation of both living and non - living resources, and for the purpose of prevention and control of pollution (87). It did not make any mention of the continental shelf. But the outer limit of the zone was intended to be, at the same time, the outer limit of the shelf as well. It also recognized the right of the land - locked states to participate in exploitation of the living resources of the zone, (88) while reserving non - living resources for the coastal state. The other traditional uses of the high seas were carefully maintained.

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(83) Article 2 (e).

(84) See, Oda, supra note 76, at 216.

(85) See, Friedmann, supra note 16, at 759.

(86) See, Draft Articles on exclusive economic zone concept, submitted by Kenya in UN Doc. A / AC. 138/SC. II/L. 10, reprinted in 1972 UN Seabed Committee, GAOR: 27th Sess. Supp. No.21 (A/8721) p. 130. In fact, Venezuela had introduced a compromise formula in the summer session of the UN Seabed Committee in 1971, proposing a 12 - mile territorial sea; maintenance of the existing rights of the coastal state with respect to the continental shelf up to the 200 metre isobath, and an economic zone not exceeding 200 miles in breadth. See, UN Doc. A/AC. 138/SR 69, at 3 (1971).

(87) Id., Article II.

(88) Id. Article IV.

The concept very quickly became popular and many other similar proposals followed. While some proposals provided separate regimes and different limits for EEZ and continental shelf, some others followed the pattern set by Kenya. Here, we shall outline the latter category, leaving the former to be dealt with under the next heading.

Particularly, Asian and African States preferred the Kenyan model, so much so that fourteen states reintroduced the Kenyan proposal in 1973 without making any substantial change (89). Other states introduced similar concepts with drafting variations (90).

Iceland made a proposal which provided for establishment of a maritime area adjacent to the territorial sea, over the natural resources of which the coastal state was to have exclusive jurisdiciton and control, and the outer limits of which would not exceed 200 n.m. as measured from the baselines. (91)

Malta proposed the concept of *National Ocean Space*, the breadth of which would not exceed 200 n.m (92). The coastal state would exercise jurisdiction over it for the purpose of exploration and exploitation of the resources. However, the acceptance of the maximum 200 mile limit was made dependent on recognition of an equitable compensation to be made to those states which would surrender their claims to the areas beyond the 200 *mile limit*. (93) The land - locked state would have right of access to the fisheries of the ocean space and the coastal state would have to transfer a portion of the revenues derived from the exploitation of the resources in question to the international space institutions.

Afghanistan, Austria, Belgium, Bolivia and Singapore introduced a joint proposal which suggested that the coastal state should have the right to establish a zone which might extend beyond a certain distance (which they did not specify) in which

(89) Algeria, Cameroon, Ghana, Ivory Coast, Kenya Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tunisia and United Republic of Tanzania: draft articles on exclusive economic zone, in UN Doc. A / AC. 138/SC. II/L. 4, and Corr. 1 - 3, **reprinted in** UN Seabed Committees's Report 87 (1973).

(90) For example, **see, Uganda and Zambia: draft articles on the proposed economic zone,** in UN Doc. A/AC, 138/SC. II/L. 41, **reprinted in id.,** at 89; **Canada, India, Kenya, and Sri Lanka: draft articles on fisheries,** in UN Doc. A/AC. 138/ SC. II/L. 38, **reprinted in id.,** at 82; **Working paper submitted by the delegations of Australia and Norway containing certain basic principles on an economic zone and on delimitation,** in UN Doc.. A/AC. 138/SC II/L. 36 **reprinted in id.** at 77.

(91) **See,** Jurisdiction of coastal states over natural resources of the area adjacent to their territorial sea: Working paper submitted by Iceland, in UN Doc. A/AC 138/SC. II/L. 23, reprinted in **id.** at 23.

(92) **See, Malta: Preliminary draft articles on the delimitation of coastal state jurisdiction in ocean space and on the rights and obligations of coastal states in the area under their jurisdiction,** in UN Doc. A/AC. 138/SC. II/L. 28, **reprinted in id.,** at 35. **See also Draft Ocean Space treaty: working paper submitted by Malta, in** UN Doc. A/AC. 138/83 **reprinted in** UN Seabed Committee Report, GAOR, 27th Sess. Supp. N. 21 (A/8921), 105 (1971).

(93) Article 17.

it would exercise jurisdiction for purpose of exploration and exploitation of the living and non-living resources of the superjacent waters and the seabed and subsoil, subject to the rights provided for the disadvantaged states (94). The proposal also provided for a revenue-sharing scheme according to which the coastal state was to make contributions to the International Authority derived from exploitation of the resources carried out both within and outside the 200 metre isobath or 50 mile distance form the coast, whichever it chose. The Authority was to distribute the contributions on the basis of equitable criteria (95).

In the same way, Uganda and Zambia proposed that economic zones, the outer limits of which would not exceed certain distances yet to be determined, (96) should be established beyond the territorial sea of the coastal state. According to the proposal, the zones would be in form of regional or subregional zones, the fisheries of which would be reserved for the exclusive use of all the states within the region or subregion. The exploitation of non-living resoures would be the responsibility of the regional or subregional state on behalf of all the states of the region or subregion. The area beyond the regional or subregional economic zone would be the international area.

In parallel to those developments, the Latin American states proposed establishment of a 200 mile partrimonial sea (or epicontinental or even territorial sea) (97) with or without an additional continental shelf according as the continental margin extended beyond 200 nautical mile limit (98).

Developed countries at the outset seemed to be unwilling to accept the concept of EEZ and they sought to regulate the living resources, as opposed to the living resources, within the context of preferential fishery regimes, the aim of which

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(94) See, UN Doc. A/AC. 138/SC.II/L. 39, **reprinted in** III UN Seabed Committee's Report, GAOR: 28th Sess. Supp. 21 (A/9021) 85 (1973).

(95) **Id.**, Article III.

(96) **See supra** note 90.

(97) Uruguay proposed a 200 mile territorial sea, generally similar to EEZ.In the first part of 12 miles, the third states would have only the right to the innocent passage., while in the remaining 188 mile part the rights of the coastal states would be similar to those rights recognized under the EEZ regime and the neighbouring land-locked states would have access to the living resources of the second part. **See, Uruguay: draft treaty articles on the Territorial Sea** in U.N. Doc. A/AC. 138 / SC. II/L. 24, **reprinted in id.**, at 23.

Brazil proposed a maximum 200 mile territorial sea within which the coastal state would have the choice of establishing modalities of legal regimes or specialized competences. **See, Brazil: draft articles containing basic provisions on the questions of the maximum breadth of the territorial sea and other modalities or combinations of legal regimes of coastal state Sovereignty jurisdiction or specialized competences,** in U.N. Doc. A/AC. 138/SC. II/L. 25, **reprinted in Id.** at 29.

(98) The proposals of the Latin American states which provided for establishment of a 200 mile zone comprising living and non-living resources and recognition of a continental shelf beyond it if the continental margin so far extended, and dealt with further below. **See infra**, VII, 2, C.

was to maximize the utilization of fisheries for the benefit of international community (99). However, they later on gradually recognized the concept of the EEZ, in conjunction with the continental shelf and in return for the recognition by the developing countries of the right to transit passage through international straits. In so doing, they took the concept of the continental shelf as undisturbed (100).

In conclusion, during the work of the United Nations Seabed Committee, the concept of the EEZ with its regime governing both living and non-living resources and with its 200 mile limit became a reality. It was bound to affect the regime of the continental shelf. After a study of the other proposals asking for an additional continental shelf area, we will be in a position to see the dimensions of that effect.

C. An Autonomous Regime of A Continental Shelf with Two Alternative Definitions: 200 mile distance and outer edge of the continental margin

As we have already noted, a group of states blessed with wide margin took issue with the policy pursued by the adherents of a unitary resource jurisdiction. Although they recognized the existence and validity of the exclusive economic zone, they insisted that in the areas where the continental margin extended beyond the 200 mile limit, the coastal state should retain its sovereign rights over the area in question up to the outer edge of the continental margin. Consequently, their proposals contained separate provisions concerning the continental shelf and the EEZ respectively. The common thread running through some of those similar proposals was that they recognized that the regime of the EEZ would apply to that part of the continental shelf covered by the EEZ and the part extending beyond it would be governed by the regime of continental shelf as established in internatinoal law. For example, Colombia, Mexico and Venezuela suggested a patrimonial sea, (101) extending 200 n.m. from the baselines, over renewable and non-renewable resources over which the coastal state were to exercise sovereign rights. But it also provided for a separate regime for the continental shelf which was defined as

> "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to the outer limits of the continental rise bordering on the ocean basin or abyssal floor" (102).

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(99) See, Working Paper on Management of the Living Resources of The Sea, Submitted by Canada, in UN Doc. A/AC. 138/SC. II/L. 8, reprinted in REPORT OF THE COMMITTEE ON THE PEACEFUL USES OF THE SEABED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION, GAOR: 27th. Session Supp. 21 (A/8721) 165 (1972); Proposals for a regime of fisheries on the high seas, submitted by Japan, in UN Doc. A/AC. 138/ SC. II/L. 12 reprinted in id., at 188.

(100) See, Oda, supra note 76, at 226.

(101) Colombia, Mexico and Venezuela: draft articles of treaty, in UN Doc. A/AC. 138/ SC. II/L. 21, reprinted in III UN Seabed Committee Report, GAOR: 28th. Sess. Supp. 21 (A/9021) 19 (1973)

(102) Id., at 21, Article 13.

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The proposal further stated that:

> in that part of the continental shelf covered by the patrimonial sea, the legal regime provided for the latter shall apply.
>
> With respect to the part beyond the patrimonial sea, the regime established by international law for the continental shelf shall apply (103).

Ecuador, Panama, and Peru proposed a 200 mile *adjacent sea* which was no different from the territorial sea in nature, (104) while the door was left open for consideration of further provisions in cases where the continental shelf extended beyond 200 miles (105). Chinese delegation suggested a 200 mile EEZ over which the coastal state was to have exclusive jurisdiction for purpose of exploring its living and non-living resources, (106) while maintaining the jurisdiction of the coastal state over the continental shelf extending beyond the 200 mile limit, on the basis of the principle of natural prolongation (107). It also recognized the right of the land-locked and shelf -locked states to participate in the exploitation of the resources of the EEZ (108).

The working paper submitted by Australia and Norway was to the same effect. (109) It provided for establishment of an economic zone (or patrimonial sea) extending to 200 n.m. over which the coastal state would exercise exclusive jurisdiction for purpose of exploiting both its living and non - living resources (110). However, where the natural prolongation of the land territory of the coastal state extended beyond the economic zone (or patrimonial sea) the coastal state was to *retain* the sovereign rights with respect to that area which "it had under international law before the entry into force of this convention: right to not extend beyond the outer edge of the continental margin" (111).

Argentina proposed a three-pronged jurisdictional area based on distance, depth and geomorphology (112). Like the other Latin American States, it suggested an adjacent sea area extending to 200 nautical miles or to the outer limit of the epicontinental sea. The latter was defined as being the column of water covering the seabed

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(103) **Id.**, Article 15.

(104) **Draft articles for inclusion in a convention on the Law of the Sea: Working paper submitted by the delegations of Ecuador, Panama and Peru**, in UN Doc. A/AC. 138/ SC. II /S. 27 and Corr. 1 and 2, **reprinted in id.**, at 30.

(105) **Id.**, at 33, part II.

(106) **Working paper submitted by the Chinese delegation: Sea areas within the limits of national jurisdiction**, in UN Doc. A/AC. 138/SC II/L. 34, **reprinted in id.**, at 71.

(107)**Id.**, at 74, Article 3.

(108) **Id.**, at 72 - 73, Article 2.

(109) **Working paper submitted by the delegations of Australia and Norway containing certain basic principles on an economic zone and on delimitation**, in UN Doc. A/AC. 138/SC. II/L. 36, **reprinted in id.**, at 77.

(110) **Id.**, Article 1.

(111) **Id.**,at 78.

(112) **Argentina: draft articles**, in UN Doc. A/AC. 138/SC. II/L. 37 and Corr. 1, **reprinted in id.**, at 78.

and subsoil of which were situated at an average depth of 200 metres. (113) The Coastal state was to exercise sovereign rights over both the living and non-living resources of the area. In the area in question, the states of region or subregion which did not establish such an exclusive maritime zone were to enjoy a preferential regime for purpose of fishing in the area in question.

The proposal, additionally, provided a separate regime for the continental shelf, the outer limit of which was to extend either to the outer edge of the continental margin or to the 200 mile distance where the edge in question did not extend that far. (114) The coastal state was to exercise sovereignty over the shelf for purpose of exploiting its living and non-living natural resources.

Japan introduced a proposal providing for establishment, beyond the territorial sea, of a *coastal seabed area* up to a maximum distance to be determined, giving the coastal state sovereign rights for purpose of exploring it and exploiting its resources. (115)

Soviet Union proposed as the seaward limit a combination of the 500 metre isobath and distance of 100 miles from the applicable baselines. (116)

By the time UN Seabed Committee's work came to an end, some basic policies had become clear: it was clear that the territorial sea would extend up to 12 nautical miles and that it ceased to be a matter for bargaining. (117) It was also clear that the concept of exclusive economic zone had become a reality. Consequently, the 200 mile limit was bound to enter or to affect the definition of the continental shelf. However, there was an ongoing disagreement whether the outer limit of the EEZ should constitute the maximum seaward limit of the continental shelf as well. The conflicting interests of wide margin states (margineers) and the states with narrow shelves (narrow shelfers) became acute. On the other hand, the question of whether the regime of the continental shelf would be absorbed by that of EEZ within the 200 mile has yet to be addressed thoroughly.

As we have indicated before, the UN Seabed Committee having failed to formulate a negotiating text for consideration of the conference, the latter had to face up to those conflicting interests and various proposals formulating them. In the next paragraphs we shall deal with them.

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(113) **Id.**, at 79.

(114) **Id.**, at 30, para. 15.

(115) **Japan: Principles on the delimitation the Coastal Sea-Bed areas**, in UN Doc. A/AC. 138/ SC. II/L. 56 **reprinted in id.**, at 111.

(116) **Union of Soviet Socialist Republics: rough draft of basic provisions on the question of the outer limit of the continental shelf, in** UN Doc. A/AC. 138/ SC. II/ L. 26, **reprinted in id.**, at 29.

(117) **See, Oda, supra** note 76, at 223.

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3. The Third United Nations Conference

Introduction

As it had been decided by the Resolution 3006 (XXVIII) of the General Assembly, the Conference had its first session in New York in 1974. Not having any negotiating text before it, it had to deal with a "package of many important questions" which had yet to be formulated. It accordingly organized itself. (117) It decided not to use the traditional voting system, in view of the divergent interests involved. Instead, it developed its own Rules of Procedure (118), according to which the decisions on substantial issues were to be taken by consensus. The conference would not take any voting on any questions of substance before it had exhausted all efforts to reach a consensus, through various deferment and cooling off periods.

On the other hand, the conference decided to form small working groups, as the large number of the participants would make it difficult to work in plenary meetings. It accordingly set up three Main Committees, which became known as the First, the Second and the Third Committees. The First Committee was assigned the task of dealing with the status of the areas beyond the national jurisdiction; the Second Committee would deal with the status of national maritime zones such as the territorial sea, the exclusive economic zone, the continental shelf, and the other related matters, and the Third Committee would deal with the questions relating to marine scientific research and the preservation of the marine environment. In the Caracas session, many proposals which had been tabled at the UN Seabed Committee were reintroduced and new proposals were made. The Governments expressed their opinions on various issues. (119)

The first negotiating text, which was named the Informal Single Negotiating Text (ISNT) (120) was produced by the chairmen of main committees on the basis of the above - mentioned proposals and statements, at the end of the third session. The second text (Revised Single Negotiating Text - RSNT) (121) was prepared in accor-

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(117a) For the developments in the Conference in a chronological order, see, Jagota, S.P. MARITIME BOUNDARY, 27, 219-279 (1985); Oxman, B.H., Stevenson, J.R., **The Preparation for the Law of the Sea Conference, 68 AJIL, 1 (1974)**; Oxman - Stevenson, **The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session, 69 AJIL 1 (1975)**; Oxman- Stevenson, **The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session, 69 AJIL, 763 (1975)**; Oxman, **The Third United Nations Conference on the Law of the Sea: the 1976 New York Sessions, 71 AJIL, 247 (1977)**; Oxman, **The Third United Nations Conference on the Law of the Sea: the 1977 New York Session, 72 AJIL 57 (1978)**; Oxman, **The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978), 73 AJIL 1 (1979)**; Oxman, **The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979) 74 AJIL 1 (1980)**; Oxman, **The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981), 76 AJIL 1 (1982).**

(118) A/Conf. 62/30/Rev. 3.

(119) UNCLOS III, OFFICIAL RECORDS, Vol. II.

(120) A/Conf. 62/WP.8, 7 May 1975.

(121) A/Conf. 62/WP. 8/Rev. 1, 6 May, 1976.

dance with the same method at the end of the fourth session. The third text (Informal Composite Negotiating Text - ICNT) (122) appeared at the end of the sixth session.

In 1978, the Conference took new decisions (123), according to which the revision of the ICNT would be the collective responsibilitiy of the President of the Conference, the chairmen of the main committees, acting as a team, but on the basis of a consensus to emerge from the Conference. Accordingly, ICNT was first revised in the Eighth Session in 1979 (124) and secondly in the ninth session. (125) A Draft Convention was produced at the end of the Resumed Tenth Session (28 August 1981) (126) and finally the Convention itself was adopted on 30 April 1982. It will enter into force one year after the date on which the sixtieth state has ratified it. As of 3 November, 1987, only 35 states (or other entities) had ratified it. (127)

A. Proposals in the Conference

a. Proposals for a single maritime zone: a maximum 200 mile zone.

In the Caracas session, in 1974, the question of whether there should be two separate regimes for the continental shelf and EEZ respectively, generated hot debates among the participants. Asian and African states argued and tabled proposals for establishment of a 200 mile EEZ in which the coastal state would exercise sovereign rights for purpose of exploiting the natural resources, both renewable and non-renewable, of the submarine area and of the superjacent waters. Thus, the regime of the continental shelf was intended to be absorbed by the wider regime of the EEZ. (128) The maximum limit of national jurisdiction would terminate at the 200 mile

(122) A/Conf. 62/WP. 10, 15 July, 1977.

(123) **Organization of Work: decisions taken by the Conference at its 90th meeting on the report of the General Committee, DOCUMENT: A/CONF. 62/62, reprinted in THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, Vol. X, pp. 6 - 10.**

(124) **Informal Composite Negotiating Text / Revision one, A/Conf. 62/WP. 10/Rev. 1, 28 April 1979.**

(125) **A/Conf. 62/W.P. 10/Rev. 2, 11 April 1980.**

(126) **A/Conf. 62/L. 78, 28 August 1981.**

(127) The following states have ratified the Convention: **Bahamas, Bahrain, Belize, Cameroon, Cuba, Cape Verde, D.Yemen, Egypt, Fiji, Gambia, Ghana, Guinea, Guinea Bissau, Iceland, Indonesia, Iraq, Ivory Coast, Jamaica, Kuwait, Mali, Mexico, Nigeria, Paraguay, Philippines, Saint Lucia, San Thomas and Principe, Senegal, Sudan, Togo, Tunisia, Trinidad - Tobago, Yugoslavia, Zambia, Namibia, United Republic of Tanzania.** See, Report of the Secretary General of the United Nations, 5 November 6 (1987).

(128) See, Observations of Governments in the Second Committee, UNCLOS III, Official Records vol. II, pp. 192-226.

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limit. Gambia and 18 other African states tabled a joint proposal (19 - power proposal) for establishment of such a regime. (129) Nigeria (130), Guyana (131) made similar proposals. Nicaragua introduced the concept of national sea, the outer limit of which was to be set at the 200 mile distance from the applicable baselines. (132) While the former proposals did not mention and had their aim the abolition of the continental shelf, the Nicaraguan national sea would comprise the continental shelf which continued the land territory under the sea up to the outer edge of the continental *emersion*, though the 200 mile rule would govern the whole notion of the national sea.

Twenty - two land - locked and geographically disadvantaged states made a proposal (133) which provided that the coastal state would have right to establish, beyond the territorial sea, a zone, the breadth of which would not exceed a yet-to -be determined distance for the purpose of exploring and exploiting its living and non-living resources. Thus,that proposal, too, would amalgamate the continental shelf regime with that of the EEZ into a new zone yet to be established. The land - locked states would participate in the exploitation of both living and non - living resources of the zone of the neighboring coastal states. (134) The proposal further provided that states deriving revenues from the exploitation of non - living resources of the zone would make contributions to the international authority for distribution to the member states. (135)

In particular, the demand to share in the natural resources of the continental shelf went probably too far. And Iran proposed that the sovereign rights of the coastal state over its continental shelf were exclusive and consequently should not be subject to any revenue - sharing. (136)

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(129) See, Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, United Republic of Cameroon, United Republic of Tanzania and Zaire: Draft Articles on the Exclusive Economic Zone, in UN DOC. A/CONF. 62/C. 2/L. 82, reprinted in UNCLOS III, Official Records, vol. III, p. 240.

(130) Nigeria: Revised Draft Articles on the Exclusive Economic Zone, UN DOC. A/CONF. 62/C. 2/L. 21/Rev. 1, reprinted in id., at 199.

(131) Guyana: Introductory Draft Articles on Coastal State Competence in Contiguous Ocean Space, UN DOC. A/CONF. 62/C. 2/L. 5, reprinted in id., at 187.

(132) Nicaragua: Working paper on Characteristics of the National Zone, UN Doc. A/CONF. 62/ C. 2/L. 19, reprinted in id., at 195.

(133) See Afghanistan, Austria, Belgium, Bhutan, Bolivia, Botswana, Finland, Iran, Laos, Lesotho, Luxembourg, Mali, Nepal, Netherlands, Paraguay, Singapore, Swaziland, Sweden, Switzerland, Uganda, Upper Volta and Zambia: Draft Articles on participation of land - locked and other geographically disadvantaged states in the exploration and exploitation of the living and non-living resources in the area beyond the territorial sea, UN DOC. A / CONF. 62/ C.2/L. 39, reprinted in id., at 216.

(134) Id., Article 7.

(135) Id., Article 5.

(136) Iran: Draft Article on the Continental Shelf, UN DOC. A/CONF. 62/C. 2/L. 84, reprinted in id., at 242.

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On the other hand, another group of states intended to maintain the separate regime of the continental shelf alongside the EEZ, but they suggested that the maximum limit of the shelf should not go too far. Japan proposed that "the outer limits of the continental shelf (the coastal sea bed area) shall not exceed a maximum distance of 200 nautical miles from the baselines ..... " (137).

Greece proposed a combination of an unspecified depth of water and distance from the coast as the outer limit of the shelf, without mentioning EEZ. (138)

The question of a maximum 200 mile limit and the relationship of the continental shelf and EEZ were closely interrelated. In the deliberations of the Second Committee (The Second Caracas Session), many states expressed themselves in favor of a maximum 200 mile EEZ for all purposes (139) because in the case of separate regimes for EEZ and the continental shelf, it was highly likely that the latter would extend up to the lower edge of the continental margin. In that case, the area of international seabed (the common heritage of mankind) would be diminished considerably. A report prepared by the Secreratiat showed that even in the case of acceptance of the 200 mile EEZ, a marginal amount of hydrocarbon would be left to the international community. Therefore, there was a considerable number of states opposing to the extension of the continental shelf beyond the 200 miles. The Japanese representative stated that:

> "in addition, the extent of the coastal seabed area was related to the concept of the common heritage of mankind. The greater the sea - bed area falling under the national jurisdiction, the smaller would be the area to be administered internationally, for the benefit, in particular, of the developing countries." (140)

The representative of Singapore made a more emphatic statement which was shared by the others:

> "Every state, whether coastal or land - locked, should be entitled to a fair share of the resources of the sea in accordance with the principle of the common heritage of mankind. If that principle was to have any meaning, as great an area as possible of the continental margin and the seabed would be reserved for the international regime." (141)

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(137) **Japan: Revised Draft Article on the Continental Shelf,** UN DOC. A/CONF. 62/C. 2/L. 31 Rev., **reprinted in id.,** at 211.

(138) **Greece: Draft Articles on the Continental Shelf,** UN DOC. A/CONF. 62/C. 2/L. 25, **reprinted in id.,** at 202.

(139) **See,** Summary Records of Meetings, Second Session: Caracas, 20 June - 29 August 1976, in UNCLOS III, Official Records, vol. II, pp. 142 - 169 (1975).

(140) Ogiso (Japan), id., at 147, para. 22.

(141) Chao (Singapore), id., at 151, para. 31.

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However, the wide margin states were determined to extend their continental shelves beyond 200 miles where their continental margin extended beyond that limit. In the following paragraph, we shall deal with the proposals of those states.

b. Proposals for a separate and wider continental shelf

On the other hand, the wide margin states, expectedly, vigorously opposed to the movements to set the outer limit of the continental shelf at 200 mile distance on the ground that under existing conventional, in particular, customary international law as clarified by ICJ in the North sea Continental Shelf Cases, their continental shelves extended up to the outer edge of the continental margin which was the national prolongation of their territories. It was their acquired right to do so. However, they recognized the concept of the EEZ, with the continental shelf rights even if the continental margin did not extend up to 200 nautical miles from the baselines. Additionally, they offered a revenue-sharing scheme for the exploitation of the resources of the areas beyond 200 nautical miles.

Accordingly Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand, and Norway introduced a joint proposal (142) which read:

> The continental shelf of a coastal state extends beyond its territorial sea to a distance of 200 miles from the applicable baselines and throughout the natural prolongation of its land territory where such natural prolongation extends beyond the 200 miles. (143)

The United States abandoned its previous position in the Seabed Committe and made a brand new proposal (144) which recognized the EEZ and suggested an outer limit for the continental shelf incorporating the former and the principle of natural prolongation:

> "The Continental Shelf is the Seabed and subsoil of the submarine areas adjacent to and beyond the territorial sea to the limit of the economic zone, or, beyond that limit, through the submerged national prolongation of the land territory of the costal state to the outer limit of its continental margin, as proviously defined and delimited in accordance with Article 23." (145)

The proposal further provided that:

> In exercise of the rights with respect to the non-renewable resources of the continental shelf, the coastal state

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(142) **Canada, Chile, Iceland,India, Indonesia, Mauritius, Mexico, New Zealand and Norway: Working Paper,** UN DOC. A/CONF. 62/L.4. 26 July, 1976 reprinted in UNCLOS III. Official Records, vol. III p. 83.

(143) **Id.,** at 83, Article 19.

(144) **United States of America: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf,** UN DOC. A/CONF. A/C. 2/L. 47, 8 August 1976 in **id.,** at 22.

(145) Article 22, **id.,** at 226, Article 23 gave information that further provisions were needed for locating and defining the precise limit of the continental margin.

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a)

b) shall pay, in respect of the exploitation of such non-renewable resources seaward of the territorial sea or the 200 metre isobath, whichever is farther seaward .... to be used as specified in Article....., for international community purposes, particularly for the benefit of developing countries. (146)

In the Second Committee all those proposals and possibilities were debated and a few points became clear:

First, the concept of the EEZ received an overwhelming support from almost all the countries represented. Secondly, it was again accepted by an overwhelming majority that the rights of the coastal state in the EEZ comprised the exploitation of non-living resources. Thirdly, and consequently, it was accepted that the continental shelf extended at least up to the outer limit of the EEZ (200 miles). Fourthly, the question of whether the continental shelf was replaced by the EEZ within 200 miles was addressed mainly with regard to the question of whether there should be a continental shelf beyond the 200 mile limit. The general understanding appeared to be that these two concepts should be dealt with separetely. Although the representatives generally accepted that the two regimes would overlap within 200 miles, their intention was to maintain the autonomy of the continental shelf not only beyond that limit but also within it. The debates of the Second Committee are indicative of that fact.

c. Observations on the effects of the EEZ on the continental shelf

As to the relationship of the EEZ with the continental shelf within the 200 miles, two theses were advanced. One group of states argued that the wider concept of EEZ absorbed or replaced that of the continental shelf, that the two concepts were mutually exclusive, and that the concept of the continental shelf should be subsumed under the concept of the EEZ and beyond that limit the common heritage of mankind applied. (147) However, when closely studied, it will be seen that the thesis in question was advanced in support of the view that the continental shelf should not extend beyond the outer limit of the EEZ rather than to compromise or prejudice the existing rights of the coastal states over the continental shelf falling within the 200 mile limit. For example, the Finnish representative said that the continental shelf situated within the proposed 200 mile economic zone would in practice be absorbed into that zone but he recalled that for the coastal states in semi - enclosed or enclosed areas

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(146) Article 27, id., at 22.

(147) See, Austria, UNCLOS III, Official Records, Vol. II, Summary Records of Meetings (Second Committee), Second Session: Caracas, 20 June - 29 August, 1976, p. 143; Zaire, id., at 146; Finland id., Lebanon, id, at 148; Singapore, id., at 151; Nepal, id., at 151 -52; Pakistan, id., at 154; Egypt, id., Switzerland, id., at 157; Gambia, id., at 160; Kenya, id., at 162; Tunisia, id., at 163; Mali, id., at 167; Malta, id., at 168; Yugoslavia, id., at 174; Madagascar, id., at 174; Tanzania, id., at 182; Liberia, id., at 184; Senegal, id., at 199-200, Burundi, id., at 191.

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which did not wish to establish economic zones over the whole area of the continental shelf, the current concept of the continental shelf would remain valid. (148)

The second thesis, which was supported not only by the wide margin states but also by the other coastal states as well, was that the EEZ should not replace the continental shelf, even within the 200 mile limit. The Greek representative said that he was skeptical with regard to such an argument since the EEZ was a new and still untried idea, while the concept of the continental shelf was recognized and accepted in international legal instruments and practice. Moreover, the two concepts were not coextensive, either in the juridical or the geographical sense. (149) The Burmese representative considered the continental shelf regime as an autonomous regime within the broader frame of the shelf regime of the EEZ. (150) The Turkish representative observed that: the fact that in certain cases the continental shelf would completely be encompassed within the economic zone did not diminish its importance. In a good number of cases, the jurisdiction of the coastal state over the continental shelf and the economic zone would be complementary rather than parallel, while in other cases the extent of the continental shelf would be the determining factor in the delimitation of the economic zone. (151) The Thai representative considered that the two regimes were well able to co-exist and that they were not mutually exclusive. (152) The Israeli representative observed that the two items should be dealt with separately for the time being, since the EEZ was still being formed, while the concept of the continental shelf was an established one. (153) The representative from Bahrain observed that the EEZ was a subsequent formulation of additional coastal state right over the living resources of the superjacent waters. (154)

Needles to say that, all the wide margin states were, for the obvious reason, against the idea of the continental shelf being absorbed by the EEZ, basically relying on the concept of acquired rights under the existing law. It also has to be pointed out that some of the states defending amalgamation of the two concepts with a single maximum limit of 200 miles relied on extra-law considerations rather than on the existing law, while the others seemed to be ready to acknowledge the extension of the continental shelf up to the outer edge of the continental margin if a satisfactory revenue-sharing scheme was worked out. (155)

(148) See, Rotkirch (Finland), Second Committee, 17th meeting, 26 July, 1976, id., at 146.
(149) Theodoropoulos (Greece), Second Committee, 18th Meeting, 29 July, 1974, id., at 152.
(150) Ukyaw Min (Burma), Second Committee, 18th Meeting, 29 July, 1974, id, at 155.
(151) Yolga (Turkey), Second Committee, 19th Meeting, 30 July, 1974, id., at 158.
(152) Panupong (Thailand), id., at 159.
(153) Orion (Israel) Second Committee, 16th Meeting, 26 July 1974, id., at144 and Rosenne, Second Committee, 22nd Meeting 31 July 1974, id. at 178 where he was more specific.
(154) Al-Nimer (Bahrain), Second Committee, 22nd Meeting, 31 July, 1974, id., at 171.
(155) Uganda, Second Committee, 18th Meeting, 29 July, 1976, id., at 151; Trinidad-Tobago, id., at 155; Ghana, id., at 165; Jamaica, id., at 167-68.

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d. Observations on the concept of natural prolongation

As indicated before, some land-locked or geographically disadvantaged states not only wanted to restrict the geographical scope of the continental shelf to the 200 mile limit, regardless of how far the continental margin extended beyond that limit, but also demanded that they should participate in the exploitation of the non-living resources of the continental shelf (or EEZ) as well, apparently on the ground, inter alia, that the continental shelf was natural prolongation of the continent and not that of the territory of the coastal state alone and as such belonged to all the states of the continent. (156) Some of them clearly indicated that the existing law should be reviewed beccause it was unjust and undemocratic. (157) Some others suggested that the continental shelf be abolished because it served the interests of a few countries. (158) Still others unequivocally stated that no rights had been acquired under the then existing law or they would not recognize them. (159) Therefore, the coastal states in general and the wide margin states in particular attached a great importance to the concept of natural prolongation as the basis of the continental shelf rights and emphasized the retention of the acquired rights on that basis. (160) It is interesting to see that contrary to some strained and spurious interpretations by some circles of the concept of the natural prolongation as enumerated by the ICJ in 1969, an impressive number of states interpreted it in a geological and geomorphological sense. To give a few examples. The Bengal representative said that "the International Court had in effect underscored the *importance of the geological factor*, which must be taken into account in any definition of the continental shelf". (161) The Peruvian representative considered that (no country had stronger claims than the coastal state over any part of its continental shelf, since *the shelf constituted a* natural and *indivisible part of its national territory*." (162) The Portuguese representative reasoned that the right of the coastal state "to the continental shelf was based on and justified by *reason of geological continuity*." (163) The representative of Korea (164) and Venezuela (165), Ar-

(156) Austria, id., at 143; Singapore, id., at 51; Nepal, id., at 151 - 152; Lesotho, id., at 164.
(157) Lebanon, id., at 148 - 49.
(158) Gambia, id., at 160.
(159) Singapore, id., at 151; Lebanon, id., at 51.
(160) In the Second Committee the following states referred to the concept of natural prolongation, Honduras, id., at 145; Portugal, id., at 145-46; South Korea, id., at 148; El Salvador, id., at 169; Argentina, id., at 150; Australia, id., at 147; Bangladesh, id., at 144; Chile, id., at 166; Turkey, id., at 158; Venezuela, id., at 152; U.K., id., at 200; Uruguay id., at 153; U.S. id., at 291; Trinidad - Tobago, id., at 154-55; Ecuador, id., at 158; Iceland, id., at 159; North Korea, id., at 162; Mauritius, id., at 163; Mexico id., at 166; New Zealand id., at 170; Burma, id., at 155; Thailand, id., at 160; U.S.S.R. id., at 161. In addition, Canada, Bahamas and Senegal referred to that concept in the plenary session, see id., vol. 1, at 97, 132, 164 respectively.
(161) Id., vol. 2, at 144.
(162) Id., at 145
(163) Id., at 145-146
(164) Id., at 148.
(165) Id., at 149.

gentina (166), Mexico (167) referred to the paragrahps 43 and 19 of the 1969 Judgment in support of their statement that the continental shelf was a prolongation of the territory. The representative of Uruguay pointed out that a new definition should respect the inalienable sovereign rights which the coastal state exercised over the continental shelf as a natural prolongation of its territory, as it had been confirmed the ICJ and had been mentioned by so many delegations. (168) The representative of Ecuador said that "the continental shelf was the natural prolongation of the territory of the coastal state and should belong to that state *up to the point where it ended geomorphologically,*" (169) Namik Yolga of Turkey stated that as the International Court of Justice had recognized in its judgment in the North Sea Continental Shelf Cases, the legal notion of the continental shelf was based on the geomorphological reality that the continental shelf was a natural prolongation of the land territory. (170) The Thai representative said that a new definition "must be based on the notion of natural prolongation of the land domain, which was considered by the International Court of Justice to be the foundation of the continental shelf entitlement". (171) The Soviet representative put it more emphatically: "The coastal state possessed sovereign rights over the continental shelf ... that was no coincidence, since the continental shelf was a prolongation under the sea of the territory of the coastal state and was originally joined to that territory." (172)

In conclusion, the arguments made by the states with regard to the legal basis of the continental shelf and their determination not to renounce their rights in that respect suggest that there was not any intention on their part to replace the continental shelf with the EEZ.

B. Negotiating Texts: separate regimes for the continental shelf and the EEZ

In August 1974, the main proposals (not all variants on drafting changes) we have outlined or quoted above, were presented by the Second Committee as the Main Trends. (173) The proposals submitted by Colombia and others, Canada and others, United States, Argentina, Greece, China, USSR, and Japan (174) became formulae A,B,C,D of Provision 68 and formulae E,F,G and H of Provision 81 of Main Trends respectively.

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(166) **Id.**, at 151.
(167) **Id.**, at 166.
(168) **Id.**, at 153.
(169) **Id.**, at 158
(170) **Id.**,
(171) **Id.**, at 160.
(172) **Id.**, at 161.
(173) **See, Main Trends** 3 UN DOC. A/CONF. 62/C. 2/W.P. 1, 15 October, 1974.
(174) **See, supra** notes 101,106,112,116,137,138,142,144, and accompanying texts respectively.

Formulae, A,B,C,D contained both the criterion of the 200 mile distance and that of natural prolongation; formula H contained only the 200 mile criterion. The formula F contained only the natural prolongation criterion but it was supplemented by a separate article on the EEZ. The formulae E and G contained the depth and distance elements but while the former was not specific about limits, the latter gave the 100 mile distance or 500 m depth as the outer boundary. However, the sponsors of both proposals had expressed their support for a 200 mile EEZ.

On the other hand, the main trends on the limits of EEZ were impressively unique. The 200 mile distance was the only limit presented and it had the support of an overwhelming majority of the participants. As for the proposal regarding revenue sharing, the proposal by Afghanistan and others in the Seabed Committee; (175) the proposal by twenty - two states in the conference (176), the United States proposal in the Conference (177) and the Iranian proposal (178) were produced as the Main Trends.

On 30 April, 1975, in the group of juridical experts, Japan changed its position and recognized that, subject to a revenue sharing system, the continental shelf could extend beyond 200 n.m. to the outer edge of the continental shelf. (179) The United States made, on 6 May, 1975, a detailed proposal (180) with respect to the outer limit of the shelf, which was mainly to form the basis of Article 76 of the Convention:

1. The Continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea through the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the continental margin does not extend up to that distance.

2. The continental margin comprises the submerged prolongation of the land mass, and includes all rocks appertaining to the said land mass, as well as the overlaying sediments of the shelf, slope, and rise, but does not include the rocks and sediments appertaining to the deep ocean floor.

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(175) **Supra**, note 94 and accompanying text.
(176) **Supra**, note 133 and accompanying text.
(177) **Supra**, note 144 and accompanying text.
(178) **Supra**, note 136 and accompanying text.
(179) **See, Japan, Continental Shelf**, 30 April 1975, in PLATZODER, R. (ed.), THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS, vol. XI, 497 (Oceana Publications, 1987).
(180) **United States, Continental Shelf**, 6 May, 1975, **id.**, at 501.

3. The seaward boundary of the continental shelf beyond the 200 nautical miles shall be delineated in accordance with the principles set out in paragraphs 1 and 2 above. Alternatively, the coastal state may delineate such boundary by drawing straight lines connecting fixed points, which are not more than 60 nautical miles from the foot of the continental slope.

4. The coastal state shall delineate the seaward boundary of its continental shelf, where that shelf extends beyond 200 miles from the baselines and shall designate that boundary by straight lines not exceeding 60 nautical miles in length, connecting fixed points, such points to be defined by co-ordination of latitude and longitude, and shall give due publicity to any such delineation.

In view of the multitude of the proposals, the Conference, finding it almost impossible to make any substantial progress unless it was presented a negotiating text acceptable to a representative majority of the states as a basis of discussion, requested at the 55th plenary meeting, on 18 April, 1975, the chairmen of the Main Committees to prepare such a negotiating text. The Chairmen of the committees then reduced the Main Trends to single articles and thus the Informal Single Negotiating Text (ISNT) was issued on 7 May, 1975. (181) Article 62 of the ISNT defined the continental shelf as follows:

> The continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea through the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

The text was apparently based on the first paragraph of the U.S. proposal in the group of juridical experts. However, the other paragraphs of the proposal defining the continental margin were not taken.

Article 63 of ISNT, regulating the nature of the continental shelf rights, was the same as Article 2 of the Geneva Convention, reserving the continental shelf rights exclusively to the coastal states, thus disregarding the demands of land-locked states to participate in the exploitation of non-living resources of the continental shelf. But Article 69 introduced a revenue sharing system for revenues derived from the exploitation of the non-living resources of the submarine areas beyond the 200 n.m.:

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(181) See, Informal Single Negotiating Text, UN DOC. A/CONF. 62/I.P. 8, reprinted in, UNCLOS III, Official Records, vol. 5, 151 (1976).

1. The coastal state shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

2. The rate of payment or contribution shall be ... percent of the value or volume of production at the site. Production does not include resources used in connection with exploitation.

3. The International Authority shall determine the extent to which developing countries shall be obliged to make payments or contributions provided for in paragraphs 1 and 2.

4. The payments or contributions provided for in paragraphs 1 and 2 shall be made to the International Authority on terms and procedures to be agreed upon with the Authority in each case. International Authority shall distribute these payments and contributions on the basis of equitable sharing criteria, taking into account the interests and needs of developing countries.

The article was apparently based on a compromise of proposals by the U.S., New Zealand and the land-locked states in the Group of Juridical Experts. (182)

On the other hand, Article 45 of ISNT introduced the new concept of exclusive economic zone:

1. In an area beyond and adjacent to its territorial sea described as the exclusive economic zone, the coastal state has:

a. Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the seabed and subsoil and the superjacent waters;

.....

3. The rights set out in this article shall be without prejudice to the provisions of Part IV (on the continental shelf).

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(182) U.S. had proposed that the contributions should be made by coastal states only with respect to the exploitation of non-living resources of the shelf seaward of 200 miles and that the rate of payment be 1% of the value of production at the site commencing in the sixth year production, increasing by 1% for the next four years and remaining at 5% thereafter. The contributions were to be made to the Authority to be distributed on an equitable basis for the benefit of the developing countries. **See, United States, Continental Shelf**, 30 April 1975, **reprinted in** Platzoder, **supra** note 179, at 495.

New Zealand made a similar but less specific proposal providing for the coastal state making contributions to the International Authority at the rate of X percentage of any revenues derived from the exploitation of the mineral resources of the shelf beyond the EEZ. **See New Zealand, Continental Shelf**, 30 April, 1975, in **id.**, at 496.

Article 46 specified the outer limit:

> The exclusive economic zone shall not extend beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.

Articles 57 and 58 provided for the land-locked and geographically disadvantaged states to participate in the exploitation of the living resources of the EEZs of neighboring states.

Thus, with the issuance of the ISNT the following points became clear: The consensus as to acceptance of a 200 mile exclusive economic zone became a reality. The coastal state would exercise sovereign rights over that zone for purpose of exploring and exploiting not only its living resources but also non-living resources which had hitherto been under the regime of continental shelf, yet the two institutions were dealt with separately. The continental shelf maintained its autonomy. However, due to partial overlapping, the outer limit of the continental shelf was at least to extend to the outer limit of EEZ. The non-living resources within 200 n.m. would remain exclusive to the coastal states as before. However, the continental shelf would extend beyond that limit and, in that case, a scheme of revenue sharing in respect of the exploitation of mineral resources beyond 200 miles was accepted in principle, but it needed to be complemented. That would proceed in parallel to the efforts to find a solution to the problem of the delineation of the outer limit of the continental shelf beyond 200 miles.

C. The rules on delineation of the outer limits and a scheme for revenue - sharing

Although the basic policies as to a separate continental shelf based on the distance and principle of natural prolongation found their way into article 64 of ISNT, there was a general understanding that the definition of continental shelf still needed to be complemented. (183) Besides, the opposition by some states to the extension of the continental shelf beyond the 200 miles continued to exist well until 1980, diminishing in degree as the provision on revenue sharing was improved.

The land-locked and geographically disadvantaged states suggested that they should be allowed to participate in the exploitation of non-living resources of the EEZ and that if that participation did not effect the total production of minerals from that zone, the coastal state should make contributions from revenues derived from exploitation of the resources lying seawards of 60 miles, at a rate to be specified and to be paid to the International Authority. See, Group of Land-Locked and Geographically Disadvantaged States, Economic Zone, 20 April 1976 Article 18, in id., at 490, 493.

(183) On the drafting history of this article see, Brown, E.D. **The Continental Shelf and the Exclusive Economic Zone: the Problem of Delimitation at UNCLOS III,** 4 MARITIME POLICY AND MANAGEMENT, 377 (1977); Brown, E.D., **Rockall and the Limits of National Jurisdiction of the U.K.,** 2 MARINE POLICY 275 (1978); Brown E.D., **Delimitation of Offshore Areas-Hard Labor and Bitter Fruits of UNCLOS III,** 5 MARITIME POLICY 172 (1981); Oda, Dissenting Opinion in Continental Shelf (Tunisia/Libyan Arab Jamahiya) Judgment, I.C.J. Reports, 211 (1982).

During 1976 various informal proposals were made both with respect to the seaward limits and the revenue sharing system in the Second Committee. Austria (184) and the Soviet Union (185) proposed the 500 m depth of water or the 200 mile distance criterion as outer limits of the continental shelf. Canada proposed establishment of a continental shelf boundary commission to deal with the determination of the outer limit shelf beyond 200 mile (186). Land-locked and geographically disadvantaged states on the other hand, made proposals which would grant them the right to participate in the exploitation of the natural resources of the area of the continental shelf of the same region or subregion which lay beyond the depth of 200 m or 50 miles from the coast. (187) Later on, Austria submitted a compromise proposal providing for their participation in the exploitation of nonliving resources of the continental shelf within the EEZ. (188) Additionally, the group of land-locked states tabled proposals for establishment of a revenue-sharing system with respect to nonliving resources of the continental shelf beyond a depth of 200 m. or 50 miles from the applicable baselines at a rate of 5 percent if the exploitation remained within the limit of 200 n.m. and 10 percent if it occurred within the area extended beyond that limit. (189)

U.S. maintained its position with regard to the definition of the continental shelf but made further proposals to improve Article 69 of ISNT (revenue-sharing). (190)

Meanwhile, ISNT became the subject of informal negotiations and at the beginning of the Fourth Session, the President of the Conference requested the Chairmen of the three committees to revise the ISNT. (191) The Chairmen, accordingly, prepared the Revised Single Negotiating Text (RSNT) in 1976. (192) However, the definition of the continental shelf did not change, except that Article 62 became 64. Article 69 (on revenue-sharing) was improved and became Article 70. The paragraph 3 of Article 45 (Article 44 in the RSNT) was changed to read: "The rights set out in

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(184) See, Austria, Article 62 (ISNT II), 11 April 1976, reprinted in Platzoder (ed.), THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, Documents, Vol. IV, 320 (1983).

(185) See, Soviet Union, Article 62 (ISNT II), 11 April 1976, id., at 322-23.

(186) See, Canada, Article 62 (ISNT II) Annex, Continental Shelf Boundary Commission, 29 April, 1976, id., at 321-22.

(187) See, Group of Land-Locked and Geographically Disadvantaged States, Article 63 bis (ISNT II), id., at 324.

(188) Austria, Article 63 bis (ISNT II), compromise text, 28 April 1976, id., at 325.

(189) Group of Land-Locked and Geographically Disadvantaged States, Article 69, (ISNT II), id., at 327.

(190) United States, Article 69 (ISNT II), id., at 326.

(191) See, Statement by the President of the Conference in the 55th plenary meeting, UNCLOS III, Official Records, Vol. III, p. 26.

(192) See, UN DOC. A/CONF. 62/W.P. 8/Rev. 1, 6 May 1976, reprinted in, Platzoder's THIRD UNITED NATIONS CONFERENCE Vol. I, p. 117.

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this article with respect to bed subsoil shall be exercised in accordance with chapter VI on the continental shelf". Article 46 (Article 44 of RSNT) was not changed. However, with respect to definition of continental shelf, a comprehensive proposal was made by Ireland on 10 August, 1976. (193) It maintained the previous one-paragraph definition but provided 3 more paragraphs. The paragraph 2 defined the continental margin: "The continental margin comprises the submerged prolongation of the land mass of the coastal state, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor nor the subsoil thereof." The paragraph 3 provided that the coastal state would establish the outer edge of the continental margin wherever the latter extended beyond 200 n.m. by either of the two alternatives it suggested. Both alternatives took as their starting point of delineation the foot of the slope which was defined as the point of maximum change in the gradient at the base of slope, unless there was evidence to the contrary. (194)

According to the first alternative, the outer edge of the continental margin was to be determined by utilizing straight lines joining the outer-most fixed points, at each of which the thickness of the sedimentary rock was at least 1% of the shortest distance from the foot of the continental slope. According to the second alternative, which was taken from the U.S. proposal in the Group of the Juridical Experts, the outer edge limit was to be determined by a line delineated by reference to the fixed points joined by straight lines not exceeding 60 miles in length and not more than 60 miles from the foot of the slope.

The above-mentioned Soviet, Austrian, Irish, and Canadian proposals did not affect or add anything to the early one-paragraph definition of continental shelf, when the Informal Composite Negotiating Text (ICNT) was prepared on 15 July 1977, except that it was renumbered 86. (195) But the article on revenue sharing (Article 62) was more improved. The relevant articles on the EEZ were renumbered and maintained, with some minor drafting changes. (196) The proposals by land-locked and geographically disadvantaged states concerning their participation in the exploitation of the natural resources of the continental shelf landward of 200 miles (or of EEZ) were never accepted and in fact they were not insisted on either.

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(193) See, Second Committee Informal Proposals, Ireland, Article 62 (RSNT II) 10 August 1976, reprinted in Platzoder's THIRD UNITED NATIONS CONFERENCE, Vol. IV, at 465-66.

(194) For the comments on the Irish formula and various others see, Brown, E.D., **The Continental Shelf and the Exclusive Economic Zone: The Problems of Delimitation at UNCLOS III**, IV MARITIME POLICY 377, 384-88 (1977).

(195) See, U.N. DOC. A/CONF. 62/W.P. 10, 15 July 1977 in UNCLOS III, Official Records, Vol. VIII, 1 (1978), reprinted in Platzoder's THIRD UNITED NATIONS CONFERENCE, Vol. 1, 301 (1982).

(196) The article on rights, jurisdiction and duties of the coastal state in the EEZ (previous article 45 of ISNT and 44 of RSNT) was renumbered 56. Article on the outer limit of the EEZ (previous article 46 of ISNT) was previous article 45 of RSNT)was renumbered 57 but was not changed in content at all.

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With respect to the outer limits, no serious work was done until 1978 except that in 1977 the Secretariat was requested to make a preliminary study of various approaches to problems. In 1978 Ireland reintroduced its proposal of 1976 with new additions. (197) The first four paragraphs were the same as the above mentioned proposal of 1976 and the paragraph 5 provided for establishment of a continental shelf boundary commission to deal with the problems concerning delineation of outer edge of the continental margin extending beyond 200 n.m. and the paragraph 7 provided that the provision of Article 76 was without prejudice to the delimitation of the continental shelf between opposite or adjacent states.

The Soviet Union, in the Seventh Session, leaving aside its previous proposals based on the 500 m isobath and 200 n.m. distance, made an informal proposal on 23 April, 1978, which embodied the previous one-paragraph definition but inserted a complementary new criterion into it to cut off the continental margin at the 100 mile distance from the outer limit of the EEZ, (198) thus, providing for a maximum 300 n.m. continental shelf.

On the other hand, the Arab Group continued its opposition, with a new proposal, to the extension of the continental shelf beyond 200 meters: "The continental shelf of the coastal states comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea through the natural prolongation of its land territory to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured". (199)

In parallel to these developments, on 13 April, 1978, the Conference formed 7 negotiating groups to deal with the hard core issues. The sixth group was assigned, among others, the task of dealing with the definition of the outer limit of the continental shelf. The Conference also laid down rules whereby the ICNT would be revised. Accordingly the revision would have to emerge from the negotiations themselves and it should not be introduced by any person. Secondly the revision of ICNT would be the collective responsibility of the President of the Conference, the Chairmen of the Main commitees, acting together as a team (colloquim), and the chairman of the Drafting Committee and the Repporteur General would be associated with them. (200)

(197) Informal suggestions by Ireland, NG 6/1, 1 May 1978, reprinted in Platzoder's THIRD UNITED NATIONS CONFERENCE, Vol. IX, 370 - 71 (1986).

(198) Informal suggestions by the U.S.S.R., C.2/Informal Meeting, 27 April, 1978, reprinted in, Platzorder's THIRD UNITED NATIONS CONFERENCE, Vol. V, 20-21 (1984).

(199) Informal suggestion by the Arab Group, NG 6/2, 11 May, 1978, reprinted in Platzoder, supra note 197 at 371.

(200) See, Organization of Work: Decisions taken by the Conference at its 90th Meeting on the Report of the General Committee, U.N. DOC, A/CONF. 62/62, in UNCLOS III Official Records, Vol. X, Reports of the Committees and Negotiating Groups, 6 (1978).

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Working in accordance with that mandate, the Sixth Group intensively studied the subject mainly on the basis of the Irish and Soviet formulae. At that time, the Secretariat was able to submit the Preliminary study illustrating Various Formulae for the Definition of the Continental Shelf, with an accompanying map. (201) It illustrated the 200 n.m. line, the 500 metre isobath, the foot of the slope, the outer edge of the continental margin and applications of the two proposed Irish alternative formulae but it did not illustrate the Soviet Formula. However, the Conference was not able to agree on new text by the end of the Seventh Session (March-May, 1978).

At the Eighth Session, the intensive negotiations resumed. Several states made proposals and the Soviet Union revised and improved its proposal, on 13 April, 1979, which proved to be the most acceptable compromise. (202) Like the proposal of 1978, it embodied the original one-paragraph definition but it made further additions to put restrictions on it. The paragraph 2 defined the continental margin as comprising the submerged prolongation of the land area of the coastal state, and as consisting of the shelf, the slope and the rise, excluding the deep ocean floor as well as the underwater ridges. Even the continental margin thus defined would have to be cut off at a certain distance. It accordingly provided that the fixed points comprising the outer limit of the continental shelf, drawn in accordance with the Irish Formula should not exceed either 100 nautical miles from the outer limit of the EEZ or 60 nautical miles from the 2,500 metre isobath. Although the Soviet formula commanded a tremendous influence, the group of wide margin states (margineers) was not happy with the provisions excluding underwater oceanic ridges from the definition of the continental margin (203) and Sri Lanka, too, expressed its displeasure with the rules on delineation of the outer limit of the margin. It pointed out that the foot of the slope and the 2500 isobath contour occurred at a very short distance off its coast, although its continental rise extended for hundreds of miles. In other words, although the definition of the continental margin included its continental rise, the rules of definiton would exclude a considerable amount of the continental margin off the coast of Sri Lanka because the continental shelf and slope was not wide but the continental rise was, and delineations taking their starting point the foot of the slope would leave a greater part of the rise outside the national jurisdiction. Accordingly it made a proposal designed to meet its special geomorphological circumstances. (204) It was on basis of that background that a nine-point compromise text together with an improved article on revenue sharing was prepared and submitted by Chairman of

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(201) **Preliminary Study of Illustrating Various Formulae for the Definition of the Continental Shelf,** U.N. DOC. A/CONF. 62/C. 2/L. 98 and ADD. 1-3, 18 April 1978, in UNCLOS III, Official Records IX, 189 (1980).

(202) **See,** U.S.S.R.: Informal Proposal, NG 6/8, 18 April, 1979, **reprinted in,** Platzoder, supra note 197, at 377-78.

(203) **See, infra** note 209 and accompanying text.

(204) **See,** Sri Lanka's Aid Memoir, in Platzoder **supra** note 183, at 514-15 and Informal Suggestion by Sri Lanka to amend the Irish Proposal (Document NG6/1), U.N., DOC. N.G. 6/1, 9 April 1979, in Pladzorder, **supra** note 197 at 374.

the Sixth Group, Aguilar, to the plenary session of the Conference on the final day of the Eighth Session. (205)

The points 1 and 2 embodied the first two paragraphs of the Irish proposal and the points 3 and 3b were based on the third paragraph of the Irish and Soviet formulae with a slight change that the fixed points comprising the outer limit of the continental shelf drawn in accordance with the Irish formula would not exceed either 350 miles from the applicable baselines or 100 nautical miles from the 2500 isobath. The point 4, 5, 6 and 7 mainly embodied the previous Irish formula. The compromise text did not include any provision regarding the underwater oceanic ridges or the Sri Lankan special situation. However, footnotes were included in the text to the effect that they would be subject to further discussion in the forthcoming sessions.

As it was stated in the explanatory memorandum by the President of the Conference (206), the compromise text in conjunction with the article on revenue-sharing was widely supported in the Plenary Session by countries from all regional groups including a number of land-locked or geographically disadvantaged states, although some delegations expressed their opposition to it on the ground that there had not been enough negotiation or discussion and that the compromise project did not take into account other proposals. (207) However, the new compromise proposal was considered as offering "the basis for a substantially improved prospect of consensus." In fact, the discussions on the subject in the Plenary are indicative of the fact that the acceptance or rejection of a certain formula was always through bargains struck through trade-offs and compromises rather than on the basis of altruistic feelings towards international community or the respect for existing international law.

At the close of the Eighth Session, the Informal Composite Negotiating Text/Revision was prepared by the above mentioned team, mostly on the basis of the compromise proposal by the chairman of the sixth group and, of course, taking into account the deliberations in the Plenary Session. (208)

As a result, Article 76 of ICNT/Revised read as follows:

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(205) **See, Compromise suggestions by the Chairman of Negotiating Group 6,** 26 April, 1979, U.N. DOC. A/CONF. 62/L. 37 in UNCLOS III, Official Records, Vol. XI at 100-101.

(206) **See** U.N. DOC. A/CONF. 62/W.P. 10/Revision, 28 April 1979, 1, p. 18. **reprinted in** Platzoder, **supra,** note 195, at 389.

(207) For example, **see,** Libya, Liberia, Syria, United Arab Emirates, Kuwait said that the document did not take into account the views of the Arab group. See, Eighth Session Plenary Meetings, 116th Meeting 27 April, 1979 in UNCLOS III, Official Records, Vol. XI, at 28, 29, 30, 37 respectively. The wide margin states mentioned of the revenue-sharing system as generous, acceptable (Mexico, Mauritius, **id.,** at 30).

(208) **See supra** note 207.

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1. The continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend to that distance.

2. The continental shelf of a coastal state shall not extend beyond the limits provided for in paragraphs. 3, 4 and 5.

3. The continental margin comprises the submerged prolongation of the land area of the coastal state, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor or the subsoil thereof. (209)

4. (a) For the purposes of this convention, the coastal state shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured by either:

(i) a line delineated in accordance with paragraph 6 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 percent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 6 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. (210)

b. In absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4(a) (i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is

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(209) The original footnote to the text noted: General understanding has been reached to the effect that on the question of underwater oceanic ridges there will be additional discussion and a mutually acceptable formulation to be included in Article 76 will be drawn up.

(210) Original text note 2: The suggestion of the delegation of Sri Lanka for an additional method of delimitation applicable to its geological and geomorphological conditions received widespread sympathy. However, the matter has been left for negotiation at the forthcoming session of the conference.

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measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

6. The coastal state shall delineate the seaward boundary of its continental shelf where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured by straight lines not exceeding 60 nautical miles, in length, connecting fixed points, such points to be defined by coordination of latitude and longitude.

Article on revenue-sharing (Article 82) was also improved and brought to completion:

1. The coastal state shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breatdh of the territorial sea is measured.

2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be one percent of the value or volume of production at the site. The rate shall increase by one percent for each subsequent year until the twelfth year and shall remain at seven percent thereafter. Production does not include resources used in connection with exploitation.

3. A developing country which is a net importer of mineral resources produced from its continental shelf is exempt from making such payments or contributions in respect of that resource.

4. Payments or contributions shall be made through the Authority, which shall distribute them to states Parties to this convention on the basis of equitable sharing criteria, taking into account the interests and needs of developing countries, particularly the least developed and the land-locked amongst them.

Shortly after the issuance of ICNT/Revision, the group of margineers tabled a proposal to amend the paragraph 5 in such a way that the fixed points comprising the line of the outer limit of the continental shelf drawn in accordance with the Irish formula would apply to submarine oceanic ridges which were defined as long narrow submarine elevations formed of oceanic crust, though the outer limit was still to re-

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main at 350 miles distance in maximum. (211)

U.S.S.R. proposed a similar amendment to be added at the end of the paragraph 5:

> "However, the limit of the shelf in area containing submarine oceanic ridges shall not extend farther than the aforementioned 350 mile distance." (212)

Singapore proposed deletion of the criterion of 2500 metre isobath. (213)

Bulgaria proposed that the 350 mile maximum limit should not apply to the oceanic ridges. (214)

Japan proposed that the paragraph 3 be changed so that the continental margin would not include the ridges formed of the oceanic crust. (215)

At the Ninth Session in 1980 when the Sixth Negotiating Group resumed deliberations on the subject, those views were taken into account. According to the Report of the Chairman of the Second Committee, (216) the question of oceanic ridges became a subject of intensive consultation. On 28 March 1980, the Chairman submitted for the consideration of the Sixth Group a compromise formula as an amendment to the paragraph 3: "it does not include the deep ocean floor with its oceanic ridges or the subsoil thereof." (217)

And a new additional paragraph was proposed:

> Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to the submarine elevations that are natural components of the continental margin such as plateaux, rises, caps, banks and spurs. (218)

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(211) **See, Informal Proposal by Argentina, Australia, Canada, India, Ireland, New Zealand, Norway, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay**, NG6/11, 13 August 1979, **reprinted in**, Platzoder, **supra** note 197, at 380.

(212) Informal proposal by the U.S.S.R. NG6/9, 6 August 1979, **reprinted in id.**, at 379.

(213) Informal Proposal by Singapore, NG6/17, 17 August, 1979, **id.**, at 384.

(214) Informal Proposal by Bulgaria, NG6/16 August, 1979, **id.**, at 382.

(215) Informal Proposal by Japan NG6/16, 16 August, 1979, **id.**, at 383.

(216) **Report of the Chairman of the Second Committee**, U.N. DOC. A/CONF. 62/S1, in UNCLOS III Official Records, Vol. XIII, at 82.

(217) **Id.**

(218) **Id.**

On the other hand, as to the Sri Lankan suggestion for an exceptional method of delimitation which had been met with much sympathy, the Report said that there was a widespread understanding that such an exception would be accomodated and that provision for it would be made by way of a statement of understanding of the President of the Conference to be incorporated in an annex to the Final Act of the Conference as part of the overall settlement. (219)

In the Ninth Session (New York 1980), the question of revenue-sharing being settled, the Group of Arab States dropped its opposition to the extension of the continental shelf beyond the 200 mile limit. (220) The compromise text of the chairman of the Second Committee was embodied in Article 76 of the ICNT/Rev.2 (221) which brought the definition to a completion. It was incorporated into the subsequent drafts and finally has become Article 76 of the Convention.

Conclusion

1. The first part of the definition in Article 76 (natural prolongation), is based on the geological identity of the adjacent submarine areas and the land territory. The idea was directly taken from the concept of natural prolongation as enumerated by the ICJ in the North Sea Continenal Shelf cases in 1969. That point was forcefully stated by many states in the Caracas session. But it is a reality that at the Conference many states opposed to its inclusion in the definition. It is not that they did not believe that the principle of natural prolongation was part of customary law. On the contrary, they sought to change the rules. Even the soundest rules were challenged. For example, the land-locked states demanded that they share in the exploitation of non-living resources even within the 40 mile limit. The negotiations were conducted by diplomats, not by the lawyers. And the negotiations took place on the basis of a "package deal," acceptance or rejection of a certain item of which was always connected with the acceptance or rejection of another one. As a result, Article 76 is a product of compromise between various and conflicting interests.

2. The distance principle was accepted as a result of the acceptance of the EEZ. The latter was, in turn, accepted by the developed countries in return for the acceptance by the developing countries of the transit passage through international straits. That is, the legal basis of the continental shelf has not been changed.

3. The fact that EEZ was recognized as comprising both living and non-living resources facilitated the inclusion of the 200 mile distante criterion in the definition of the continental shelf. But that does not mean that the continental shelf was absorbed into the EEZ. The Conference deliberately maintained the autonomy of the continental shelf, not only beyond 200 miles but also within it. That is obvious

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(219) **Id.**, at 83.

(220) **Id.**

(221) U.N.DOC. A/CONF. 62/W.F. 10/Rev. 2, 11 April 1980, **reprinted in** Platzoder's THIRD UNITED NATIONS CONFERENCE, Vol. II, at 3.

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from the statements of the governments at the Caracas session. It is also clear that the governments never intended that the definition of the outer limits of the shelf should change the rules on delimitation of the shelf between neighboring states. The delimitation question was quite different from the definition of the outer limits. That was why the paragraph 10 of Article 76 was accepted.

4. The acceptance of the outer edge of the continental margin as the seaward boundary of the shelf was contingent on the acceptance of a revenue-sharing scheme by the wide margin states. Until 1980, some states continued to oppose the extension of the shelf beyond the 200 miles. It was after satisfactory revenue-sharing system was found that the opposition was dropped. In fact, the wide margin states (especially developed ones) themselves offered the revenue-sharing system.

5. The judicial nature and legal basis of the continental shelf rights were preserved intact. Article 77 of the Convention is the same as Article 2 of the Geneva Convention.

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VIII - NEW DEFINITION OF THE CONTINENTAL SHELF AND CUSTOMARY INTERNATIONAL LAW

1. Statement of the Problem

As we have pointed out before, the ICJ decided, in the North Sea Continental Shelf Cases, in 1969, that the legal basis of the continental shelf was the fact that the latter constituted the natural prolongation of the land territory of the coastal state. That's why the latter had the exclusive rights over the adjacent submarine areas of the high seas which had hitherto belonged to the whole international community. What conferred on it those rights or what deprived all the other states of the use of the same shelf was the fact of its being a part of the territory of the coastal state covered.

The new definition in Article 76, at least partly, acknowledges that fact:

> 1. The continental shelf of a coastal state comprises **the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin,** or to a distance of 200 nautical miles from baselines... where the outer edge of the continental margin does not extend to that distance (emphasis added).

The continental margin is defined in the paragraph 2 as comprising "the submerged prolongation of the land mass of the coastal state" and it "consists of the seabed and subsoil of the shelf, the slope, and the rise."

The continental margin here is used in the same meaning as the ICJ is considered, at least by some writers and many states represented in the Third United Nations Conference, as having used it in the 1969 Judgment.

On the other hand, Article 77 is the same as Article 2 of the Geneva Convention in which, the Court said, the principle of natural prolongation is enshrined. That is, the Article relating to the basis of the rights is fully maintained. The coastal state shall exercise, as before, sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources which consist of mineral and other non-living resources of the seabed and subsoil, together with living resources belonging to sedentary species. The rights of the coastal states are exclusive and do not depend on occupation or proclamation. Finally, the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters.

All those arrangments are in line with what the ICJ considered in 1969 as customary law. However, the second part of the definition in Article 76 is based on the concept of distance from the coast, a concept which was resoundedly rejected by

the ILC in 1950s and by the 1958 Conference as well as by the ICJ in 1969. The Convention enables the coastal state to have a 200 mile continental shelf even if its continenal margin does not extend that far.

As we have indicated before, it is a fact that a coalition of Latin American, Asian and African states brought about the concept of the EEZ, covering living and non-living resources, and that the definition of the EEZ is responsible for inclusion of the 200 mile distance criterion in the definition. Now, the Convention contains two separate regimes for the EEZ and the continental shelf respectively but they overlap in some respects. For example, Article 57 on the breadth of the EEZ reads:

> "The exclusive economic zones hall not extend beyond 200 nautical miles from the baselines..."

The Article 56 (1) (a) provides for the rights, jurisdiction of the coastal state which explicitly overlaps the rights and jurisdiction provided for by the continental shelf regime:

> In the exclusive economic zone, the coastal state has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone such as the production of energy from water, currents and winds.

To make it more complicated, the paragraph 3 provides that the rights set out in Article 56 with respect to the seabed and subsoil shall be exercised in accordance with Part VI on the continental shelf.

This arrangement raises the question of whether the EEZ has absorbed the continental shelf within the 200 mile limit. Specially, if the EEZ is now part of customary international law, which, the Court said, it is, then it becomes more important to know whether the distance principle has replaced the principle of natural prolongation as basis of the entitlement. In the cases where the coastal state borders onto an ocean, it shall have the right to declare an EEZ of 200 miles, with continental shelf rights, even if its continental margin does not extend that far, as would be the case with Peru, or Chile. The right in question would be exercised against the international community as a whole. But in the cases where two states face each other across a sea the breadth of which is less than 400 miles, the rights based on the distance would be used against another state which might fare much better with the principle of natural prolongation. To put it in other way, in the cases where the area to be delimited between two opposite states is scarred by a major discontinuity or trough dividing the natural prolongations of the two states at a distance closer to one of them, as compared with the other, question would arise of whether the distance principle should be considered as having replaced the principle of natural prolongation and thus deprived that state against its will of a part of its continental shelf which has appertained ab initio and ipso facto to it. This question would arise if a

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state has acquired more favorable continental shelf rights as against another state under the 200m depth criterion or principle of natural prolongation. Before expressing any view on these interrelated questions we propose to have a look at the recent judgments of the ICJ.

2. Tunisia/Libya Case

A. Article 76 and Effect of Distance Principle on the Legal Basis of the Continental Shelf

As it has been noted above, the question of the status of the EEZ and its impact on the status of the continental shelf was addressed, for the first time, by France, before the Court of Arbitration in 1977. It argued that the 1958 Convention had become obsolete because a consensus had emerged within the Third United Nations Conference, with respect to the right of the coastal state to proclaim a 200 mile EEZ comprising the continental shelf rights (1). The United Kingdom, while acknowledging the emergence of certain consensus at the Conference with regard to the EEZ did not accept that the consensus in question had become law. In its view, there were still substantial problems with the EEZ to be solved (2).

The Court of Arbitration, although agreeing that the evolution of law should be taken into account, did not agree with France that the 1958 Convention was obsolete. But it avoided giving any opinion on the status of the EEZ and its impact on the continental shelf (3).

However, the Court of Arbitration decreased the emphasis on the geophysical aspects of the shelf and decided that the force of the principle of natural prolongation was not absolute, so far as the delimitation of geologically continuous areas was concerned (4).

In the Tunisia/Libya Case, in 1982, the ICJ had the occasion to address directly the status of Article 76, which was then in its draft form.

Tunisia and Libya had referred, by a special agreement, their differences on the delimitation of the continental shelf areas lying off their respective countries, to the Court in 1978. (5)

They had requested the Court to indicate, inter alia, the principles and rules of international law which might be applicable to the

(1) See, supra VI, 3, note 156 and accompanying text

(2) Id. para 46.

(3) Id. para. 47. For further explanation also see, supra, VI, note 158 and accompanying text.

(4) See, supra, VII.

(5) The area in which the parties asked the Court to effect the delimitation constitutes a part of the Pelagian Block (or the Pelagian Basin) which underlies the sea area known as the Pelagian Sea. Therefore, the Pelagian Block, the Parties agreed, includes also the land areas within the territories of the litigants. The eastern Tunisia south of the Gulf of Hammamet and the Plain of Jaffara in the south-eastern Tunisia and northern Libya fall in the above-mentioned entity. This broad

delimitation of the said areas and, in so doing, to take account of the equitable principles and the relevant circumstances which characterized the area, as well as the recent trends admitted at the Third United Nations Conference on the Law of the Sea (6).

Both states not being parties to the Geneva Convention, they agreed that the applicable law was naturally the customary international law. They also were in accord that the concept of natural prolongation was to be the commanding principle in the delimitation. They both based their arguments on the principle that delimitation should, in accordance with the 1969 Judgment, leave each party all those parts of the continental shelf which constituted natural prolongation of its land territory. However, they differed on the meaning they attached to the concept. First, they were not in agreement by reference to what terrestrial unit (continental land mass or territory of the individual state) or by application of what criteria it was to be decided whether a given area was natural prolongation of one state rather than of another. Secondly, they differed on the relationship between the concept of natural prolongation and the need for the delimitation to be effected in accordance with the equitable principles (7).

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area is inclined in a west-east direction. It extends northwards as far as a series of large depressions south of Malta and eastwards as far as a change in the slope of the seabed described as Malta-Misratah Escarpment or Ionian Flexure (approximately 15 degree east). An important depression called Tripolitanian Furrow runs roughly parallel to the coast of Libya between 13° and 15° east, which, according to Tunisia, constitutes an under-sea extension of the Gulf of Gabes. Zira and Zuwarah ridges are two other geomorphological features which run approximately in a west-east direction and are on the parallels of 33° and 33° 30' north. The Tunisia Plateau which Tunisia used for its description of other geomorphological features is south of Kerkennah Islands and Melita-Medina Plateau between 34° and 35° north and Approximately 14° 30' and 15° 30' east. Finally, another important geomorphological feature called the Ionian Abyssal Plain is an area lying outside the Pelagian Block and with a depth of 4000 metres, east-south-east of Malta.

(6) See, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Report, 21 (1982). For the comments on the case see, Brown, E.D., **The Tunisia-Libya Continental Shelf Case, A Missed Opportunity,** MARINE POLICY, 142 (1983); Christie, D.R., **From the Shoals of Ras Kaboudia to the Shores of Tripoli: The Tunisia/ Libya Continental Shelf Boundary Delimitation,** 13 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 1 (1983); Herman, L.L., **The Court Giveth and the Court Taketh Away: An Analysis of the Tunisia Libya Continental Shelf Case,** 33 ICLQ 825 (1984); Sonenshine, M., **Law of the Sea: Delimitation of Tunisia-Libya Continental Shelf,** 24
HARVARD INTERNATIONAL LAW JOURNAL, 225 (1983); Feldman, M.B., The **Tunisia-Libya Continental Shelf Case: Geographic Justice of Judicial Compromise,** 77 AJIL 219 (1983); Toluner, MILLETLERARASI HUKUK DERSLERI, 189,190 n. 145e, 195-196 (1984); Hutchinson, **Seaward Limit to Continental Shelf Jurisdiction in Customary International Law,** 56 BYIL 113 (1985).

(7) See, 1982 Judgment, supra note 6, at 44. para. 38-41

Libya, for its part, argued as to the legal basis of title that:

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"The concept of the continental shelf as the natural prolongation of the land territory... is fundamental to the juridical concept of the continental shelf and a state is entitled ipso facto and ab initio to the continental shelf which is the natural pro'-ongation of its land territory..." (8).

It further argued that the natural prolongation was determinable as a matter of scientific fact by application of geological criteria and therefore the equitable principles should not play any part in identifying appurtenant continental shelf (9). It went as far as to argue that, once the natural prolongation of a state was scientifically determined, the delimitation became a simple matter of complying with the dictation of the nature (10). It accordingly contended that a delimitation giving effect to the principle of natural prolongation in physical sense was in accordance with the equitable principles, since it then would respect the inherent rights of each state (11). In its view, for the determination, with the aid of physical science (theory of plate tectonics), of the natural prolongation of a state's land into and under the sea, the terrestrial unit was the continental land mass; the direction of the natural prolongation was determined by the general geological relationship of the continental shelf to the continental land mass, and not by the accidental or incidental direction of any particular part of the coast (12). It thus urged the Court to identify, with the help of geology, the natural prolongations of the two states and to effect a delimitation accordingly (13).

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(8) Id, at 30.

(9) Id. at 44. para. 39

(10) Id. at 47 para. 44.

(11) Id. at 44. para 39.

(12) Id. at 44-45, para 40.

(13) Libya argued, on the basis of the theory of plate tectonics, that the geologic history of the land territory of Tunisia on one hand and that of the territory of Libya and the Pelagian Bloc on the other hand was different. Its argument may be summarized as follows:
As a result of two important geological events which took place in late Triassic or early Jurassic time (some 195 to 170 million years ago) and in the Tertiary Era (between 53 and 18 million years ago) today's geological structure of the continent of Africa took its shape. The plate underlying the continent of Africa and the modern Europe (the Eurosan Plate) first moved apart (rifting process) and in the second time, the north western part of Africa moved towards the Eurosan Plate and they collided. An origenic zone (an area of mountain building) of east-west orientation was produced, and today's Atlas Mountains thus came into being. Prior to that process, the area which was to become today's Tunisia was crossed from north to south by a fault axis (north/south axis,) thus dividing the continent in north-south direction. But none of those events affected the area of present day's Libya because it lies on the stablecraton or Saharan platform, and not within the areas of orogeny. Accordingly, the Sahara Platform to the south of the Pelagian Block covering greater part of Libya and only southern part of Tunisia is made up of thin sediments which have never been subject to regular detailed folding. But Atlas Mountain westward of the "north/south axis" extending the whole western Tunisia is constituted by thick sedimentary deposits which have undergone deformation in process of developement of the Atlas Mountain.

Tunisia, on the other hand, admitted that the principle of natural prolongation was the legal basis of the title to the continental shelf, and that there was no necessary conflict between natural prolongation and equity (14). But the Tunisian reasoning was quite different. It attached only a relative importance to the physical concept of natural prolongation and said that "the satisfying of equitable principles in a particular geographical situation" was part of process of" the identification of the natural prolongation." (15). Besides, Tunisia rejected the view that the natural prolongation of a state should be measured by reference to the continental land mass; it rather argued that what was in question was the prolongation of the land territory of the individual states. Therefore, for Tunisia to adopt the whole continental land mass as terrestrial reference unit, and to exclude on that basis variations in the direction of the coastlines from consideration would allow the geology alone to determine the natural prolongations. Whereas, in its opinion, considerations of geography, geomorphology, and bathimetry were at least as much relevant to the question as were those of geology (16).

It said that the marine topography of the submarine areas concerned (the Pelagian Block) showed presence of three major units:

a central spur stretching eastwards as a continuation of the Tunisian Plateau (Sahil) and on each side of it, low areas or valleys running eastwards. The low area on the north prolonged the Gulf of Hammamet and the other low area on the south prolonging the Gulf of Gabes. The latter feature called Tripolitanian Furrow, in Tunisian opinion, extended from west to east between the Tunisian Plateau and the Jefara Coast and it ran parallel to the coast of Libya and finally dropped progressively towards the Ionian Sea (17).

Tunisia contended that those features were found with the same characteristics and same general orientation on its land territory. Therefore, it suggested that its

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Acting on those conclusions, Libya contended that the area in front of its coasts constituting the Pelagian Block was the natural prolongation northward of the North African landmass to the south, since it constituted a typical continental margin produced by plate tectonic movements and rifting process. Consequently, Libya requested the Court to decide that the direction of the natural prolongation of Tunisia as of Libya, was northwards. Because the separating movement was north-south oriented and therefore it produced a continental margin lying to the north of a coastline running east-west. Libya further argued that the subsequent geological events which caused present day's Tunisia to be lifted up out of the then sea and tilted the Pelagian Block slighlty, did not affect the present day's Libya and its relationship to the Pelagian Block as a projection to the north of the land mass. Consequently, the submarine areas (Pelagian Block) lying in front of the Libyan coast and extending northward near and parallel to the Kerkennah Islands were claimed by Libya. See, id. at 50-51, paras. 53-56.

(14) Id. at 4, paras 38-39.

(15) Id. para. 39.

(16) Id. at 45. para. 40

(17) Id. at 54. para. 63.

natural prolongation was oriented west-east (18). The seabed off the Libyan coast, it said, sank quite rapidly towards greater depths in a general south -west-northeast direction.

Arguing on those and other geomorphological data, Tunisia sought to persuade the Court that its natural prolongation was west-east oriented and that of Libya extended north-or north-east only as far as the Tripolitanian Furrow. Thus, it suggested that the Tripolitanian Furrow constituted a natural boundary between two shelf areas (19).

Faced up with those conflicting views of the principle of natural prolongation, the Court examined the nature and meaning of the principle and the changes it had undergone. Relying on the exploitability criterion in article 1 of the Geneva Convention, it came to the conclusion that" the concept of natural prolongation was and remains to be examined within the context of customary international law" (20). Then, it indicated that since the Court gave its Judgment in 1969 a period of time had elapsed during which there had been much state practice in the field of law of the sea and it had been under close scrutiny in the context of the Third United Nations Conference on the Law of the Sea (21). The Court accordingly started examining the evolution of the concept in the state practice, and in that context it dealt with the new definition of the continental shelf in Article 76 of the then Draft Convention (1981), as prepared by the Conference, to see whether the rules and principles of international law applicable to delimitation might be derived from or might be affected by the "new accepted trends". As a result, it noted that the definition in that Article could not be ignored, although it did not relate to the delimitation (22). It further pointed out that the definition consisted of two parts, the first part employing the natural prolongation and the second part the distance criterion. In its view, the natural prolongation was the main criterion; the distance principle was in certain circumstances the basis of title of the coastal state (23). Thus, it concluded, the concept of the continental shelf as based on the "species of platform" had been modified by the distance criterion (24). It furthermore pointed out that" in so far as the paragraph provides that in certain circumstances the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal state, it departs from the principle that natural prolongation is the sole basis of title" (25).

(18) Id. at 56. para 64.
(19) Id. at 56. para. 64.
(20) Id. at 46. para. 43.
(21) See, 1982 Judgment, supra note 6, at 47. para. 45.
(22) Id. at 48. para. 47.
(23) Id.
(24) Id.
(25) Id. para. 48.

However, the Court stopped short of saying that the distance principle as contained in Article 76 was part of customary law. In fact, it did not apply the distance principle to the case at hand, as both the Parties relied on the principle of natural prolongation and as they had not advanced any argument based on the new trends towards the distance principle (26).

On the other hand, while dealing with the historic rights claims by Tunisia to certain areas, it said that "it may be that Tunisia's historic rights and titles are more nearly related to the concept of the exclusive economic zone which may be regarded as part of modern international law" (27). The Court's mention of the exclusive economic zone as part of modern international law, coupled with its emphasis on the distance principle, foreshadowed that the concept of natural prolongation would be considered in future with less enthusiasm within the 200 mile limit.

B.Relevance of geology and geomorphology specially addressed

Consistently with its general tendency of going away from the geological and geomorphological aspects of the shelf, the Court rejected the Libyan view that the natural prolongation of the Parties concerned should be found with the help of geology and a delimitation be effected accordingly. In its view, despite the confident assertions of the geologists from both sides, legally it was not possible to define the continental shelf areas appertaining to the two countries by reference solely or mainly to geological considerations. The Court would make use of geology only in so far as required by the application of international law. It accordingly ruled that:

"what must be taken into account in the delimitation of shelf areas are the pyhsical circumstances as they are today; that just as it is the geographical configuration of the present-day coast, so also it is the present-day seabed, which must be considered. It is the outcome, not the evolution in the long distant past, which is of importance" (28).

Consequently, the Libyan view that the natural prologation of a state which established its ipso jure title to the appurtenant continental shelf was determined by the whole physical structure of the land mass as indicated primarily by geology was clearly rejected. Probably, that was also determinative of the question of whether the natural prolongation should be understood in terms exclusively of geology. The Court's answer was seemingly negative, although it did not shut the door completely to the use which, in the right circumstances, it could make of geology, as far as it was required by the application of international law.

On the other hand, it said that the geomorphological features could be examined from two points of view: their relevance to determine the division between the

(26) Id.
(27) Id. at 74. para. 100.
(28) Id. at 53-54. para. 61.

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natural prolongations of the two states and their more general significance as potentially relevant circumstances affecting the course of the boundary. When examined for the former purpose, it said, the geomorphological features relied on by Tunisia did not involve" **such a marked disruption or discontinuance of the seabed as to constitute an indisputable indication of the limits of two separate continental shelves or two seperate natural prolongations"** (emphasis added) (29). Moreover, the Court continued, "**so substantial a feature as the Hurd Deep-Hurd Deep Fault Zone** was not atıributed such a significance in the France British Arbitration of 1977" (emphasis added) (30). The only feature which could be considered to be of any substantial relevance, it said, was the Tripolitanian Furrow. But that submarine valley did not display any really marked relief until it had run considerably farther to east than the area relevant to the delimitation (31).

Consequently, the Court said, the submarine area of the Pelagian Block which constituted the natural prolongation of Libya substantially coincided with an area which constituted the natural prolongation of Tunisia. In other words, the Pelagian Block constituted a common natural prolongation to the territories of both Parties.The geomorphological features the parties relied on did not constitute a marked disruption or discontinuance of the seabed area in such a way as to constitute the natural prolongations of the two Parties. Therefore, the question of which parts of the continuous submarine area appertained to Libya and which to Tunisia could not be solved by the geophysical criteria provided by the Parties. The Court, for that reason, turned to the equitable principles to effect the delimitation (32).

However, the Court pointed out that the geomorphological features not involving such a marked disruption or discontinuance of the seabed as to constitute an indication of separate prolongations could be taken into consideration for the delimitation as relevant circumstances. But, it added, "in such a situation, however, the physical factor constituting the natural prolongation is not taken as a legal title, but as one of several circumstances considered to be the elements of an equitable solution"(33)

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(29) Id. at 57. para. 66.

(30) Id.

(31) Id.

(32) Id. at 58, para. 67.

(33) Id. para. 68. Arechaga, in his separate opinion in the same case, even went further than the Court and observed that the geology or geomorphology had not been "admitted as the tests for the existence and recognition of the right to explore and exploit adjacent submarine areas, they cannot constitute by themselves valid grounds or applicable criteria for continental shelf delimitation." Id. at 113.
Judge Mbaye wrote in his separate opinion in the Libya/Malta Case, in 1985, that "in stating that 'the physical factor constituting the natural prolongation is not taken as a legal title, the court [in 1982] had already taken a stand on the question of natural submarine boundaries and well in advance of the present case, had settled the question of the basis of title which in spite of its name (natural prolongation) is entirely legal". Continental Shelf (Libyan Arab Jamahiriya/ Malta), Judgment, I.C.J., Reports, 98 (1985). However, in view of the Court's approach to the geomorphological features as potential indicators of two different shelves, this view is hardly acceptable.

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In view of those observations, the following conclusions seem to be properly in order:

First, although the Court did not decide the case on the basis of the geomorphological criterion, it is clear that it did not dismiss that possibility under the right conditions (34). Secondly, the way it treated the subject suggests that it considered the concept of natural prolongation in a geophysical sense, giving a proper consideration to the geomorphological features of the seabed, leaving the door open for proper use of geology if the law requires such a use. Finally, by accepting that the exclusive economic zone became a part of customary law, and signalling that the new definition in Article 76 departed, in certain circumstances, from the concept of natural prolongation, the Court also signalled that it could take new policy decisions with regard to title favouring distance principle.

3. Gulf of Maine Case: Emphasis on Geography

In the Gulf of Maine Case, (35) involving delineation by a single boundary line both of the water column and of the seabed and subsoil of the Gulf Area between U.S. and Canada, the Parties addressed effectively the questions relating to the seaward limits within the context of delimitation (36). Referring to the arrangments for the continental shelf and the EEZ in the Montego Bay Convention, Canada argued, before a chamber of International Court of Justice (hereafter cited as the chamber), that the basis of the coastal state title to the said maritime areas had changed and that the change should be reflected in the delimitation process (37).

Arguing on the basis of the Tunisia/Libya Case, it said that:

> Developments in the law of the sea have made distance from the coast a decisive factor in the definition of coastal state title to offshore zones. The most fundamental characteristic of coastal state title to an exclusive economic zone is that it is the same for all coastal states. It is a spatial concept that operates indepen

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(34) Accord: Feldman, supra note 6, at 226, 228; Herman, supra note 6, at 839, 840; Legault-Hankey, **From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case**, 79 AJIL 961, 975 (1985).

(35) See, Delimitation of the Maritime Boundary in the Gulf of Maine Case Area (Canada/United States of America), Judgment, I.C.J., Reports, 246 (1984).

(36) For the comments on this case see, among others, Rhee, S.M., **Equitable Solutions to the Maritime Boundary Dispute between the United States and Canada in the Gulf of Maine**, 75 AJIL 590 (1981); Legault-Hankey, supra note 34, at 961; Legault-LeMcRae, **The Gulf of Maine Case**, 22 THE CANADIAN YEARBOOK OF INTERNATIONAL LAW, 267 (1984); McRae, D.M., **The Gulf of Maine Case: the Written Proceedings**, id., vol. XXI, 266 (1983); Clain, L.E., **Gulf of Maine-A Disappointing First in the Delimitation of A Single Maritime Boundary**, 25 VA.J.INT'L L. 521 (1985).

(37) See, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Counter-Memorial submitted by Canada, 28 June, 1983, pp. 230-242, paras. 555-578.

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> dently of physical criteria other than simple proximity to the coast. Not only does the 200 mile distance criterion constitute the sole basis of coastal state title to the exclusive economic zone or 200 mile fishing zone, but it has now been accepted also as a sufficient basis of continental shelf jurisdiction within that distance from the coast. It has become the coastal factor in giving precise content to the principle of appurtenance and to the maxim that land dominates the sea (38).

In its Reply, Canada clarified the meaning of the term distance as being adjacency from the coast. In other words, the distance principle meant that adjacency within 200 miles from the coast was the sole basis of title to both EEZ and to the continental shelf (39).

With that proposition, Canada implied that the EEZ had superseded the regime of the continental shelf within 200 miles of the coast, and, consequently, the principle of natural prolongation was no longer a relevant concept (40).

Proceeding on that premise, it further argued that the delimitation should be effected in accordance with the equidistance principle, without taking into account any physical features of the seabed.

On the other hand, the U.S. rejected that view, and observed that the Montego Bay Convention expressly confirmed the legal concept of the continental shelf as traditionally understood, and that by accepting the 200 mile EEZ, states did not "relinquish the substance of the continental shelf regime either within or beyond 200 nautical miles" (41). In its view, the 200 mile limit was accepted by the wide margin states as a supplement to the physical definition of the continental shelf, in return for the acceptance of the principle that the continental shelf regime applied to the entire continental margin both within and beyond 200 miles from the coast (42). The reference in Article 56 (3) to the Part VI (on the continental shelf) was designed to "accomodate the refusal of the wide margin states to accept any articles dealing with the economic zone that would infringe upon a continuous continental shelf regime...; and, to avoid any uncertainty regarding the continued application of existing laws and arrangements with respect to the continental shelf" (43). Consequently, the U.S. argument continued, article 56 preserved all the seabed areas up to the outer limit of the EEZ and far from superseding continental shelf, the seabed of the EEZ was made subject to the former regime. In fact, the economic zone, it said, was a separate regime imposed on the already existing continental shelf regime (44).

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(38) Id. at 231, para. 556.

(39) See, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Reply Submitted by Canada, 12 December, 1983, p.25.

(40) See, I.C.J., Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Reply Submitted by the United States of America, 12 December 1983, pp. 60-61.

(42) Id.

(43) Id. at 62.

(44) Id. at 63.

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U.S., accordingly and succesfully, objected to any effect being given to the distance principle in a delimitation setting, a possibility which, it said, was never intended by the Conference (45).

In keeping with the views they expressed with regard to the basis of title, the parties' approach to the concept of natural prolongation was different. U.S., arguing on the basis of the previous judgments, said that the natural prolongation in its geographical sense (or in the sense of coastal front extension) was still the basis of title to the continental shelf and it had not been superseded by the distance principle (46). It accordingly asked the Chamber to effect a delimitation of the area concerned, taking into account the extension of the coastal fronts of the Parties concerned. However, it did not dismiss the possibility of the geomorphological features playing a role in the delimitation. Its concept of geographical natural prolongation allowed for such features to play their parts:

"Except in those rare instances where there are two separate continental shelves, this geographical aspect of natural prolongation, or coastal-front extension, lies at the heart of the coastal state jurisdiction over maritime areas, with respect both to the continental shelf and to fisheries zones" (emphasis added) (47).

As, in its view, the Northeast Channel constituted a geomorphological break in the surface of the continental shelf in the Gulf area and, consequently together with other ecological factors, formed a 'natural boundary (48). U.S. requested the Chamber to effect a delimitation in such a way that the Northeast Channel constituted the natural boundary, a proposition, the acceptance of which would have given the whole resource-rich Georges Bank to the U.S.

Canada, referring to the Tunisia/Libya Case, acknowledged that a 'natural boundary' had been at least a hypothetical possibility when natural prolongation represented the legal basis of title; in circumstances where the delimitation of the continental shelf involved an area that exhibited marked disruption of the seabed. But in the pending case that was not applicable, since the Parties agreed that the seabed in the Gulf of Maine Area was continuous (49). Moreover, it said, the natural boundary concept could not apply to the delimitation in question, since that would not be in keeping among others, with the distance being the only basis of title (50).

The Chamber did not directly address the question of whether the continental shelf had been superseded by the EZ within the 200 mile limit, but it expressed itself on the concept of adjacency:

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(45) **Id.**

(46) **Id.** at 65.

(47) **Id.** at 67.

(48) See, Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Counter-Memorial Submitted by the United States of America,23 June 1983, pp. 28-29.

(49) See, Canada's Reply, supra note 39, at 32.

(50) **Id.** at 33.

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> Regarding adjacency the Chamber acknowledges that in most cases this concept can be credited with the ability to express, perhaps better than that of natural prolongation, the link between a state's sovereignty and its sovereign rights to the adjacent submerged land. It can also be acknowledged to express correctly the link between the state's territorial sovereignty and sovereign rights over waters covering such submerged land.It should not be forgotten, however, that" legal title" to certain maritime or submarine areas is always and exclusively a legal operation. The same is true of the boundary of the extent of the title. That boundary results from a rule of law, and not from any intrinsic merit in a purely physical fact. In the Chamber's opinion, it is therefore correct to say that international law confers on the coastal state a legal title to an **adjacent** continental shelf or to a maritime zone **adjacent** to its coast; it would not be correct to say that international law recognizes the title **conferred on the state by the adjacency** of that shelf or that zone, as if the mere natural fact of adjacency produced legal consequences (emphasis added) (51).

The Chamber, accordingly, rejected the Canadian argument that the delimitation should be effected in accordance with the equidistance principle in order to remain loyal to the legal basis of title to maritime areas within 200 mile limit (distance). It considered that view as amounting" to just one more, still unconvincing, endeavour to instill the idea that "equidistance" -rather than 'distance" is the concept endorsed by the customary international law, since the objective is to assert that whatever lies less far from the coasts of one state than from those of another should be automatically appertain to the former state" (52).

As regards the geomorphological features, in particular, the Northeast Channel, the Chamber said that the delimitation area, as the parties agreed, constituted a geological and geomorphological continuity. Even the Northeast Channel, it said, did not have the characteristics of a real trough marking a dividing line between two geomorphologically distinct units (53). Consequently, in the Chamber's opinion, the situation in the Gulf of Maine Area was different from 'the stuations that may prevail in areas where a natural separation does exist, from the factual viewpoint, between the respective continental platforms of the parties in dispute' (54).

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(51) See, 1984 Judgment, supra note 35, at 296.
(52) Id. at 297.
(53) Id. at 274
(54) Id. at 275

After having examined the ecological factors advanced especially by the U.S. to show the prasence of a "natural boundary" the Chamber concluded that:

"it must, however, be emphasised that a delimitation, whether of a maritime boundary or of a land boundary, is a legal-political operation, and that it is not the case that where a natural boundary is discernible, the political delimitation necessarily has to follow the same line" (55).

However, the Chamber added that in the pending case such a problem did not arise, since there was no geological, ecological, or other factors which would exclusively represent a single incontestable natural boundary (56).

The Chamber, finally, drew a single boundary line, as the parties had requested, on the basis of what it called the "neutral" element of geography. But that did not depend on any fusion of the two regimes. It did not pronounce itself on that question, contending itself with saying that the international law did not prohibit drawing a single boundary line both for the EEZ, and for the continental shelf (57).

4. Libya/Malta Case: Distance Principle Prevails within the 200 Mile Limit

In the Libya/Malta case (58) the Court clarified the status of the distance principle in general international law and made itself much clearer on the relationship between the EEZ and the continental shelf within the 200 mile zone. That the Court had to do because the parties were in sharp disagreement on the main issues relating to the delimitation.

In the Libyan view, the natural prolongation of the land territory into and under the sea, referred to by the Court in the North Sea Continental Shelf Cases, was the basis of title to the areas of the continental shelf which appertained to each of the contending Parties (59). Consequently, the delimitation should be effected in such a

(55) Id. at 277

(56) Id.

(57) Legault-Hankey write that although the term natural prolongation had had a geomorphological origin, it became a legal concept expressive of the basis of title and of the outer limit of that title. Accordingly, the argument continues, the continental shelf extending to a distance less than 200 miles (as provided by article 76) is now defined solely in terms of geographical adjacency measured from the coast. See, supra note 34, at 983.

(58) See, Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.CJ., Reports, 1985.. For the comments on the case, see, among other, Gündüz, A., **Kıta Sahanlığı Hukukunda Yeni Gelişmeler (Libya/Malta Davası)**, 3 HUKUK ARAŞTIRMALARI 5 (Marmara Üniversitesi Hukuk Fakültesi, 1986); McDorman, T.L., The Libya-Malta Case:Opposite States Confront the Court,24 CANADIAN YEARBOOK OF INTERNATIONAL LAW, 335 (1986); Hutchinson, supra note, 6; Willis, L.A., **From Precedent to Precedent: The Triumph of Pragmatism in the law of Maritime Boundaries**, 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW, 3,30 (1986).

(59) See, the 1985 Judgment, supra note 58, at 31, para. 30.

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way as to leave as much as possible to each party all areas of the continental shelf that constituted natural prolongation of its land territory. Each Party, it said, should prove how far its natural prolongation extended seaward into the area to be delimited. As the UK had argued in the Anglo-French Arbitration, Libya argued that, if there existed a fundamental discontinuity between the shelf adjacent to one Party and the shelf adjacent to the other, the boundary should be drawn along the general course of that discontinuity (60). Such a discontinuity, it alleged, existed in the delimitation area; it was called "Rift Zone",constituted by tectonic plate boundaries (a geological discontinuty) or at least by the presence of a very marked geomorphological feature (geomorphological discontinuity) (61). The "Rift Zone", it continued, divided the areas of the continental shelves appertaining to the territories of the Parties respectively. Accordingly, there was no problem of overlapping of the shelves to be divided by other methods.

Malta countered that, although the continental shelf of a state constituted the natural prolongation of its land territory, the prolongation was no longer defined by reference to physical features (geological or bathimetric), but by reference to a certain distance from the coast (62). Through the evolution of the law, the natural prolongation ceased to be understood in geophysical terms within the 200 mile limit; it now became a spatial concept which operated independently of all the geological or geomorphological characteristics of the seabed (63). It would resume its physical significance only beyond the 200 mile limit, since the coastal state's continental shelf extended up to the outer edge of the continental margin. Consequently, continental shelf rights within the 200 mile limit were controlled by the distance principle. In support of its thesis, Malta resorted to the genesis of the EEZ and its inclusion in the 1982 Convention as confirming the importance of the distance principle in the law of the continental shelf and the detachment of latter from any criterion of physical prolongation (64). In its view, the EEZ allowed the coastal state jurisdiction over both the seabed and water column up to a distance of 200 miles and Article 76 (1) defined the continental shelf as extending either to the outer edge of the continental margin, or to 200 miles of the coast, if the former does not extend that far. For that reason, it contended, the customary law reflected in Article 76 (1) must be taken into account in the light of the provisions of the Convention concerning the EEZ. In making this argument, it built on the Court's reference in the 1982 Judgment to the definition of the continental shelf in Article 76 and to the EEZ and to the concept of natural prolongation. It argued that the distance principle was included among the principles and rules of customary international law, with the result that the entitlement of coastal state to the continental shelf within the 200 mile limit came to be detached from all the physical characteristics of the seabed. The reference to distance principle in Article 76, it continued, simply declared that fact.

(60) Id. at 34, para. 36.
(61) Id.
(62) Id. at 31-32. para. 29.
(63) Id. at 31-32, para. 30.
(64) Id. at 32. para. 31.

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In keeping with its argument relating to title, Malta requested the Court to indicate the maritime boundary by reference to the equidistance principle, giving each state the areas closer to its coasts, regardless of physical characteristics of the seabed (65).

Libya rejected the view that the distance principle was a part of customary international law. It contended that the 1982 Convention not being in force, it could not be binding on the Parties as the conventional law, and that it was not a rule of positive international law, either, so far as the regime of the continental shelf was concerned (66). Only the first part of the definition (natural prolongation) corresponded to the customary law. The distance principle was intended to apply to definition of the outer limit of the continental shelf in certain cases and its application in a delimitation between neighbouring states was not appropriate, still less in such an area as Mediterranean (67). In fact, Libya could not see any reason why the rules on the EEZ should apply to a delimitation regarding the continental shelf. In its view, the continental shelf had not been absorbed by the EEZ and establishment by some states of fisheries zones or EEZs had not changed the law of maritime zone delimitation (68). It referred to the following points of difference which, it said, made the absorption impossible: the continental shelf rights are inherent, the rights over the EEZ exist only if and when the coastal state choses to proclaim it. Besides, article 78 of the 1982 Convention still disassociates the legal regime of the seabed and subsoil from that of the superjacent waters (69).

The Court essentially upheld the Maltese view and gave only lip service to the Libyan argument, so far as the law relating to the legal basis of entitlement to continental shelf is concerned. It admitted that the case at hand did not relate to the delimitation of the EEZ, but yet it said that the principles and rules underlying the concept of the EEZ could not be left out of consideration (70). That conclusion It arrived at on the basis of the relationship which, it said, the 1982 Convention established between the two institutions. It was obviously impressed by the fact that, under the Convention, the rights enjoyed by the coastal state would also be possessed by it over the seabed and subsoil of the EEZ, which it might proclaim. Actually the Court believed that the concept of the EEZ, independently of the provisions of the Convention, had become a part of customary international law:

> It is in the Court's view incontestable that, apart from those provisions, the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of states to have become a part of customary law (71).

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(65) Id. at 33. para. 34.
(66) Id. at 32. para 32.
(67) Id.
(68) Id.
(69) Id. at 32,33. para 32.
(70) Id. at 33. para. 33
(71) Id. para. 34.

The Court then turned to the link between the continental shelf and the EEZ to show how the distance principle which underlay the concept of the EEZ was applicable to the continental shelf within 200 miles of the coast as well. It pointed out that although the two institutions were different and distinct, the rights which the EEZ entailed over its seabed and subsoil were defined by reference to the regime laid down for the continental shelf. Consequently, it said, there could be a continental shelf where there was no EEZ, but there could not be an EEZ without a corresponding continental shelf (72). From that relationship it drew the principle that for juridical and practical reasons, the distance principle must apply to the continental shelf as well as to the EEZ, as a principle of customary international law (73).

However, it rejected the view that the idea of natural prolongation was thus superseded by the distance principle. In its view:

> What it does mean is that where the continental shelf does not extend as far as 200 miles from the shore, natural prolongation which, in spite of its physical origin, has throughout its history become more and more a complex and juridical concept, is partly defined by distance from the shore, irrespective of the physical nature of intervening seabed and subsoil. The concept of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of continental shelf (74).

Having so decided, the Court proceeded to reject the Libyan view that the delimitation line should be drawn alongside the Rift Zone:

> since the development of law enables a state to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever geological characteristics of the corresponding seabed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of states concerned, or in proceeding to a delimitation as between their claims. This is especially clear where the verification of the title is concerned, since, at least, in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title solely depends on the distance from the coasts of the claimant states of areas seabed claimed by way of the continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial (75).

(72) **Id.**
(73) **Id.** at 33, para. 34.
(74) **Id.**
(75) **Id.** at 35. para. 39.
(76) **Id.**
(77) **Id.** at 35. para. 40.

The Court accordingly ruled that "since the distance between the coasts of the parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the "Rift Zone" cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the natural extension of the Libyan coast as if it were some natural boundary". (76).

To make it sure that the geophysical feature within 200 mile limit did not have any relevance to the delimitation, the Court continued to say that:

"Neither is there any reason why a factor which has no part to play in the establishment of title should be taken into account as a relevant circumstance for the purpose of delimitation" (77).

In the following paragraph, an attempt will be made to evaluate the recent decisons of the Court, with special reference to the the legal basis of title and its impact on the delimitation.

5. Evaluation: Relevance of Legal Basis of Entitlement to Delimitation

We have concluded before that the legal basis of the continental shelf until up to 1982 had been considered by international courts, and states that to be the fact that the continental shelf constituted the natural prolongation of the land territory of the coastal state. The concept of natural prolongation had been undisputably considered in terms of geology or geomorphology. We also stated the same concept, without change, has been incorporated into Article (76). Besides, there is some state practice showing that the gemorphological breaks in the surface of the continental shelf have been given effect in delimitation between neighbouring states (78). The Court itself and the Court of Arbitration in the Anglo - French Arbitration did not rule out

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(78) For example, trenches in Arafura Sea and Timor Sea, with depths ranging from 100 to 3000 metres, were given effect in seabed boundary agreement, concluded in 1972, between Australia and Indonesia. See, Agreement Between Australia and Indonesia Establishing Certain Seabed Boundaries in the area of the Timor and Arafura Seas, Supplementary to agreement of 18 May 1971, October 9, 1972, UNITED NATIONS, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, UN DOC. ST/LEG/SER. B/18. at 441 (1976).
The agreement concluded in 1974 between S.Korea and Japan by which the continental shelf between the two countries was delimited also gave effect to the northern part of Okinava Trough, with a depth of 300 to 1300 metres (northern part). The Joint development zone as established by the agreement in question has its boundaries between trough line claimed by Korea and the equidistance line by Japan. See, Rhee, supra note 36, at 616. For the text of the treaty see, Continental Shelf Boundary and Joint Development Zone, Japan-Republic Of Korea, January 30, 1974, in LIMITS IN THE SEA, No 75.
For further details, see, Pazarci, H., LA DELIMITATION DU PLATEAU CONTINENTAL ET LES ILES, 273-74 (1982).

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the possibility that such major and persistent discontinuities as capable of interrupting the essential geological continuity of the submarine areas could constitute a natural boundary betewen the continental shelves or natural prolongations of the neighbouring states. In fact, the Court stated that point very clearly in Tunisia/Libya Case, when it said that a marked disruption or discontinuance of the seabed might constitute an indisputable indication of two separate natural prolongations (79). The Chamber referred, in the Gulf of Maine Case, to this passage and apparently did not depart from the previous jurisprudence (80). But in the Libya/Malta Case, the Court reversed the established law on the ground that the law relating to the legal basis of title to the continental shelf had changed and it accordingly put aside the previous jurisprudence, so far as the effect of some geomorphological features on the delimitation is concerned:

> However, to rely on this jurisprudence [referring to the passages in the 1969 Judgment and the 1982 Judgment relating to geology and geomorphology] would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, it finds warrant for so doing in a legal regime title itself which used to allot those factors a place which now belongs to the past, in so far as seabed areas less than 200 miles from the coast are concerned (81).

As it has been indicated before, the Court arrived that result on not the basis of the state practice indicative of the fact that the distance principle in Article 76 has become part of customary international law in its own right. On the contrary, it depended on the status of the EEZ in international law and its impact on the continental shelf. In other words, the Court's ruling that the 200 mile distance in article 76 is customary law is based on the fact that the 200 mile EEZ has become part of customary international law and hence the 200 mile distance limit of the continental shelf, since the continental shelf rights are subsumed under the regime of the EEZ (82).

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(79) See, supra note 6, at 57.

(80) See, supra note 53 and accompanying text.

(81) See, supra note 58, at 36, para. 40.

(82) Although the campaign to establish an EEZ had come from the developing countries, it is now the developed countries that have benefited most from the established regime. As a result of the establishment of the EEZ, 37.59 % of Atlantic Ocean and Arctic; 32.34 % of Indian Ocean; 36.29 % of Pasific Ocean; and a total 35.86 % of the world oceans have been apportioned. The lion share has gone to a few ocean bordering states: U.S. (2831 400 sq nm); Australia (1409500sq nm); Canada (857000 sq nm); USSR (1309500 sq nm); Japan (1260000 sq nm); Brazil (924000 sq nm); Mexico (831500 sq nm); Chile (667300 sq nm); Norway (590000 sq nm); India (587000 sq nm); Philippines (520700 sq nm); Portugal (517400 sq nm); Madagascar (376 800 sq nm.). See, Alexander, L.M.-Hudgson, R.A., The Impact of the 200 Mile Economic Zone on the Law of the Sea, 12 SAN DIEGO LAW REVIEW, 573 (1975); Attard, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, xxx-xxxiii (1987).
The portion of submarine areas which has gone to those states as the continental shelf is, in many cases, bigger than that of the EEZ.

As a matter of fact, the state practice concerning the EEZ is impressive. Starting with Bangladesh which was the first state to declare an EEZ in 1974, many states established their EEZs without waiting for conclusion of the Convention (83). As we have allready indicated, at the Caracas Session there was almost a consensus as to the establishment of EEZ with its 200 mile limit. Therefore, the Court is right in ruling that EEZ is part of customary international law.

But with respect to the continental shelf as such, the recent practice is not helpful. In fact, after advent of the EEZ, the state practice relating to the continental shelf has become ambiguous. For example, many states that are parties to the 1958 Convention, have proclaimed their EEZs (84),which would, in good many cases, go beyond or at least cover the existing continental shelves. Some of those states have even ratified the 1982 Convention (85). On the other hand, for the states bordering onto the oceans but having continental margins not extending up to 200 miles, the establisment of the EEZ resulted in enlargement of their continental shelves, but for the states bordering onto closed or semi-closed seas, the advent of the EEZ has brought almost no change with respect to their continental shelves, as they had already possessed them under the existing law. For this second category, proclamation

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On the other hand, for example, the area of the EEZ of Kenya which had paved the way for acceptance of the institution is 34400 sq nm. Most of the other developing countries are not in a better position. The total area of the EEZ of Bangladesh which was the first state to declare an EEZ is 22400 sq nm. More importantly, the available statistics do not show that any big improvement in incomes or in economies of the developing countries has ever materialized. See, Churchill-Lowe, THE LAW OF THE SEA, 114 (1983); Toluner, MILLETLERARASI HUKUK DERSLERI, 224 (1984)

It would not be a surprise to hear in future from the developing countries that they made a mistake in resisting the proposals for narrower national maritime zones, just as they had made a mistake in the Geneva Conference of 1958, in insisting on the inclusion of the exploitability criterion in the definition of the continental shelf in article 1 of the Geneva Convention.

(83) The following states have declared EEZ: Antigua-Barbuda, Bangladesh, Barbados, Burma, Cape Verde, Colombia, Comoros, Cook Islands, Costa Rica, Cuba, Democratic Kampuchea, Democratic People's Republic of Korea, Democratic Yemen, Djibuti, Dominica, Dominican Republic, Equatorial Guinea, Fiji, France (except Mediterranean), Grenada, Gutemala, Guinea, Guinea-Bissau, Haiti, Honduras, Iceland, India, Indonesia, Ivory Coast, Kenya, Kribati, Madagascar, Malaysia, Maldives, Malta, Mauritania, Mauritius, Mexico, Morocco, Mozambique, New Zealand, Nigeria, Niue, Norway, Oman, Pakistan, Papua New Guiena, Philippines, Portugal, Qatar, Samoa, Sao Toma and Principe, Seychelles, Spain, Solomon Islands, Sri Lanka, St. Christopher and Nevis, St. Lucia, St. Vincent and Grenadines, Surinam, Thailand, Togo, Tonga, Turkey (only Black Sea), Union of Soviet Socialist Republics, United Arab Emirates, U.S.A., Vanauatu, Viet Nam, Venezuela, Western Samoa, Yemen People's Democratic Republic,

Additionally, the following states declared fishery zones: Finland, Canada,Bahamas, Australia, Angola, Sweden, Tuvalu, UK, South Africa, Nauru, Netherlands. See, Simmonds K.R., (ed)., NEW DIRECTIONS IN THE LAW OF THE SEA , (Release 86-1; 86-2, 1986). See, also, Attard, supra note 82.

(84) For example, Madagascar, Malaysia, Malta, Mauritius, New Zealand, Nigeria, Norway, Costa Rica, Cuba, France, Solomon Islands, D.Kampuchea, Portugal, Sweden, Thailand, Tonga, Tobago, Guatemala, Haiti, USSR. Kenya, Venezuela.

(85) For example, Cuba, Nige..., Mexico.

of the EEZ has affected or would affect only the fisheries. However, there are some indications that after appearance of the negotiating texts of the Montego Bay Convention, in mid-1970s, some states, in parallel with the wide practice of establishing EEZs, began to adjust the outer limits of their continental shelves to the provisions of the negotiating texts. That is, incorporating the criteria of distance and natural prolongation into the domestic laws (86). Most recently, Iceland, (87), Chile, (88) and Ecuador (89) passed regulations or issued proclamations whereby they delineated, in accordance with Article 76 of the Convention, their continental shelves, extending in some cases to 350 miles from the coast. The Iceland's regulation has its aim to delimit the continental shelf to the west, south and east of the island. It provides for use of 200 or 350 mile limits, as the case might be. The Chilean declaration delineated the outer limit of the continental shelf of Easter Island and Sala Y Gomez Island, in the Pacific Ocean, at the 350 miles of the coast. The Proclamation of Ecuador delimited the continental shelf of Galapagos Islands at the 2500 metres isobath.

An evaluation on the basis only of these numerical data certainly would be misleading and, to be sure, would fall short of proving that Article 76 is part of customary international law on its own. Such an evaluation, besides, would overlook the fact that the natural prolongation has throughout been the basis of the continental shelf and a rule of general law. As Article 76 has simply incorporated it, the state practice is not required every time to show that the rule is there. Therefore, apart from the technicalities of delineation in Article 76, with respect to areas extending beyond 200 miles, there must not be any doubt that the principle of natural prolongation is part of customary international law. More so, in the areas remaining landward of 200 miles, where paragraphs 4,5,6 of Article 76 would not apply. Consequently, in the areas not extending beyond 200 miles the coastal state's rights based on natural prolongation are as sound as they had been before. It is only with regard to the rights not covered by the natural prolongation that the distance principle would apply. As for the status of the latter in international law, an evaluation on the basis of the available information would not be realistic, since the 200 mile limit of

(86) For example, Sri Lanka, Seychelles, Burma, Iceland, Dominican Republic, Bangladesh, Kampuchea, D. Yemen, Guyana, Chile, Ecuador, India.

(87) See, Iceland, Regulation No 196 of 9 May 1985 concerning the Delimitation of the Continental Shelf to the West, South, and East, in Simmonds (ed), NEW DIRECTIONS IN THE LAW OF THE SEA, (Release 87-1, issued May 1987).

(88) Declaration by Chile: Easter Island and Sala Y Gomez Island, 15 September, 1985, Id. Following this declaration and that of Ecuador (infra note 89) U.S. protested against the extension by these two states of their continental shelves to the indicated distances, on the ground that the part of the claimed continental shelf beyond the 200 miles did not meet the conditions set forth in article 76 (4). For details see, Ramakrisna, K-Bower, R,. E-Archer, J.H., **Outer Limits of Continental Shelf: A Legal Analysis of Chilean and Ecuadoran Islands Claims and U.S. Response**, 11 MARINE POLICY, 58 (1987).

(89) Proclamation by Ecuador: Galapagos Islands, 19 September, 1985, supra note 87.

the EEZ in good many cases is the outer limit of the continental shelf as well. Consequently, that makes us face up to the very important question of whether the recognition of the EEZ, with its rule on outer limit and entitlement, as customary international law requires, or is tantamount to, the recognition as customary law of the distance principle in Article 76. The Court's answer was affirmative but there appears to be some opposition to it.

Scholarly opinions are divided on the status of Article 76 in customary law as well as on the question of whether the continental shelf has been absorbed by the EEZ within 200 miles of the coast (90). For some jurists who rely on the 1969 Judgment only the first part of the definition in Article 76 is customary international law, the distance principle has not yet attained that status (91). For some

(90) In support of the integration of the two regimes see, O'CONNELL,1 THE INTERNATIONAL LAW OF THE SEA, 467 (1982) where he writes:

The doctrine of the continental shelf has been relegated at the Third Law of the Sea Conference to playing the minor and ancillary role of extending the exclusive economic rights of coastal state over the seabed, in a relatively few cases, to distances beyond the 200 miles of the EEZ.

But in a chapter concerning the relationship between the EEZ and the continental shelf, he concludes that:

In this rather roundabout way, the Draft Convention instead of substituting the EEZ for the continental shelf, really restates the continental shelf doctrine and partially relabels it . Id at 580.

Arechaga, separate opinion in Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J., Reports, 114,115-116 (1982); Apparently, Evenson, dissenting opinion in the same case, Id, at 222,228-29,231-32,233. But he expresses doubts as to whether the content of the EEZ regime has been wholly accepted as customary law. Id. at 229-233. Hutchinson agrees with the Court in the Libya/Malta case that the rules on the EEZ apply to the continental shelf within the 200 miles. 46 BYIL 170 (1985). See, also, Wodie, **Les interets economique et le droit de la mer**, 80 REVUE GENERAL DE DROIT INTERNATIONAL PUBLIC, (RGDIP), 762-63 (1976).

For the arguments that the two regimes exist within the 200 mile limit, see, Extavour, THE EXCLUSIVE ECONOMIC ZONE, 2nd ed, 223 (1981); Attard, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, 136-145 (1987); Caflish, **Les zones maritimes sous juridiction nationale, leur limits et leur delimitation**, 84 (RGDIP), 98 (1980); Legault-Hankey, supra, note 34, at 980-86 (But they consider that partial integration has taken place); Judge Gros, dissenting opinion in the Gulf of Maine Case, **supra** note 35, at 374.

(91) O'connel writes that:

> Despite the intrusion of depth and distance criteria in the formula for determining the outer limits of the continental margin, rendered necessary by technical complexities, the doctrine of natural prolongation, has clearly overtaken depth and exploitability as basic criteria in determining the extent of rights to the continental shelf. Except for the technicalities of delineation, the granting of seabed rights to states with continental shelves narrower than 200 nautical miles, the Draft Caracas Convention provisions may be taken to represent the present position in customary international law. I THE INTERNATIONAL LAW OF THE SEA, 497 (1982).

Sette-Camara wrote in his separate opinion in the Libya/Tunisia Case, that:

> In spite of all the speculations backing the theory of instantaneous formation of customary international law by procedural consensus, I find it difficult to accept that at this time the distance provisions of Article 76, paragraphs 1 and 5, as rules of customary international law. The only rule of customary international law retained by this article is, I submit, still the old rule of natural prolongation.

See, supra note 6, at 69.

others, who generally rely on the language of Articles 56,57, and 76, the distance principle (alone or with the natural prolongation) is customary law (92).

On the other hand, it seems that the argument that the continental shelf has been absorbed by the EEZ within 200 miles is not supported by the state practice. As a matter of fact, a number of states have already stated in their legislations that their EEZs would not affect the regime of their continental shelves or that they have retained the autonomy of the shelf regime (93). Apparently only two states have fused the two regimes (94).

While those who argue for integration could not see how Article 56 could be read other than meaning that the two regimes are integrated, the opponents would advance the following reasons or justification of their view:

First, the principle of natural prolongation has not been abandoned; it is maintained in Article 76. The 200 mile limit simply supplements it in order to meet the needs of states, the continental margins of which do not extend that far. Indeed, apart from the statements registered in the records of the Conference, a number of

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(92) Arechaga stated, in his separate opinion in the Tunisia/Libya Case, that:
In my view, if a distinction is to be made in respect of the legal status of two criteria in Article 76, it would rather have to be in the opposite sense... It is safe to assert that today the distance test of 200 miles has abrogated the exploitability test and consequently must be considered as having already crystallized as a rule of customary international law. See, supra note 6, at 114.
Judge Oda said, in his dissenting opinion in the same case, after a thorough study of the subject, that: Well may be the draft convention be expected eventually to become binding upon many nations, once it has become widely accepted and received a sufficient number of ratifications. Until that time, there is no doubt that Article 76 is not a provision of any world wide multilateral convention, and can hardly be considered as enshrining established rules of international law. Id. at 220. However, his attitude towards the distance principle as a principle of positive law seems to be positive: Although the outer limit of the area has yet hardly been established, even with the abandonment of the depth/exploitability test, it can at least be said that a 200 mile distance test has found wide acceptence. Id. at 233.
Hutchinson argues, on the basis of the relationship between the EEZ and the continental shelf that, the distance principle is now customary law, but the rule governing the continental shelf extending beyond 200 miles is not. See, supra note 6, at 170,172-183.

(93) For example, U.S. EEZ Proclamation clearly stated that the existing U.S. policy concerning the continental shelf would not be affected by the proclamation of the EEZ. Proclamation on the Exclusive Economic Zone No 5030 of 10 March 1983, in 22 ILM 461 (1983).
For the other similar proclamations see, Bangladesh, Maritime Zones Act (1974); Dominican republic, Act 186, (1967); Pakistan, Maritime Zones Act, (1976); France, Decree No 77-130, (1977); Burma, Maritime Zones Act, (1977); Colombia, Act 10, (1978); Ivory Coast, Law No 77,926, (1977); D. Yemen, Act 45 (1977); Guyana, Maritime Boundaries Act, (1977); Iceland, Law 41, (1979); Portugal, Act 33/77; Seychelles, Maritime Zones Act, (1977); Sri Lanka, EEZ Declaration, (1980); Vanuatu, Maritime Zones Act, (1981); Venezuela, EEZ Act (1978).

(94) Guinea, Decree no 336/PRD4. G/80 and Guinea-Bisssau, Law No 3/78.

states, including the U.S. explicitly maintained the autonomy of the continental shelf in their national legislations (95).

Secondly, the two regimes of the continental shelf and the EEZ arose from two completely different circumstances and their histories are quite different (96). Moreover, the Conference preferred two separate regimes in spite of some demands to the contrary. Accordingly, while the Part V deals with the EEZ, the Part VI deals with the continental shelf as a whole, not only the continental shelf beyond the 200 mile limit (97). Consequently, the rules of international law on interpretation require that the two Parts should be so interpreted that they both be meaningful. In his dissenting opinion in the Gulf of Maine Case, Judge Gros wrote that:

> The construction of the treaty with a Part V... and a part Vi... only makes sense if the two areas differ in certain ways, to such an extent that it was necessary to devote to them two parts of a convention on the law of the sea. Exegetics who want to fuse the rules of delimitation have therefore to justify the radical uselessness of Part Vi, in what purports to be a text of codification (98).

In his view, comparison of rules on the EEZ (Articles 55-62 and 73-4) and on the continental shelf (76,77,78,81 and 82) leave only two alternatives: either two legal regimes or chaos (99).

As a matter of fact, it has been suggested that through reference in Article 56 to the Part Vi, the seabed regime is made subject to the regime of the continental shelf; the regime of the EEZ does not affect those rights (100).

Thirdly, the boundaries of the two maritime spaces are not co-extensive. The maximum breadth of the EEZ is 200 miles, which is the minimum breadth of the continental shelf, while the maximum limit extends up to 350 miles of the coast or to 100 miles of 2500 isobath (101).

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(95) See, supra note 93

(96) See, Judge Oda, dissenting opinion in the Tunisia/Libya case, supra note 6, at 231; Report of International Commitee on the Exclusive Economic Zone of ILA, (hereafter cited as ILA's Report), REPORT OF THE SIXTY-FIRST CONFERENCE, Paris, 183,188 (1984).

(97) Sette-Camara, separate opinion in Tunisia/Libya Case, supra note 6, at 69,70; Churchill-Lowe, THE LAW OF THE SEA, 111 (1983).

(98) See,Gros, dissenting opinion in Gulf of Maine case, supra note 35, at 374.

(99) Id.

(100) Extavour writes that:

In short under the proposed new regime, 200 nautical miles and the seabed and subsoil of the exclusive economic zone would, therefore, be automatically subject to the regime of the continental shelf, see, supra note 90 at 223; U.S Reply in the Gulf of Maine case, supra note 41, at 62.

(101) See, Sette-Camara, supra note, 6 at 70

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Fourthly, the continental shelf rights are of the ipso facto and ab initio character, which is still maintained in article 77 of the Convention, but the EEZ does not exist unless and until it is proclaimed (102).

Fifthly, sedentary fisheries, whether within or outside the 200 miles still fall under the regime of the continental shelf. Moreover, the continental shelf rights, including sedentary fisheries, are exclusive, and the coastal state is not under any duty towards other nations with respect to those rights, while the rights of the coastal state in the EEZ are not exclusive in that the participation of other nations in the exploitation of the living resources is recognized, and the coastal state is under many duties with respect to preservation, utilization, and management of the living resources in the EEZ (103).

It is a fact that all these points are hard to challenge. The two regimes are obviously autonomous. In fact, the Court itself stated that point very clearly in its latest judgment (104). But it is also a fact that the maximum limit of the EEZ is in some cases the maximum limit of the continental shelf as well, while in other cases it constitutes the minimum limit. Although the state practice regarding the continental shelf does not distinctly indicate that the distance principle in Article 76 has now become customary international law, it would not be wrong to rely in that respect on the state practice with respect to the EEZ, so far as the outer limit (distance criterion) is concerned. Therefore, it is fair to conclude that the 200 mile limit is customary international law both for the EEZ and for the continental shelf only if that does not affect continental shelf rights of coastal states which may have been acquired under the previous regime (105). In other words, this never means that the contents of the two regimes have been fused or that the rules on delimitation between the neighbouring states have consequently changed (106).

In the cases where the continental margin of the coastal state does not extend up to 200 miles of the coast, it will still have that much continental shelf but that rule was not intended to damage the rights which the coastal state might have acquired under the principle of natural prolongation (107). The distance principle has not for its aim to redistribute the continental shelf areas between theneighbouring states, regardless of the principle of natural prolongation. Therefore, in our opinion, one of the most important points which the Court missed in the Libya/Malta case is that the 200 mile criterion is designed for the purpose of determination of the outer limits of the shelf, and it has nothing to do with the delimitation between the opposite and adjacent states. In fact, the Court's own jurisprudence and Article 76 (10) are absolutely against the criterion in question being used for such an operation. In the

(102) See, also, ILA's Report 1984, at 188.
(103) Id.; O'Connell, supra note 90, at 580.
(104) See, supra note 58.
(105) Compare: Oda, dissenting opinion in Tunisia/Libya Case, supra note 6, at 233.
(106) See, U.S. Reply in the Gulf of Maine Case, supra note 41, at 62-63.
(107) Id.

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Nort Sea Continental Shelf Cases, when Denmark and the Netherlands asked the Court to effect the delimitation in accordance with the equidistance principle which they considered as being implicit in articles 1 and 2 of the Geneva Convention, the Court found that argument unconvincing:

"In the first place, Articles 1 and 2 of the Geneva Convention do not appear to have any direct connection with inter-state delimitation as such, article 1 is concerned only with the outer, seaward, limit of the shelf generally, not with the boundaries between the shelf areas of opposite or adjacent states. Article 2 is equally not concerned with such boundaries" (108).

On the other hand, Article 76 (10) is so clear in this respect that it does not require any interpretation of whether it should be applied to a delimitation between opposite or adjacent states:

"The provisions of this article are without prejudice to the question of delimitation of the continental shelf between states with opposite or adjacent coasts".

In spite of all this clarity, the Court decided that as the development of the law enabled a state to claim the continental shelf up to 200 miles from the coast, regardless of the characteristics of the seabed and subsoil, there was no reason to ascribe any role to such characteristics with respect to delimitation between competing claims either and it rejected the Libyan "Rift Zone" argument out of hand (109).

This is, we submit, at the same time, a violation or repudiation of two things: First, it is a violation of the intention behind the acceptance of Article 76 (1), which is articulated in the paragraph 10 of the same. The Court applied the distance principle in Article 76 as if it had been designed for delimitation of competing claims between opposite or adjacent states. Secondly, it overlooks all the efforts and struggles which took place at the Conference between the states favouring the equitable principles and those favouring the equidistance principle for the purpose of delimitation. It is common knowledge that the proposals of the former group always emphasised the importance of the geological and geomorphological factors in a

(108) North Sea Continental Shelf, Judgment, I.C.J., Reports, 40, para. 67 (1969). In the Tunisia/Libya Case the Court made a similar statement:

While the idea of natural prolongation of land teritory defined, in general terms, the physical object or location of the rights of the coastal state, it would not necessarily be sufficient, or even appropriate, in itself, to determine the precise extent of the rights of one state in relation to those of a neighbouring state. See, supra note 6, at 46. This point has been emphasised by various scholars. See, Toluner, **supra** note 82 at 231; Pazarci, LA DELIMITATION DU PLATEAU CONTINENTAL ET LES ILES, 141 (1982).

(109) After having referred to the paragraph 10 of Article 76, the Court observed that:

that the questions of entitlement and of definition of continental shelf, on one hand, and of delimitation of continental shelf, on the other hand, are not only distinct but are also complementary is self evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertaining to that delimitation. See, Continental Shelf (LibyaArab Jamahiriya/Malta), Judgment, I.C.J., Reports, 30, para. 27 (1985).

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delimitation setting (110). The Court takes in the equidistance principle through backdoor, so far as the effect of the geomorphological features on the delimitation is concerned.

Thus, the Court overlooks a very important aspect of the doctrine of the continental shelf which it itself established in 1969. The continental shelf attaches ipso facto and ab initio to the coastal state; it does not depend on occupation or proclamation. Well before the advent of the EEZ, the coastal state had had the continental shelf rights on the basis of the principle of natural prolongation. And the continental shelf areas, at least, landward of the 200m depth line was, by every standard, natural prolongation of its territory. In areas where two opposite or adjacent states had acquired rights according to the principle of natural prolongation, it is not unlikely that one of them might be favoured by the geology or geomorphology of the seabed (111). For example, there might be a major geomorphological break (trough or trench) in the seabed closer to the coast of one of them than to that of other. Or one of them might have acquired more seabed areas under the 200m depth criterion than another simply because of the favourable geology or geomorpholoy of submarine areas adjacent to its coasts (112). The law relating to such situations has not changed. In Article 76, the rights of states based on natural prolongation have been maintained and consequently in such situations the principle of natural prolonga-

(110) Just to give a few examples:
Eighteen African States made a proposal with regard to the delimitation of the EEZ (not to mention of the continental shelf) which read:
1. The delimitation of the exclusive economic zone between adjacent or opposite states shall be done by agreements between them on the basis of principles of equity, the median line not being the only method of delimitation.
2. For this purpose, **special account shall be taken of geological and geomorphological factors** as well as other special circumstances which prevail (emphasis added).
See, **Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, United Republic of Cameroon, United Republic of Tanzania, and Zaire:draft articles on the exclusive economic zone**, DOC. A/CONF. 62/C. 2/L. 82,26 August, 1974, UNCLOS II, Official Records Vol. II, at 249-50.
Turkey proposed that:
Where the coasts of two or more states are adjacent and/or opposite, the delimitation of the respective economic zones shall be determined by agreement among them in accordance with equitable principles, taking into account all the relevant factors including, inter alia, geomorphological and geological structure of the seabed involved...
See, **Turkey:draft article on delineation between adjacent and opposite states,** DOC.A/CONF. 62/ C.2/L.4 in UNCLOS II, Official Records, Vol. III, p. 213.

(111) Compare: Gönlubol, M., Ege'de 12 Mil Hukuk Dışı, MİLLİYET, 10 Haziran 1982 (reprinted in NEWSPOT , 15 June 1982, under the title (12-Mile Limit in Aegean Contradicts International Law,).

(112) Judge Oda wrote in his dissenting opinion in the Libya/Malta Case that:
While I agree that, for practical purposes-and, as I suggested elsewhere, for reasons connected with the regime of exclusive economic zone -the distance criterion has replaced that of geomorphology in all respects save in regard to the outer continental shelf between the 200 mile and

tion prevails (113). However, the Court seems, in one fell swoop, to have erased all the history of the natural prolongation and turned all the submarine areas within 200 miles into homogeneous areas for the purpose of delimitation between neighbouring states. Although it denied any supremacy to or mandatory character of the equidistance principle, it obviously applied the distance principle so far as the effect of the geomorphological features on the delimitation is concerned. That approach would seem to assume that states, by accepting the EEZ, have renounced all their rights which might have arisen from application of the natural prolongation principle in geophysical sense within the 200 mile limit. That assumption is simply not true. When the records of the Conference are examined it becomes clear that states specially emphasised that acquired rights should be respected, not only outside the 200 mile limit but also within it. It is not realistic to assume that the countries which border on the semi-closed or closed seas, with no chance of extending their claims even to 200 miles, but which emphasised the natural prolongation concept in a geophysical sense, simply defended the rights and interests of the wide margin states in the Conference. On the contrary, the intention was that the principle of natural prolongation and the rights associated with it should be maintained (114). It is very difficult to assume that states which emphasised the geophysical aspects of the submarine areas in their proposals regarding inter-state delimitation intended that the geology or geomorphology of the seabed and subsoil should be denied all effects. The outer continental shelf was incorporated into Article 76 on the ground, inter alia, that it constituted the natural prolongation of territory of the coastal state, and consequently an acquired right. It is simply not acceptable to think that, while the rights beyond

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350 mile limits. I am not sure that the Court has realized that, by stating that international law has already developed to that stage, it has added weight to the second of the alternative definition in Article 76 and, in fact, replaced with the minor premise (distance) what some jurists may still regard as the the major premise (physical prolongation). From the viewpoint of that Article, this would have been open to challenge, had the seabed in the present case featured, not a rift zone, but the outer edge of a continental margin. The Court would then almost certainly have had to weigh the merits of two convincing claims invoking the sense of Article 76, the one based on geomorphology, the other relying on distance. As it happens, the only real problem before the Court was actually that of discerning the rule for division of a single maritime area homogeneous in terms of the 200 mile distance criterion. See, **supra** note 109 at 157.

(113) See, Pazarcı, supra note 78, at 142-46, where he discusses various hypothetical situations where the criteria of distance and natural prolongation would potentially conflict with each other. He rightly suggests that in a delimitation setting where the breadth of the area is less than 400 miles each state should first be given its natural prolongation and then the remaining area, if any, lying between the two prolongations should be delimited in accordance with the equitable principles.

(114) Compare: Yolga, N., Ege'deki Başlıca Deniz Sorunları, in EGE'DE DENİZ SORUNLARI SEMİNERİ, Ankara, 28,32 (1986)

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200 miles were maintained, the rights which the coastal state might have acquired under the natural prolongation principle within 200 miles were disregarded. There is not such an intention registered in the records of the Conference. The 200 mile distance was accepted in the interests of the states with narrow margins but it was not intended to prejudice the interests of states which might be favoured by their margins as compared with their neighbours.

Consequently, the Court's decision holds good for areas where the coastal state borders onto an ocean and, thus, it is physically possible to extend the EEZ to its full length without encountering the rights of other states, although the continental margin does not extend that far, and not for the areas of less than 400 miles lying between neighbouring states if the geology and geomorphology of the seabed is not continuous. For these reasons, the rejection of the Libyan "Rift Zone" argument on the basis of the distance principle is unfortunate and wrong. It could have rejected it on the same basis as it had rejected a similar claim in the Tunisia/Libya case, making it case-specific but maintaining the essence of the principle.

Conclusions

The most recent judgement of the court would seem to be in sharp contrast with its former judgements so far as its elaboration or explanation of basis of entitlement to the seabed areas is concerned, whatever justification might have been given to support the newly proposed basis. From the very beginning of emergence of the concept of the continental shelf, it was the geophysical nexus or identity between the emergent land and submerged land that has given the right to the coastal state, as opposed to, or to the exclusion of all others, to lay claims to the seabed. It was on that basis that the 1969 judgement was given by the ICJ, which formally and unequivocally enunciated the concept of the natural prolongation. It was again on that basis that the Court decided that closeness of a particular seabed area to a particular coastal state alone did not necessarily confer upon that coastal the right to explore or exploit the seabed concerned but that the decisive criterion was whether it was an extension into and under the sea of the contiguous land territory.

Finally, it was on that basis that the Court and the Anglo - France Arbitral Tribunal said in the Libya / Malta case and in the Anglo Franch Arbitration respectively that in seabed areas where there were two geophysically distinct natural prolongations, the delimitation line schould be drawn alongside that natural boundary.

In the UN Conference on the Law of the sea, the participating states that expressed themselves on basis of entitlement to the continental shelf made it further clear that principle of natural prolongation was a principle of customary law and they did say nothing to indicate that they turned away from that stand toward one which would give pride of place to the distance principle.

There is nothing in the minutes of the Conference to indicate that the newly accepted concept of the EEZ was intended to replace that of the continental shelf, es-

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pelcially where such a replacement might result in one state loosing what it had acquired under the current regime to benefit of another state. It is quite clear that to the extent that legal basis of entitlement is decisive or helpful for the purpose of delimitation, in particular where the seabed to be delimited is scarred by a trough or trench in such a way that two natural prolongations are quite distinct, the Conference did not intend to change the existing law. It is also common knowledge that some states have had wider continental shelf areas under the criterion of 200 metre depth than others.

In fact it is a well established principle of law that acquired rights must be respected.A state which might have acquired under the criterion of 200 metre depth (the concept of the geological shelf) or the principle of natural prolongation as expressed above, should not be forced to abandon its rights in interest of another one. The Court's recent judgment might give that impression if the present tendency is continued.

Morover, even if one accepts for the sake of discussion that the law has changed as the Court put it, the present author humbly submits that the Court is yet barred from not applying the former law if state against which the law is to be applied has not accepted or is not considered as having accepted the new law. It is correct that the Court must take into account the effects of temporal application of law, but in case of the law on the continental shelf, the situation is quite different, because the continental shelf belongs **ipso jure** and **ab initio** to the coastal state. Therefore, the coastal state does not need to do any further action to have or maintain its continental shelf areas. If this is the case, then the dicta of the Court to the contrary would conflict not only with all the history and evolution of the concept of the continental shelf but also with the time - honored principle that the acquired rights must be respected and that Courts should interpret the law and not change it for the parties.

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